

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

JOSHUA MALDONADO,

*Appellant*

v.

G1-16-131

CITY OF LAWRENCE,

*Respondent*

Appearance for Appellant:

Mr. Maldonado, *pro se*

Appearance for Respondent:

Matthew J. Buckley, Esq.  
Deutsch Williams Brooks Derensis &  
Holland  
1 Design Center Place  
Boston, MA 02110

Commissioner:

Cynthia A. Ittleman

**DECISION**

The Appellant, Joshua Maldonado, (Mr. Maldonado or Appellant), acting pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission or CSC) on July 22, 2016 contesting the decision of the City of Lawrence (Lawrence or Respondent) to bypass him for appointment to the position of fulltime police officer. A pre-hearing conference was held on August 30, 2016 at the Mercier Housing Center in Lowell.<sup>1</sup> The

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<sup>1</sup> At the prehearing conference, the Appellant filled out a CSC appearance form with the contact information of an attorney who did not appear at the prehearing conference or thereafter. On October 11, 2016, that attorney sent an email message to the Commission (which I forwarded to the Respondent) stating that she would not be representing the Appellant in this case. The Appellant represented himself at the full hearing.

full hearing was held on October 24, 2016, also at the Mercier Housing Center.<sup>2</sup> Witnesses, except for the Appellant, were sequestered. The full hearing was digitally recorded. The Commission sent copies of the digital recording to the parties.<sup>3</sup> Both parties submitted post-hearing briefs to the Commission.

### **FINDINGS OF FACT:**

Fifteen (15) exhibits were entered into evidence in total (Appellant's Exhibits (A.Ex.) 1<sup>4</sup> through 3<sup>5</sup> and Joint Exhibits (Jt.Ex.) 1 through 11A). Based on these exhibits, the testimony of the following witnesses:

#### *Called by the Respondent:*

- Frank Bonet, Director of Personnel, Lawrence
- Maurice Aguilar, Sergeant (Sgt.) Detective (Det.), Lawrence Police Department (LPD)

#### *Called by the Appellant:*

- Joshua Maldonado, Appellant
- Harold Maldonado, father of the Appellant

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<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31 or any Commission rules taking precedence.

<sup>3</sup> 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.

<sup>4</sup> A.Ex. 1 is a one (1) page Lahey Health Behavioral Services "Discharge Plan" with a brief summary of a clinician's findings about the Appellant. At the Commission hearing, I ordered the Appellant to produce the clinician's full report. The Appellant produced the clinician's ten (10)-page report on October 25, 2016. The full report is included as a part of A.Ex. 1.

<sup>5</sup> Appellant's Exhibit 2 is presently unavailable. I have retained the Exhibit reference to indicate that it had been admitted into the record at the hearing. This Exhibit was a one (1)-page statement written by the Appellant's father. During his testimony, the Appellant's father had his written statement in hand and he appeared to be relying on it for his testimony. Preferring to hear his testimony unsupported by the letter, I asked Mr. Maldonado to put down the written statement and testify from his memory, which he did. After the hearing, neither the Appellant nor the Commission, could locate this written statement. However, since the hearing was recorded, the record includes Mr. Maldonado's testimony in full and it has been given appropriate consideration in rendering this decision.

and taking administrative notice of all matters filed in the case; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant took and passed the civil service exam for police officers on April 25, 2015. (Stipulation)
2. The state's Human Resources Division (HRD) established an eligible list of all those who took and passed the police officer exam for Lawrence, on October 2, 2015. (Stipulation; Administrative Notice)
3. The Respondent<sup>6</sup> requested a Spanish language certification from HRD to fill seven (7) vacancies. On January 29, 2016, HRD sent Certification #03482 to the Respondent, which Certification expired on April 5, 2016.<sup>7</sup> The Appellant's name did not appear on this Certification at first<sup>8</sup>; his name was added to the Certification on February 3, 2016, where he was ranked 5<sup>th</sup> as a veteran.<sup>9</sup> The Appellant signed the list indicating that he would accept employment. (Stipulation; Jt.Exs.1 and 3) When he applied for the position, the Appellant was approximately twenty-four (24) years old.
4. The Respondent sent an email message to the candidates on February 8, 2016 stating, in pertinent part,

“...we are working rather promptly to ensure timely hiring and scheduling for the police academy in late April/early May.

As mentioned, to everyone upon receiving the police application, an informational briefing is to take place – **this meeting has been scheduled for Friday, February 12<sup>th</sup>, 2016 at 12:30 PM in the City Hall Council of Chambers.** The itinerary will include discussion on the process of the application (whether or not

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<sup>6</sup> The Mayor of Lawrence is the Respondent's appointing authority. (Testimony of Bonet)

<sup>7</sup> The Respondent initially requested a “minority hire” certification but that request was denied. The Respondent subsequently requested and was approved to receive a Spanish “language skills” certification. (Jt.Ex. 4)

<sup>8</sup> There appears to have been some confusion about the Appellant's email address at that time.

<sup>9</sup> The Certification indicated whether the candidates listed are disabled veterans, veterans or civilians. There was no indication of residency preference.

you have completed it, please bring your application), detailed overview of the Criminal/Character Background Check, prospective dates for Medical and Psychological Exams, as well as the Physical Abilities Test (PAT) Exam....” (Jt.Ex. 2)(**emphasis** in original)(emphasis added)

The Appellant attended the information briefing. (Testimony of Bonet; Jt.Ex. 3)

5. At the information briefing, candidates were advised, in part, of a list of reasons for which candidates may be bypassed, including “Incomplete Application”, “False or misleading information on application”, Character Background Check”, “Job Performance” and “Psychological Examination”. (Testimony of Bonet; Jt.Ex. 4) They were also informed, in part, that typed (electronic) applications would be helpful. (Jt.Ex. 4)
6. The Appellant submitted his handwritten application to the Respondent on or about February 11, 2016. (Jt.Ex. 5) I find that his handwriting thereon was small but legible. (Administrative Notice)
7. In response to questions 1 – 4 of the application, the Appellant answered each basic question, providing his full name, date of birth, social security number, and place of birth. In addition, he indicated that he used no other names, provided his phone numbers, email address and information about any social media accounts he had. He also indicated that he had not applied for a public safety position before. (Jt.Exs. 5 and 6)
8. Question 5 of the Appellant’s handwritten application requires the candidates to list the places they have lived in the past ten (10) years and, for residences in the past three (3) years, to list a “person who knew you at that address, preferably someone who still lives in that area. If you were in the Armed Forces and resided in single soldier housing write the unit and building number of where you resided.” (Jt.Exs. 5 and 6) It does not ask for the name and contact information for landlords. (Administrative Notice) From August

2015 to February 2016, the Appellant wrote that he lived with his parents in Lawrence at a specific street address (redacted), listing his parents as the people who knew him at that address and he provided their phone numbers. From May 2014 to August 2015, the Appellant wrote that he lived with at least one (1), if not two (2) roommates at a specific address (redacted) in Lawrence and he provided their contact information (one of whom, Ms. B, he indicated was the landlord). From May 2013 to May 2014, the Appellant wrote that he lived at a specific address (redacted) in Haverhill, listing his mother and grandmother as the people who knew him at that address, providing their specific street addresses and phone numbers (redacted). From March 2012 to May 2013, the Appellant wrote that he lived at Minot Air Force Base in Minot, North Dakota but did not list a street address for his residence there; he listed his father and apparent step-mother as the people who knew him when he was living there, their address and phone numbers, although he arguably lived in North Dakota more than the three (3)-year reporting period required in the LPD job application, in which case the application would not require the candidates to include the name and contact information of people who knew him when he resided in North Dakota.<sup>10</sup> (Jt.Exs. 5 and 6).

9. Question 6 of the application requires the candidates to provide their educational background, the street address of the school, the dates the candidate attended and the name, current address and phone number of someone who knew the candidate when he attended the school. The Appellant wrote that he attended Lawrence High School from 2007 to 2008, Methuen High School from 2008 to 2011, and University of Phoenix in Braintree from 2011 to 2013. For each educational experience, the Appellant did not list

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<sup>10</sup> Filling out the application in February 2016, the Appellant would have been required to provide information about his residence since 2006. From 2006 to at least 2011 (the remaining period of the ten (10)-year period), the Appellant probably would have been in middle- and high school and living with his parents.

the street address of the school; he provided the name of at least one (1) person who knew him when he attended each school and their phone numbers but he did not provide their street addresses. (Jt.Exs. 5 and 6)

10. Question 7 of the application requires the candidates to list their employment history as follows: “Fill in your employment activities, beginning with the present and working backward ten (10) years. Include: all full time work, all part-time work, all paid work, active military duty, self-employment, volunteer, internships.” (Jt.Ex. 5) In response, the Appellant filled in this section, listing:

1/2016 to current – [restaurant R], server, the address and phone number of the restaurant and the name and phone number of his supervisor as required;

6/2015 – 1/2016 – [restaurant G], server, the address and phone number of the restaurant and the name and phone number of his supervisor, and the “reason for leaving this employment” as “reduction in hours”, as required;

9/2015 to current, Debt Collection Company (name redacted), debt collector, and the street name (but no street number<sup>11</sup>) and city; provide the name and phone number of his supervisor in the handwritten application but included it in the electronic version;

5/2013 – 6/2015 – [restaurant T], server, and he provided the address and phone number of the restaurant and the name and phone number of his supervisor, and the reason for leaving was “accepted better employment opportunity”; and

7/2011 to 5/2013 – Minot Air Force Base, Minot, North Dakota, military police, but he listed no specific address, phone number, supervisor’s name and contact information; he wrote “honorable discharge” as the reason for leaving.

(Jt.Ex. 5; *see also* Jt.Ex. 6)<sup>12</sup>

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<sup>11</sup> On the electronic version of the Appellant’s application (Jt.Ex. 6), the appellant wrote “N/A” instead of leaving the street address section for his Debt Collection Company employer blank. (Administrative Notice)

<sup>12</sup> The application asked candidates to provide information about the past ten (10) years of employment. Since the Appellant graduated from high school in 2011, his employment record only covers a five (5) year period (2011 – 2016) prior to his application for employment to the LPD. There is no indication that the Appellant was employed during high school.

The Appellant also provided written references from three (3) employers. The R restaurant reference states, in part, that the Appellant is a “stellar employee and a huge asset to our team. He is always on time and willing to help out in any situation.” (App.Ex. 3) The restaurant T reference states, in part, that the Appellant was an employee for nearly two (2) years and that, “his attendance was outstanding and promoted him from host to a server. He was never written up and was recognized several times during his employment ...” (Id.) At restaurant G, JQ, the “Culinary Manager”, wrote, in part, that at that time the Appellant had been working there for approximately six (6) months and that the Appellant “had good attendance and worked extremely well” as a bartender/server. (Id.)

11. Question 8 on the application requests that the candidates list any “outside activities” that “reflect ... favorably on your reputation for leadership responsibility, honesty, and integrity (Response is Optional)”. The Appellant wrote that he was an intern from 2013 to 2015 at company X (name redacted), where he conducted surveillance. (Jt.Exs. 5 and 6) Company X is a business operated by the Appellant’s father. (Id.; Administrative Notice)
12. Question 9 asks candidates to list the foreign countries they have visited and the dates they visited. The Appellant wrote “N/A”, indicating that he has not travelled to foreign countries. (Jt.Exs. 5 and 6)
13. Question 10 of the application requires candidates to list their “military history/information”. The Appellant wrote that he was in the U.S. Air Force from July 2011 to May 2013, provided his rank, indicated that he had been on active duty, and that he had not been disciplined. Although he was in the military for nearly two (2) years, he

had enlisted for a four (4)-year term. (Testimony of Appellant; Jt.Ex. 5) In Jt.Ex. 6, the electronic version of the Appellant's application, the Appellant did not check the "no" box to indicate that he had not been disciplined in the military but he did write "N/A" to indicate that he had not been so disciplined. The Appellant provided his military service number in Jt.Ex. 5 but not in Jt.Ex. 6. (Jt.Exs. 5 and 6)

14. The Appellant provided the family information required in question 11 of the application. (Jt.Exs. 5 and 6)

15. Part of question 11 of the application requires candidates to provide information about current or former spouses. The Appellant is divorced. He provided all of the information requested about his former spouse (including the location where official records of the marriage and divorce are available) except for the specific street address where his former spouse lives in Haverhill. (Jt.Exs. 5 and 6)

16. Question 12 of the application asks the names of the people with whom the candidate currently resides other than a spouse or relatives indicated in question 11. The Appellant wrote "N/A" presumably because he had written earlier in the application that he was living with his mother and stepfather in Lawrence, providing their names, addresses and phone numbers. (Jt.Ex. 5)

17. Question 13 of the application asks the candidates if in the past ten (10) years they have been discharged from employment, quit employment after being told they would be fired, left employment by mutual agreement, left employment by mutual agreement following allegations of unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. The Appellant indicated that in 2014 he was discharged from Lord and Taylor, at a specific address, providing the name and phone number of his

supervisor (redacted). (Jt.Ex. 5) In his electronic version of the application, the Appellant added to his response to question 13, “I was let go from Lord and Taylor for providing backup to another retail store. An incident occurred where the other store’s loss prevention was injured by the shoplifter. I was unaware that we were not allowed to assist other stores with apprehensions, and was subsequently released from employment for violating that policy.” (Jt.Ex. 6 (response to question 24 entitled “continuance space”))

18. In response to question 14, the Appellant answered that he does not use illegal drugs and has not used them in the prior five (5) years). (Jt.Ex. 5)

19. The Appellant disclosed in response to question 15 about his credit history that in 2014 he had been more than 180 days delinquent on a car loan that was subsequently written off by the creditor (creditor name redacted) in Methuen for \$2,000 for a car, although he did not indicate the street address of the credit union. (Jt.Ex. 5) The Appellant explained in the “Continuance Space” (question 24), “Loan taken out for purchase of automobile. Three days later car broke down and was returned to dealer. Dealer was supposed to pay off the loan and never did. I am disputing it with creditor and credit bureau.” (Id.; Testimony of Appellant)

20. Another part of question 15 asks if the candidates have or a company they owned (at least in part) had filed for bankruptcy, was subject to a tax lien or had a legal judgment against him (or such business) for a debt. In his handwritten application, the Appellant checked “no”. (Jt.Ex. 5) In his electronic application, the Appellant checked both “yes” and “no”. (Jt.Ex. 6)

21. Another part of question 15 asks if the candidates have been ordered to pay child support or alimony and the Appellant checked “no”. (Jt.Exs. 5 and 6)
22. Question 16 asks if the candidates had timely filed tax returns; the Appellant checked “yes”. The same question also asked if the candidates were delinquent in payment of any tax liabilities, and the Appellant checked “no”. (Jt.Exs. 5 and 6)
23. Question 16 also asked if the candidates owe money for traffic fines, parking tickets or excise taxes. The Appellant wrote “no”. (Jt.Exs. 5 and 6)
24. Question 17 asks if the candidates own at least part of a business and the Appellant answered “no”. Asked if his family owns a business, the Appellant wrote ‘yes’, providing the following required information: the name of the business, the complete business address, the percentage of the business owned by his father, that it is an investigation services business and that the business conducts business, *inter alia*, with the state Committee for Public Counsel Services. (Jt.Exs. 5 and 6)
25. Question 18 asks if the candidates have any civil litigation filed against them and the Appellant checked “no”. (Id.)
26. Question 19 asks if the candidates have had interactions with state agencies, such as the state Ethics Commission or state licensing agencies, and the Appellant checked “no”. (Id.)
27. Question 20 asks for information about candidates’ licenses. In the Appellant’s handwritten application, he checked “yes” that he has a license to drive and “yes” that he possesses another type of license. (Jt.Ex. 5) In the Appellant’s electronic application, he checked “yes” only, indicating that had only a driver’s license and no other licenses. (Jt.Ex. 6) However, the Appellant listed on both versions of his application that he has a

driver's license and a firearms license and provided the license number, the date of issuance, the date of expiration, and the name of the issuing entity, as required. (Id.)

28. In response to question 21, the Appellant answered that he is not a member of a professional or trade association. (Jt.Exs. 5 and 6)
29. In response to question 22, the Appellant indicated that he has no financial or equity interest in real property. (Id.)
30. In response to question 23 concerning references, the Appellant provided the names and contact information for three (3) persons who know him professionally and can attest to his fitness for the position of police officer, as required. (Jt.Exs. 5 and 6) In response to another part of the same question asking for the names of three (3) people whom the candidate knows "PERSONALLY" and can attest to your qualifications and fitness" to be a police officer, the Appellant listed his parents and a friend who is a police officer with their contact information, as required. (Id.)(emphasis in original)
31. At the end of the application, a form requests information concerning the candidates' police records. This form adds, in part, that candidates are not to list anything that occurred "prior to his/her seventeenth birthday and that candidates with a sealed record may answer 'no record'" regarding prior arrests, criminal court appearances or convictions. In response to this form, the Appellant indicated that he has never been arrested, convicted of a felony offense, convicted of any drug-related offenses, nor were there any current felony or drug charges pending against him. (Jt.Exs. 5 and 6)
32. Also at the end of the application, candidates are required to sign an "Agreement of Understanding" indicating that they agree, for example, that they are not to provide false or misleading information, authorizing the Respondent to conduct criminal records, as

well as credit and financial checks. The Appellant signed this “Agreement” on his handwritten application but not on his electronic application. (Jt.Exs. 5 and 6)

33. The Appellant obtained a notary public seal for his handwritten application one (1) day after he initially submitted the application to the Respondent. (Jt.Ex. 5) He did not obtain a notary public seal for his electronic application. (Jt.Ex. 6)
34. The Appellant wrote his name and the last four (4) digits of his social security number at the bottom of each page on which it was required. (Jt.Exs. 5 and 6)
35. Mr. Bonet sent the candidates’ LPD employment applications to Police Chief Fitzpatrick. (Testimony of Bonet) Lt. Fleming distributed the candidates’ applications to various members of the LPD to conduct background investigations. (Testimony of Aguilar) Sgt. Det. Maurice Aguilar was assigned to conduct the background investigation of two (2) candidates, one of who was the Appellant, even though Lt. Fleming was aware of a problem between Sgt. Det. Aguilar and the Appellant’s father. (Testimony of Bonet, Appellant and Aguilar)
36. Sgt. Det. Aguilar was hired as a patrol officer at the LPD approximately twelve (12) years prior to this appeal. Approximately eight (8) years after he was hired, Sgt. Det. Aguilar was promoted to Sergeant. Approximately one (1) month prior to this appeal, Sgt. Det. Aguilar was promoted to Sergeant Detective. Sgt. Det. Aguilar has performed approximately ten (10) background investigations previously. Background investigations take at least a month, although that is not set in stone. In this case, they only had approximately two (2) weeks to conduct the investigation. When he received the Appellant’s application packet, Sgt. Det. Aguilar realized that he knew the Appellant’s father, although he did not know the Appellant. Sgt. Det. Aguilar denied there was any

reason to recuse himself from conducting the background investigation of the Appellant, testifying, in effect, that if he recused himself in that regard, he would have to recuse himself from any candidate background investigation. (Testimony of Aguilar)

37. The Appellant's father retired from the LPD in 2003 after working there for approximately twenty (20) years. (Testimony of Appellant's father) In November 2013, the Appellant's father was arrested for disorderly conduct by the LPD in connection with domestic violence allegedly committed by a man who was dating someone in the Appellant's family. Sgt. Det. Aguilar asserts that the Appellant's father was arrested and handcuffed before he (Sgt. Det. Aguilar) arrived at the scene of the arrest and that, when he arrived, the Appellant's father appeared to suggest that Sgt. Det. Aguilar remove the handcuffs, which he apparently declined to do. (Testimony of Aguilar) The Appellant's father denies that he asked Sgt. Det. Aguilar to remove his handcuffs but he asserted that Sgt. Det. Aguilar instructed someone in the LPD to add to the charges pressed against the Appellant's father. (Testimony of Appellant's father) Although Sgt. Det. Aguilar asserts that the Appellant's father never talked to him again as a result of this incident, he denies having any ill will toward the Appellant's father. (Testimony of Aguilar) However, the Appellant's father asserts that Sgt. Det. Aguilar is angry with him because he (the Appellant's father) was allegedly involved in the Respondent's initial decision not to hire Aguilar. (Testimony of the Appellant's father)

38. After receiving the Appellant's application, Sgt. Det. Aguilar met with the Appellant twice to review it. When they met the first time, Sgt. Det. Aguilar stated to the Appellant words to the effect that he had nothing against the Appellant but there was an issue between him (Sgt. Det. Aguilar) and the Appellant's father. (Testimony of Appellant and

Aguilar; Jt.Ex. 11) Sgt. Det. Aguilar also phoned the Appellant several times to request information. (Testimony of Aguilar) The Appellant hand-wrote the additional information requested directly onto the application form he had submitted initially. (Testimony of Aguilar) As a result, it is unclear what information was missing from the Appellant's initial application and what information the Appellant added at Sgt. Det. Aguilar's request and when. (Administrative Notice) At the Commission hearing, Sgt. Det. Aguilar could not recall what specific information was missing from the Appellant's application and when the Appellant added the information to his application. (Testimony of Aguilar)

39. Sgt. Aguilar asked the Appellant for his DD214, a certificate of discharge from the military. The Appellant provided a copy of his DD214, which states that the Appellant received an honorable discharge and the reason given for his separation on the DD214 is "adjustment disorder". (Jt.Ex. 8) The Appellant was not given a conditional offer of employment and examined by a psychologist authorized by the Respondent. (Administrative Notice)

40. The Appellant enlisted in the Air Force in 2011 for four (4) years. (Testimony of Appellant) However, the Appellant left the Air Force in 2013. The reason the Appellant gave Sgt. Det. Aguilar for his early departure from the military was that his occupation as a military police officer was different from being a civilian police officer in that it involved securing a missile silo that was hours away, for multiple days at a time, and being away from his wife and newborn child quickly became untenable. (Testimony of Aguilar and Appellant)

41. One (1) day before the completed application was to be submitted, Sgt. Det. Aguilar asked the Appellant to enter the information electronically onto a new application form, which the Appellant did, adding the name and contact information for his supervisor at the debt collection company that he did not include in the handwritten application. (Testimony of Appellant; Jt.Ex. 6)<sup>13</sup> The Appellant did not add to the electronic version of his application an address for his residence while in the service, nor did he provide the name of a military supervisor and his or her contact information. (Jt.Exs. 5 and 6)<sup>14</sup>
42. While the Appellant's application to the LPD was pending, a member of the LPD with whom the Appellant's father had worked told the Appellant's father that Sgt. Det. Aguilar was causing the Appellant problems in his application for employment at the LPD. Thereafter, and prior to the Respondent's hiring decision here, the Appellant's father spoke to someone allegedly associated with the Mayor to find out what was happening with his son's police application and to ensure that the hiring process was fair. The Appellant's father said that this alleged associate did not report back to him in this regard. (Testimony of the Appellant's father)
43. On March 1, 2016, Sgt. Det. Aguilar wrote a memo to PD Lt. Fleming concerning his background investigation of the Appellant. The memo states, in pertinent part,

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<sup>13</sup> The Appellant alleged that Sgt. Det. Aguilar's last minute request to transfer the information from his handwritten application to the electronic version was evidence of bias against him because, the Appellant averred, Sgt. Det. was making more work for the Appellant than for other candidates. However, as indicated at the candidates' orientation, they were advised that the electronic version of the application was preferred because it would be easier for the Respondent to process. (Jt.Ex. 4) Therefore, although the Appellant was asked to complete the electronic application at the last moment, the request to do so does not, on its own, illustrate bias. However, it is another indication of the brief amount of time that was given for the application process.

<sup>14</sup> Although he had signed the application on the Certification and Release, the Agreement of Understanding, and the notary pages (on the line for the candidate's signature) on his handwritten application (Jt.Ex. 5), he did not sign the electronic version. (Jt.Ex. 6) However, it is unknown if the candidate was supposed to type their names into the form as a "signature" or print the electronic version and sign it.

In February of 2016, I commenced a background investigation of [the Appellant] based upon information provided in the application. It should be noted that several attempts to ascertain application information has been fruitless. I have been provided with insufficient information regarding references, phone numbers, dates, etc. that would allow for a thorough and complete investigation. I have met with [the Appellant] and requested a complete packet. He resubmitted a second packet, but this packet also is missing information that would facilitate a thorough investigation. As such, [the Appellant's] application is **INCOMPLETE**. I provide the following the information (sic) as to the *limited information I have obtained, to date*.

Mr. Maldonado is currently employed at [restaurant R] (address redacted) where he is a wait-staff server. He (sic) direct Supervisor Y [name and phone number redacted], describes Mr. Maldonado as a 'team player' and has 'no complaints' against him. Y did reiterate, however, that Mr. Maldonado has only been here three months,' and that she hopes he continues his 'great work,' ....

Prior to [restaurant R], Mr. Maldonado worked as a server at [restaurant G] [address redacted]'. He listed Z as his supervisor. Several calls to Z went unanswered and it was later discovered that his supervisor was B [name and phone number redacted], General Manager. [B] states Maldonado regularly received 'poor employee scores, did not give 100%, and took no work initiative.' He states Maldonado 'stopped coming to work' after an incident wherein Maldonado was caught attempting to drink in the bar while *on duty* which was in contravention to known and established employee policies ... [B] states that when he confronted Maldonado about this, Maldonado became belligerent and disrespected him. [B] believes that 'maybe' Maldonado would 'do better in a law enforcement environment.'

No other employment information has been successfully investigated as of this time due to *incompleteness and/or lack of responses*. ...

**Residency:** Mr. Maldonado currently resides at [redacted street address], Lawrence, MA, where he lives with this mother [name redacted] and step-father [name redacted]. Prior to that, Mr. Maldonado listed an address [different street address redacted] in Lawrence. *I have been unable to meet and/or interview the listed landlord, [Ms. MB], as of this time*. Prior to this, Mr. Maldonado lived in Haverhill, MA. Maldonado alleges not to 'remember' the name or contact information of his last landlord despite allegedly leaving (sic) there as recently as May of 2014. I have been unable to ascertain residency information, as a result.

**Driver History:** Mr. Maldonado's OLN issue dated is [redacted]. One record of note appears ... this related to a [2009] surchargeable motorvehicle (sic) accident out of Methuen ...

**Criminal History:** ... "No Adult Court Appearances" ...

**Employment History:**

[restaurant R], Waitstaff Server.

Bar Manager X describes Mr. Maldonado as a 'team player' and has 'no complaints' against him. X did reiterate, however, that Mr. Maldonado has 'only been here three months,' and that she hopes he continues his 'great work,' ...

[restaurant G], Server.

[Mr. B] described Mr. Maldonado as having a 'difficult time with authority.' He states Maldonado regularly received 'poor employee scores, did not give 100%, and took no work initiative.' He states Maldonado 'stopped coming to work' after an incident wherein Maldonado was caught attempting to drink in the bar while on duty ...

**NO FURTHER EMPLOYMENT INFORMATION AVAILABLE DUE TO LACK OF INFORMATION**

**Military Information:**

DD Form 214 indicates Air Force-REGAF dates of service from 2011 to 2013 (month and day redacted). Discharge Honorable. Reason for Separation:

**ADJUSTMENT DISORDER**

**Education:**

2011-2013 Insufficient information<sup>15</sup>

2008-2011 Methuen High School ...

2008-2008 Lawrence High School ...

**Credit:**

Credit Default with a credit union [name of credit union redacted]. Disputed. (Jt.Ex. 7)(all emphasis in original, except italics)

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<sup>15</sup> This appears to refer to the two (2) years that the Appellant wrote in his application that he had attended the University of Phoenix in Braintree. There is no indication in the hearing record that the Appellant provided the specific address in Braintree for the university or any documents of his matriculation there from 2011 to 2013. (Administrative Notice)

44. The Appellant submitted three (3) positive written employment references for his application: one (1) from restaurant R, one of the Appellant's current employers; one (1) from restaurant T, where he worked previously; and one (1) from restaurant G. (A.Ex. 3) Sgt. Det. Aguilar's memo does not mention those written references. The Appellant's other current employer was a debt collector company. There is no indication that Sgt. Det. Aguilar contacted the Appellant's supervisor at the debt collection company where the Appellant was still working or at restaurant T, where the Appellant had previously worked. Sgt. Det. Aguilar called the Appellant's supervisor at restaurant R and received a positive verbal reference but the Appellant had just begun working there a few months earlier. Sgt. Det. Aguilar asked to speak with the supervisor at restaurant G whose name the Appellant provided but that person did not return his call. Consequently, Sgt. Det. Aguilar called and asked to speak with another supervisor at restaurant G. (Testimony of Aguilar; A.Ex. 3) This supervisor at restaurant G told Sgt. Det. Aguilar that the Appellant once attempted to have a drink at the restaurant bar as an employee, that the self-identified supervisor told the Appellant that restaurant policy prohibited it, that the Appellant argued with the self-identified supervisor in this regard, and that the Appellant did not return to employment thereafter. (Testimony of Aguilar) At the Commission hearing, the Appellant denied that he was working there at the time but he did not deny that he argued with the Supervisor. (Testimony of Appellant) A June 15, 2016 letter from the restaurant G supervisor to whom Sgt. Det. Aguilar spoke, indicates that the Appellant was off duty at that time. (Jt.Ex. 11A) Similarly, there is no indication that Sgt. Det. Aguilar contacted the Appellant's professional and personal references. (Administrative Notice) Sgt. Det. Aguilar was "unable to meet and/or interview the listed

landlord, [Ms. B]”, which the Appellant referenced in his application in connection with his Lawrence residence from May 2014 to August 2015. (Jt.Ex. 7)<sup>16</sup> Sgt. Det. Aguilar did not check to see if the candidates to whom he was assigned for background investigations resided in Lawrence during the one (1) years prior to the 2015 police officer exam. (Testimony of Aguilar) There is no indication in Sgt. Det. Aguilar’s memo that the Appellant failed to provide copies of documents such as his driver’s license, tax returns or credit reports. Sgt. Det. Aguilar could not contact the Appellant’s military supervisor because the Appellant did not provide one. (Administrative Notice)

45. After the background investigations were completed, Mr. Bonet, then-Police Chief James Fitzpatrick and Mayor Daniel Rivera reviewed the information for each candidate, including the Appellant. Mr. Bonet and Mayor Rivera are both veterans. Mayor Rivera asked Mr. Bonet to interview some of the candidates, including the Appellant, to give them a chance to explain items of concern in the background investigation. The Mayor wanted Mr. Bonet to ask the Appellant why his application was incomplete, why the Appellant could not recall a landlord’s name, to verify the Appellant’s residence, provide the reason for his military separation, and to explain the negative employment reference. (Testimony of Bonet)

46. Mr. Bonet met with the Appellant. The Appellant asked Mr. Bonet why Sgt. Det. Aguilar was the one who conducted his background check, given the problem between Sgt. Det. Aguilar and the Appellant’s father, apparently to no avail.<sup>17</sup> (Testimony of Appellant)

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<sup>16</sup> Not included with Jt.Exs. 5 and 6, as produced by the Respondent, are copies of documents apparently required by the application, such as the candidate’s driver’s license, tax returns and credit reports. However, there is no specific allegation in the record that the Appellant failed to provide such documents. (Administrative Notice)

<sup>17</sup> Jt.Ex. 11 is a letter dated July 22, 2016 that the Appellant submitted to the Commission with his appeal. At the Commission hearing on October 26, 2016, Mr. Bonet denied knowing about the problem between Sgt. Det. Aguilar and the Appellant’s father until the prehearing conference in this case. Given the closer proximity in time of the Appellant’s letter to his bypass, I find the Appellant’s letter more credible than Mr. Bonet’s denial.

The Appellant also told Mr. Bonet that he responded to Sgt. Det. Aguilar's requests and provided the information needed for his application. (Testimony of Bonet)

47. The Appellant explained to Mr. Bonet that he left the military early because of the circumstances that he had explained to Sgt. Det. Aguilar. The Appellant also told Mr. Bonet, as he had told Sgt. Det. Aguilar, that, although he was honorably discharged from the military, the reason for his early separation was "adjustment disorder", although he denied having such a disorder. The Appellant further told Mr. Bonet that he pursued this form of separation because it offered the best and expedited way to leave the military while preserving his benefits. (Jt.Exs. 8 and 11; Testimony of Appellant) Mr. Bonet told the Appellant that the Mayor was concerned that the Appellant may not adjust to the police department as a paramilitary organization. (Testimony of Bonet)
48. Mr. Bonet noted to the Appellant that he (the Appellant) did not have the usual medals on his DD214, such as medals for completion of basic training, advanced individual training and for service weapon training. (Testimony of Bonet) The Appellant could not explain the lack of the usual medals, indicating that he would look into it. (Testimony of Appellant) In addition, Mr. Bonet noticed that the "reentry code" on the Appellant's DD214 was "2C", which Mr. Bonet understands to mean that the Appellant will not be allowed to re-enter military service. (Testimony of Bonet)
49. With respect to the negative employment reference at restaurant G, the Appellant showed Mr. Bonet a letter from Mr. B, with whom Sgt. Det. Aguilar had spoken at the Appellant's job at restaurant G. (Jt.Ex. 11A) Mr. B's letter stated that the incident at the restaurant bar occurred when the Appellant was off duty, not on duty as Sgt. Det. Aguilar reported. (Jt.Ex. 7) The Appellant also asserted to Mr. Bonet that Mr. B was away from

the restaurant at times and that he was unaware, for example, that the Appellant was working fewer hours at restaurant G at the time of the incident. (Testimony of Appellant) However, the Appellant did not deny that he had an argument with Mr. B at the restaurant. (Administrative Notice)

50. With regard to the name and contact information for the Appellant's landlord when he resided in Haverhill, the Appellant told Mr. Bonet that he could not recall the landlord's name because he was still living with his wife (now ex-wife) at the time and that she was the one who sent the rent checks to the landlord. (Testimony of Appellant)

51. On March 11, 2016, Mayor Rivera wrote to HRD requesting approval of the Respondent's proposed bypass of the Appellant stating, in pertinent part,

Mr. Maldonado failed to submit a completed employment application despite multiple opportunities to do so. ... Information missing from his application includes, ... former residences, addresses of former employers, addresses of institutions of education, information regarding his former spouse, current contact information of individuals listed on the application, and information related to his former employment....

Lawrence Police Sergeant Aguilar, who conducted the background investigation into Mr. Maldonado spoke to him about the deficiencies with the application and allowed him to re-submit a new application. However, the second application submitted ... was also missing much of the same information. It was also not notarized by a notary public as required.

Because the employment applications submitted by Mr. Maldonado were incomplete, the City was unable to conduct a thorough background investigation, including a determination of whether he was entitled to the residency preference he had claimed. The investigator indicated that several attempts to ascertain application information were fruitless and that the background check and all other reference check (sic) were incomplete as a result.

The City also seeks to bypass Mr. Maldonado because the background investigation revealed poor work performance during his employment with [restaurant G]. ... After locating the correct supervisor for Mr. Maldonado

(erroneously listed on the application), his supervisor described Mr. Maldonado as ‘having a difficult time with authority.’ .... Mr. Maldonado ‘stopped coming to work’ after an incident where he was caught attempting to drink in the bar while on duty ...

A third concern is that, although Mr. Maldonado is an honorably discharged veteran ... he was involuntarily separated prior to completion of his term and he is ineligible to return to service. ....

City Personnel Director Frank Bonet met with Mr. Maldonado to go over the above concerns on March 10, 2016. During the meeting, the above issues were discussed. Mr. Maldonado confirmed that the investigator ... met with him regarding his incomplete application. Mr. Maldonado stated that he could not recall the information being sought. For example, he did not recall the name of the landlord of a residential address where he lived in April/May 2014.

When asked about the poor performance recommendation from his previous employer ([restaurant G]), Mr. Maldonado attributed it to his decision to quit for a position at another restaurant ([restaurant R]). He also claimed he was off duty at the time ...

With regards to his military discharge, Mr. Maldonado stated that he requested to be discharged because his absence from his new wife and young child created stresses in their relationship. Mr. Maldonado stated that his superiors found the best available rapid discharge with a limited damage (sic) to his veteran benefits.

....

(Jt.Ex. 9)

52. On June 3, 2016, HRD wrote to the Appellant, enclosing a copy of Mayor Rivera’s March 11, 2016 letter to HRD, indicating that HRD accepted the Respondent’s reasons for bypassing the Appellant. (Jt.Ex. 10)
53. The Respondent hired seven (7) candidates, four of whom (4) were ranked below the Appellant and bypassed him. (Jt.Ex. 1)
54. The Appellant filed the instant appeal on July 22, 2016. (Jt.Ex. 11; Administrative Notice)

55. The Appellant obtained his own psychological evaluation on October 24, 2016 at Lahey Health Behavioral Services by a clinician who noted, in part, “[n]o remarkable psychiatric needs observed/stated during evaluation. Pt falls within normal limits throughout evaluation.” (App.Ex. 1)<sup>18</sup>

### *Relevant Authorities*

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

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

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<sup>18</sup> Attached to the summary is the clinician's ten (10)-page report reflecting her evaluation of the Appellant. I asked the Appellant to produce the clinician's curriculum vitae (c.v.). The Appellant requested the c.v. From the clinician but she declined to produce it.

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)).

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)).

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).

G.L. c. 31, s. 58 provides that applicants for the position of police officer (and firefighter) shall not be required to reside in the city or town in which they have been appointed. However, the same statute provides a preference for applicants who have resided in the city or town one (1) year prior to their examination, stating, in pertinent part,

If any person who has resided in a city or town for one year immediately prior to the date of examination for original appointment to the police force or fire force of said city or town has the same standing on the eligible list established as the result of such examination as another person who has not so resided in said city or town, the administrator, when certifying names to the appointing authority for the police force or the fire force of said city or town, shall place the name of the person who has so resided ahead of the name of the person who has not so resided; provided, that upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided.

Id.

With respect to applicants’ medical information, in Kerr v. Boston Police Department, G1-16-203 and G1-17-230 (2018), the Commission found that 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 such 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 (7<sup>th</sup> 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.

The Commission has discussed the accessibility of applicants' criminal records. As noted in *Man v. Quincy*, G1-17-023 (2018), G.L. c. 151B, s. 4(9) and 4(9<sup>1/2</sup>) prohibit employers from asking about criminal behavior orally or in an application or discriminating against applicants who fail to provide such information.

However, the state of the law regarding whether law enforcement agencies are exempt from G.L. c. 151B, s. 4 and related laws barring discrimination in employment. The Commission has yet to issue a decision in this regard as the cases were decided based on other issues. Such decisions have acknowledged that judicial decisions have similarly not yet decided whether civil service employers may obtain criminal record information from applications 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. In addition, related statutes appear to be

conflicting. G.L. c. 31, s. 20 requires the agency conducting civil service exams to ask candidates, [h]ave you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace?” and asks for related details, subject to the sealing of criminal records under G.L. c. 276, ss. 100A, 100B and 100C.

Id. That said, section 20 also provides,

No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of 18 years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application.

Id.

In contrast, G.L. c. 31, s. 50 provides, in pertinent part, that a civil service employer is barred from appointing someone within one (1) year after his conviction of any crime, although the employer may appoint someone convicted of a crime within the year after the person is convicted of,

a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine.

Id.

However, under G.L. c. 6, s. 172(a)(1), criminal justice agencies may obtain all criminal offender record information (CORI), including sealed records “for the actual performance of their criminal justice duties”. Id. Further, section 172(a)(3) adds that a criminal justice agency may obtain the CORI “to evaluate current and prospective employees . . . .” (Id.) Section 172(a)(3) adds, however, in part, that,

Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody ....  
Id. (emphasis added)

Finally, at least one statute treats firefighters and police differently in connection with criminal records. Specifically, pursuant to G.L. c. 41, s. 96A, no one who has been convicted of a felony may be a police officer. The statute does not reference firefighters.

### *Analysis*

The Respondent failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Specifically, the Respondent did not conduct a reasonably thorough review of the Appellant's background. The letter that the Respondent sent to HRD to bypass the Appellant asserts generally, in addition to certain specific matters, that "several attempts to ascertain application information has (sic) been fruitless." Jt.Ex. 7. Although it is accurate to say that the Appellant did not provide certain information on his applications, it is not accurate to say that requests for information were "fruitless". Further, Sgt. Det. Aguilar testified at the Commission hearing that he could not recall what information the Appellant had failed to include, what information he asked the Appellant to provide, and what information the Appellant added to his applications. In fact, information provided to the candidates asking them to submit their applications even stated that they need not have been completed at that time. Jt.Ex. 2. Further, there appears to be no record of the information the Appellant added at Sgt. Det. Aguilar's request because the Appellant simply added the information to the applications. In addition, it is clear that the two (2)-week time period for the background checks, which typically take a month to produce, had a significant bearing on both the Appellant's ability to obtain certain information and for Sgt. Det. Aguilar to review and

verify the information the Appellant provided. Finally, the bypass was also flawed because it was affected by the appearance of bias (if not actual bias), it wrongly relied on a reference to an adjustment disorder in the Appellant's military documentation without giving the Appellant a conditional offer of employment and conducting an appropriate psychological exam, and the application forms wrongfully asked the candidates if they had "ever" committed various crimes.

As noted in the facts, the application asks candidates to provide, and the Appellant provided, the names and dates of the public high schools he attended in Methuen and Lawrence, and the name, address and phone number of at least one (1) person who "knows/knew you while you attended the above school". Jt.Exs. 5 and 6. The applications also required candidates to add the name of a person ("such as an instructor or a student") regarding a school the candidates attended in the past three (3) years. The one (1) school that the Appellant attended in the three (3) years prior to applying to the LPD was the University of Phoenix in Braintree (2011-2013) but the Appellant did not provide the University's street address in Braintree or the name of an instructor or student who knew him there. The Appellant provided the information concerning a car loan he obtained from the credit union in Methuen but he did not provide the credit union's specific street address. The Appellant provided the information requested about his ex-spouse except for the specific street address where she lives in Haverhill. The Appellant provided the residence information requested except for his residence in the military. The Respondent asserts that the Appellant failed to provide the contact information of his landlords in the residence section of the applications. However, the applications do not request the name and contact information for the candidates' landlords. Nonetheless, the Appellant included on the applications the name and contact information for his landlord in Lawrence from 2014 to 2015. Sgt. Det. Aguilar apparently attempted to contact the Lawrence landlord but was unable to reach

her during the two (2)-week background check up. The Respondent also asserts that the Appellant failed and/or refused to provide the name of his prior landlord in Haverhill. However, the Appellant credibly testified that he was given minimal time to obtain the information and that he did not know the name or contact information for the Haverhill landlord because his then-wife was the one who had made the Haverhill rent payments to the landlord when they lived there, not him. The Appellant did not provide his address while in the military. With respect to the Appellant's personal and professional references, the Appellant provided the information requested in his applications but there is no indication that Sgt. Det. Aguilar contacted them. The Appellant signed the releases at the end of his written version of his application but not in the electronic version. Similarly, the Appellant obtained notarization of the written version of his application but not his electronic version.

The bypass also relies on one (1) negative employment reference to bypass the Appellant. The Appellant provided all of the employment information regarding his current and prior employers, including the name and contact information of his supervisors except that he did not provide the name and contact information of his supervisor in the military or the number on Merrimack Street in Lawrence of his then-current job at a Debt Collection Company. The Appellant provided written references from supervisors at restaurant R, restaurant T and restaurant G. There is no indication that Sgt. Det. Aguilar called restaurant T, where the Appellant had worked for two (2) years, or the Debt Collection Company, for job references. Sgt. Det. Aguilar did contact restaurant R, one (1) of the Appellant's two (2) current employers, and restaurant G, one (1) of the Appellant's prior employers, for job references. Sgt. Det. Aguilar spoke to the supervisor at restaurant R whom the Appellant identified in his applications. The restaurant R supervisor made very positive statements about the Appellant's work there but

noted that the Appellant had only been working there several months at the time. Sgt. Det. Aguilar tried, but was unable to reach the supervisor at restaurant G whom the Appellant identified in his applications. Sgt. Det. Aguilar then called and asked to speak to another supervisor. This supervisor at restaurant G made a number of negative statements about the Appellant's work including an assertion that the Appellant had attempted to have an alcoholic drink at the restaurant during the time that the Appellant was employed there. The Appellant alleges that that supervisor was not his direct supervisor, that that supervisor travelled a lot and, as a result, was unaware of the Appellant's performance and that the Appellant (at or about that time) had begun employment at a different restaurant. While it appears that the Appellant was not working at restaurant G on the day of this event, the Appellant does not deny that he had a problematic exchange with that supervisor as reported by Sgt. Det. Aguilar. Had the Respondent conducted a reasonably thorough review of the Appellant's background and its decision not been effected by the appearance of bias, inappropriate consideration of an alleged adjustment disorder, and inappropriate requests for information indicating whether or not the candidates had ever committed various crimes, the negative job reference and the Appellant's failure to provide contact information for his military supervisor otherwise may have provided reasonable justification for the bypass.

A major concern in this case is that the hiring process was sufficiently flawed to require that the Appellant be granted another opportunity for consideration. Specifically, Sgt. Det. Aguilar informed the Appellant, when they first met to discuss the Appellant's application, that he had a problem with the Appellant's father. Lt. Fleming was aware of Sgt. Det. Aguilar's problem with the Appellant's father and yet he assigned Sgt. Det. Aguilar the task of conducting the Appellant's background check. Although Sgt. Det. Aguilar told the Appellant that he had a

problem with the Appellant's father and not the Appellant, Sgt. Det. Aguilar's statement established at least an appearance of bias, which is inconsistent with basic merit principles. Under the circumstances, Sgt. Det. Aguilar should not have conducted the Appellant's background check. Likewise, when the Appellant met with Mr. Bonet to discuss his application, he told him that Sgt. Det. Aguilar had a problem with his (the Appellant's) father, apparently to no avail. Thus, despite repeated reports that Sgt. Det. Aguilar had a problem with the Appellant's father, the Respondent did not refer the Appellant's background check to someone other than Sgt. Det. Aguilar.

The Respondent's applications asked candidates if they had committed various crimes. As noted herein, the law prohibits employers from asking candidates orally or in writing in an application from requiring that candidates provide information about their criminal records. The Respondent's application devotes an entire section to criminal records ("Police Record"). In addition, this section of the application is open-ended, asking if you have ever been arrested, have you ever been convicted of any felony offense, have you ever been convicted of any offense(s) related to drugs, and are there currently any felony or drug charges pending against you, asking for a variety of data about each such question. The Appellant's responses to these questions in this case were negative and, thus, he was not harmed by the questions. Nonetheless, the Respondent shall remove such questions from its application forthwith.

Similarly, the Respondent relies in part on a reference in the Appellant's DD214 military discharge form which states that although the Appellant was honorably discharged, the reason for his separation from the Air Force was "adjustment disorder." As noted 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. Here, the Respondent did not extend a conditional offer of employment and did not ask him to take an appropriate subject psychological exam. Further, there is no indication that the Appellant was examined by anyone in the medical field prior to including a reference to the adjustment disorder in his DD214. Moreover, after he was bypassed, the Appellant obtained an evaluation by a Lahey clinician who found that he did not have an adjustment disorder, at least as of the time of the clinician's report. While I do not find that the Lahey clinician's report is dispositive, the report undermines the Respondent's assertion that the Appellant has a disorder, justifying its decision to bypass the Appellant.

### Conclusion

For all of the above-stated reasons, Appellant's appeal under Docket No. D1-16-131 is ***allowed***. Pursuant to its authority under Chapter 310 of Acts of 1993, HRD shall:

1. Place the name of Joshua Maldonado at the top of any future (regular or special) Certification for Lawrence Police Officer for which Mr. Maldonado is eligible until such time as he is appointed or bypassed;
2. If Mr. Maldonado is appointed as a Lawrence Police Officer, he shall receive a retroactive civil service seniority date the same as those candidates appointed from Certification No. 03482. This retroactive civil service seniority date is for civil service purposes only and is not meant to provide Mr. Maldonado with any additional pay or benefits, including creditable service for retirement.
3. The Appellant's future consideration pursuant to the relief stated herein shall be fair and not subject to appearances of impropriety.

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

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan Commissioners) on July 5, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have

overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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:

Joshua Maldonado (Appellant)  
Matthew J. Buckley, Esq. (for Respondent)  
Michael Downey, Esq. (for HRD)  
John Marra, Esq. (HRD)