JULIO SANCHEZ

v.

BOSTON POLICE DEPARTMENT[1]

G1-17-224

December 31, 2020
Cynthia A. Ittleman, Commissioner

***Bypass Appeal-Original Appointment to the Boston Police Department-Failure to Prove Boston Residency*—**The Commission affirmed the bypass of a candidate for original appointment to the Boston Police Department whose tax records, bank statements, life insurance policies, and military earnings records failed to substantiate his claim to Boston residency during the necessary one-year period and instead showed him residing between Woburn and Lynn.

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), Mr. Julio Sanchez (Appellant), appealed the decision of the Boston Police Department (BPD or Respondent) to bypass him for original appointment to the position of full-time police officer. The Appellant filed the instant appeal on October 26, 2017. The Civil Service Commission (Commission) held a prehearing conference in the case on November 14, 2017 at the Commission's office in Boston. The Commission conducted a full hearing[2] in the case at the same location on March 22 and 26, 2018. The witnesses were sequestered. The hearing was digitally recorded and the parties were each sent a CD of the proceeding.[3] The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Thirty-four (34) exhibits (Ex./s) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Detective Karyn VanDyke, Recruit Investigations Unit, BPD ("Det. VanDyke")
- Nancy Driscoll, Director of Human Resources, BPD

Called by the Appellant:

- Julio Sanchez, Appellant

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

Appellant's Background

1. At the time of the hearing in this appeal, the Appellant was forty-one (41) years old and resided in Lynn, Massachusetts with his fiancé and their two (2) children. Mr. Sanchez was born and raised in Lynn. He was one of a number of children born to a single mother. He was eventually sent to be raised by his grandmother after his mother was incarcerated. (Testimony of Appellant)

2. Mr. Sanchez graduated from Lynn Classical High School. After high school, Mr. Sanchez attended a state university, from which he graduated with a bachelor's degree in 2000. In 2010, Mr. Sanchez earned a master's degree in Special Education from another state university. (Testimony of Appellant)

3. Mr. Sanchez has completed thirty (30) course credits beyond his master's degree. (Testimony of Appellant)

4. During his college years, Mr. Sanchez worked summers at a camp for Lynn residents. One of his supervisors was a guidance counselor from his high school who helped Mr. Sanchez obtain his first job teaching in Lynn. (Testimony of Appellant)

5. After a short period of employment with the Lynn Public Schools, Mr. Sanchez began working with special needs students in the Boston Public Schools beginning in 2001, where he was still employed at the time of this hearing. (Testimony of Appellant)

6. In addition to working in the Boston Public Schools, Mr. Sanchez began employment with the Department of Youth Services (DYS) as a shift supervisor in 2012. As a shift supervisor, the Appellant was responsible for the care and custody of juvenile offenders remanded to DYS at a facility in Dorchester from 3pm to 11pm. (Testimony of Appellant)

7. In 2008, Mr. Sanchez became an officer in the United States Coast Guard Reserve (USCGR). He has had a series of assignments with the USCGR, including in-port security and as an armorer. From March 24, 2016 to the time of the hearing in this appeal, the Appellant was on active duty and assigned to the First Coast Guard District in Boston. During active duty, Mr. Sanchez was on military leave from Boston Public Schools and DYS. (Testimony of Appellant)

The 2017 Hiring Process

8. The Appellant took and passed the April 2015 civil service police officer exam, requesting that he be considered for employment as a Boston resident. In 2017, the BPD asked the state's

1. At the time of the hearing in this case, Attorney Zawada represented the Boston Police Department. At the present time, she no longer works at the BPD and a copy of this decision will be sent to BPD Legal Advisor David Fredette.

2. 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.

3. 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.

Human Resources Division (HRD) to issue a certification to fill one hundred (100) vacant police officer positions. HRD issued Certification 04401 to the BPD on February 2, 2017 on which the Appellant was ranked in the 40th tie group. (Stipulation) On March 2, 2017, HRD added names to the Certification at the request of the BPD. (Administrative Notice - HRD information provided to the Commission and the parties) The BPD subsequently selected one hundred and thirty (130) candidates, one hundred thirteen (113) of whom were ranked below the Appellant on the Certification.[4]

9. Eligible candidates who are interested in applying for the position of police officer with the BPD sign a Certification maintained at the BPD Department. Thereafter, each applicant attends orientation, completes the student officer application, attends an initial interview, and undergoes a background investigation conducted by a detective assigned to the BPD's Recruit Investigations Unit (RIU). (Testimony of VanDyke and Driscoll)

10. Det. VanDyke began working for the BPD in 1994 and earned her detective rating in 2010. At all pertinent times, she was assigned to the RIU and has worked there approximately four (4) years. Her responsibilities at the RIU included conducting pre-employment background investigations on applicants to civilian and police officer positions at the BPD. (Testimony of VanDyke)

11. In conducting a background investigation, Det. VanDyke reviews information including, but not limited to, an applicant's residency in the city of Boston during the one (1) year prior to the civil service exam as well as criminal history, driving history, education, and employment history. (Testimony of VanDyke)

12. Det. VanDyke was assigned to the RIU and conducted background investigations in the summer of 2017 for approximately forty-four (44) applicants to the position of police officer, including that of the Appellant. (Testimony of VanDyke; Ex. 1)

2017 Hiring Process - Residency

13. During her background investigation of the Appellant, Det. VanDyke reviewed information regarding the Appellant's residency, including but not limited to, his driver's license, credit check, bank statements, tax returns and added information that the Appellant produced at her request. Det. VanDyke noted that the Appellant had addresses outside the city of Boston, including in Lynn and Woburn. (Testimony of VanDyke; Exs. 2 - 12)

14. For the 2015 civil service police officer exam, applicants were required to have resided permanently and consistently in Boston from April 2014 to April 2015 (residency period) in order to receive the statutory residency preference. (Testimony of VanDyke and Driscoll)

15. The Appellant claims that he resided at his sister's home on Washington Street in Dorchester from September 2012 to December 2015. (Testimony of Appellant; Exs. 1 and 34)

16. The Appellant purchased a four (4)-unit house on Newhall Street in Lynn in 2003. The Appellant informed Det. VanDyke that, of those units at Newhall Street, one (1) was a basement apartment, which he did not rent out from September 2012 to December 2015. (Testimony of VanDyke and Appellant; Ex. 1)

17. On the Appellant's 2014 state tax returns covering the residency period, the Appellant reported his residence as being Newhall Street in Lynn, Massachusetts. On that tax return, the Appellant signed his name and declared under the penalties of perjury that the return was true, correct, and complete. (Testimony of VanDyke; Ex. 2)

18. The Appellant did not provide the BPD any tax records indicating that his address was in Boston. (Testimony of VanDyke)

19. The Appellant gave Det. VanDyke a copy of his Group Life Insurance Election and Certificate, which was dated during the residency period and which identifies the Appellant's address as Newhall Street in Lynn. The Appellant signed the form to "certify that the information provided on [the] form is true and correct to the best of [his] knowledge and belief." (Testimony of Appellant; Ex. 5)

20. Det. VanDyke reviewed the Appellant's Experian credit report, which listed numerous addresses for the Appellant outside of Boston, including addresses in Lynn and Woburn. The credit report states that addresses it contains are personal information reported to Experian by the Appellant, his creditors, and other sources. The Washington Street, Dorchester address where the Appellant asserts that he resided during the residency period was not among the addresses listed in the credit report. (Testimony of VanDyke; Ex. 7)

21. The Appellant provided a list of his prior residences as part of his application. All of the addresses he disclosed on his application were listed in the Experian credit report except for the Washington Street, Dorchester address where the Appellant claimed residency during the residency period. (Testimony of Appellant; Exs. 7 and 34)

22. Det. VanDyke reviewed the Appellant's bank statements for the residency period, which indicate that the Appellant's address was on Newhall Street in Lynn. The four (4) bank statements in the record were for April and May 2014 and January and February 2015. Based on the four (4) bank statements, the BPD found that the Appellant made purchases (i.e.—at retail establishments) near the Dorchester address he claimed as his residence in April 2014 on five (5) days of the month; in May 2014 on seven (7) days of the month; in January 2015 on fifteen (15) of the month; and in February 2015 on four (4) days of the month. There were very few occasions in the four months of bank statements on which the Appellant made such purchases on consecutive days. This was insufficient to establish that the Appellant had been a Boston resi-

4. At the pre-hearing conference, the BPD was unable to report the precise number of candidates who bypassed the Appellant. At the full hearing, counsel for the BPD stated that 113 candidates had bypassed the Appellant. The Appellant did not dispute the BPD's statement.

dent during the residency period. (Testimony of VanDyke; Ex. 4; Administrative Notice)

23. According to excise tax records provided by the Appellant, he paid motor vehicle excise tax on three (3) vehicles to the City of Woburn, Massachusetts in 2013, 2014 and 2015. (Testimony of VanDyke; Ex. 8)

24. The Appellant gave Det. VanDyke auto insurance statements for the three (3) vehicles during the residency period. The auto insurance statements indicate that the Appellant's address was in Woburn. Moreover, the statements indicate that the three (3) vehicles were principally garaged in Woburn. Det. VanDyke did not receive any information indicating that the Appellant provided a Boston address on his auto insurance documents. (Testimony of VanDyke; Ex. 3)

25. The Appellant gave Det. VanDyke a copy of his Planet Fitness membership agreement dated 2013. (Ex. 1)[5]

26. The Appellant's sister, who lives in Dorchester, provided a letter that the Appellant gave to Det. VanDyke regarding his residence during the residency period. The letter, dated April 10, 2017, asserts that the Appellant lived with his sister at her home on Washington Street in Dorchester during the residency period. The Appellant did not pay rent to his sister. (Testimony of Appellant; Ex. 12)

27. The Appellant applied to the BPD previously and underwent a background investigation in 2015, which was completed by Det. Anthony Ortiz. At that time, the Appellant stated that he was "living simultaneously in Dorchester and in Lynn." (Testimony of VanDyke; Ex. 28)

28. On September 21, 2015, Det. Ortiz conducted a home visit at the Washington Street, Dorchester address, a home owned by the Appellant's sister. There, Det. Ortiz observed "a couch that the applicant stated was his bed." Det. Ortiz also noted that the Appellant "didn't have a close (sic) or dresser for clothing" and rather only "had a few articles of clothing hanging on a wooden stick and some clothing in a duffle bag." The Appellant admitted to Det. Ortiz in 2015 that he stayed with his girlfriend in the town of Melrose "the majority of the time." Det. Ortiz concluded "[i]t appears that the [A]pplicant doesn't actually live at" the Dorchester address where he claimed residency. (Testimony of VanDyke and Appellant; Exs.1 and 28)

29. In 2017, Det. VanDyke reviewed the Appellant's 2015 application and Det. Ortiz's Privileged and Confidential Memorandum (PCM). Det. VanDyke also spoke with Det. Ortiz about his 2015 background investigation into the Appellant and incorporated his observations into her PCM. (Testimony of VanDyke; Exs. 1 and 28)

30. During this 2017 hiring process, Det. VanDyke's supervisor, Sgt. Lucas Taxter, performed a visit of the Appellant's home in Lynn. (Testimony of VanDyke; Ex. 1)

31. The Appellant gave the BPD his earnings statements from the USCGR during the 2014-2015 residency period. Det. VanDyke reviewed these statements and noted that they indicated that the Appellant's address was on Newhall Street in Lynn. None of the USCGR earnings statements that the Appellant provided to Det. VanDyke provided a Boston address during the residency period in this case. (Testimony of VanDyke; Ex. 6)

32. The Appellant gave Det. VanDyke documents of his Prudential Life Insurance policy dated during the 2014-2015 residency period. These insurance policy documents indicate that the Appellant's residence was on Newhall Street in Lynn. (Testimony of VanDyke; Ex. 5)

33. Det. VanDyke also reviewed a letter to the Appellant from DYS, one of the Appellant's employers. The date of the letter is within the residency period and the letter indicates that the Appellant's address was on Newhall Street in Lynn. (Testimony of VanDyke; Ex. 9)

34. Det. VanDyke also reviewed police reports and records concerning the Appellant, generated during the April 2014 - April 2015 residency period. (Testimony of VanDyke; Exs. 10 and 11) According to an October 4, 2014 Boston Police report, the Appellant reported a motor vehicle accident and indicated that his address was in Woburn. (Testimony of VanDyke; Ex. 10)

35. According to a Lynn Police Department report, the Appellant had two (2) recorded addresses during the residency period, one in Woburn and one in Lynn. (Testimony of VanDyke; Ex. 11)

36. Det. VanDyke determined that the documents the Appellant had provided were not adequate to prove the Appellant's Boston residency during the residency period so she asked the Appellant for additional documents. (Testimony of VanDyke) The additional documents that the Appellant provided and Det. VanDyke considered included registration for one (1) car at the Appellant's purported Boston address during the residency period, a Boston Board of Election Commissioners notice for the Appellant at the Boston address the Appellant claimed during the residency period and a Juror Service Summons to the Appellant at the Boston address that the Appellant claimed during the residency period. However, the insurance policy for the car registered at the Boston address states that the insured's address was in Woburn. (Testimony of VanDyke; Exs. 1, 3, 30, 31 and 32) In addition, the Appellant's Board of Election Commissioners notice was based on his voting in Boston in 2013 and 2016 and the Appellant did not provide Det. VanDyke any documents indicating that he voted in Boston during the residency period. (Testimony of Appellant; Ex. 30) Further, the Appellant's jury duty was scheduled for October 2015, a date five (5) months after the residency period. (Ex. 32)

5. The gym membership document is not in the record but Det. VanDyke's PCM indicates that the Appellant gave her a copy of the membership.

37. By letter dated August 31, 2017, the BPD informed the Appellant that he had been bypassed, in part, because he failed to prove his residency in Boston during the residency period.

38. The Appellant timely filed the instant appeal. (Administrative Notice)

Applicable Law

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass.1106 (1996) .

A person may appeal a bypass decision under G.L. c.31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton,* 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient") .

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission—

> ". . . cannot substitute its judgment about a ***valid*** exercise of ***discretion based on merit or policy considerations*** by an appointing authority" but, when there are "***overtones of political control or objectives unrelated to merit standards or neutrally applied public policy***, then the occasion is appropriate for intervention by the commission."

City of Cambridge v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 428 Mass. 1102 (1997)(*emphasis added*). However, the governing statute, G.L. c. 31, § 2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id*.

The Commission's role, while important, is relatively narrow in scope: to review the legitimacy and reasonableness of the appointing authority's actions. *See Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly* v. *Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188 (2010).

ANALYSIS

It is clear that the Appellant has made great strides, overcoming exceedingly difficult challenges in his life to obtain a master's degree, to teach students in need of special education, supervise juvenile offenders in the custody of DYS, and become a Lieutenant in the Coast Guard reserves. Nonetheless, I find that the Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant because he did not establish that he resided in Boston during the 2014 - 2015 residency period.

The Respondent considered numerous documents it obtained and asked the Appellant to produce to assess whether the Appellant had been a Boston resident during the residency period. The documents included the Appellant's state and federal tax records, bank statements for four (4) months, his service member's life insurance policy, a Coast Guard Earnings Statement, a credit report, a September 8, 2014 DYS letter, Lynn Police Department reports, car insurance documents, car registration information, car excise tax documents, a BPD incident report, a letter from the Appellant's sister, a voter address document and a jury duty summons. These documents failed to establish the Appellant's Boston residency between April 2014 and April 2015. Exs. 2, 3, 5, 6 through 9 and 11. Instead, these documents indicated that he informed certain authorities that his address was in Lynn, where he owned residential property, or in Woburn. The Appellant's sister wrote a letter stating that the Appellant had lived in her house in Boston but the Appellant indicated that he did not pay her rent and the recruit investigator in the 2015 hiring cycle visited the Appellant at his sister's house and the Appellant said he lived in the finished basement, where the investigator found a couch with some clothes hung on a wooden stick and a duffle bag with clothes and the Appellant told that investigator that he lived in both in another city with his girlfriend and in Boston. Det. VanDyke included this information in her own PCM. The Appellant's jury duty summons was for a date five (5) months after the residency period. The Appellant registered a car at his sister's address but the insurance for the vehicle indicated that the Appellant's address was in Woburn during the residency period. The voter address document the Appellant provided to the BPD did not indicate that the Appellant had voted in Boston in the residency period. The few bank statements the Appellant offered showed that he only made purchases near his purported Boston residence on five (5) days in one month, seven (7) days in another month and on fifteen (15) days in another month. When Det. VanDyke determined that the residency information she received was not sufficient, she afforded the Appellant the opportunity to provide additional documen-

tation to prove his residency in the City of Boston during the residency period. Moreover, the Appellant claims he was living in his sister's basement without paying rent during the residency period while the basement apartment of his property at Newhall Street in Lynn was not rented out during the residency period. In sum, the Appellant provided insufficient information to indicate that he resided in Boston during the residency period. Since the Appellant would not have been considered for appointment in this hiring cycle but for his rank on the Certification based on the residency preference, he was not eligible for consideration for appointment.[6]

CONCLUSION

For all the reasons asserted herein, the Appellant's appeal under Docket No. G1-17-224 is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 31, 2020.

Notice to:

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* * * * * *

THOMAS L. WALSH, JR.

v.

TOWN OF WATERTOWN

D1-20-138

January 14, 2021
Paul M. Stein, Commissioner

Commission Practice and Procedure-Arbitration as Alternate Forum for Firefighter Discharge Appeal-Dismissal Nisi—The Commission agreed with a Watertown Fire Captain appealing his discharge that his appeal to the Commission should not be dismissed with prejudice until an arbitrator hearing the same appeal under the collective bargaining agreement had finally determined to arbitrate the appeal and not dismiss it in favor of Commission jurisdiction. The Appellant's Motion to Dismiss Nisi was granted, allowing him the option of subsequently filing a Motion to Revoke this Dismissal if his grievance were found not to be arbitrable.

DECISION ON APPELLANT'S MOTION TO DISMISS NISI

The Appellant, Thomas L. Walsh, Jr., appealed to the Civil Service Commission (Commission) from the decision of the Town of Watertown (Watertown) terminating his employment as a Fire Captain with the Watertown Fire Department (WFD). On December 23, 2020, the Appellant filed the "Appellant's Motion to Issue Dismissal Nisi". Watertown opposed the motion and seeks an order dismissing the appeal with prejudice. On January 12, 2021, I conducted a hearing on the Motion via remote videoconference (Webex). After carefully reviewing the submission of the parties and hearing oral argument, I conclude that the Appellant's Motion should be granted, with conditions. The appeal shall be dismissed nisi, to become effective on March 15, 2021, with the proviso that, if the issue of arbitrability in American Arbitration Association (AAA) Case No. 01-20-0015-4650 now pending before Eileen A. Cenci, Arbitrator, has not been finally determined before that time, the Appellant may move to further extend the future effective date of the dismissal of this appeal for such additional time and on such conditions as the Commission may determine.

FINDINGS OF FACT

Based on the submissions of the parties and argument of counsel, the following relevant facts are not in material dispute:

1. By letter dated September 3, 2020, Watertown terminated Capt. Walsh from his position of Fire Captain in the WFD. (*Stipulated Facts; Respondent's Opposition*)

2. On September 9, 2020, the Appellant's counsel, acting on behalf of the Watertown Firefighters Association, Local 1347 (the

6. Since the Appellant was not eligible for consideration, I have not addressed other issues raised in the bypass letter.

"Union"), inquired by email whether Watertown would waive the normal grievance procedures and "go to direct arbitration" over the Appellant's termination. (*Respondent's Opposition*).

3. On September 11, 2020, Watertown replied by email to the Union's request by stating "it is our understanding that the practice between the parties relative to discipline cases has been that discipline is appealed to the Civil Service Commission pursuant to Article XIV of the collective bargaining agreement." (*Respondent's Opposition*)

4. On September 14, 2020, the Union filed a grievance with the WFD Fire Chief alleging that the Appellant's termination violated the collective bargaining agreement entered into by the Union with Watertown. (*Respondent's Opposition*)

5. On September 15, 2020, the Appellant duly appealed his termination to the Commission. (*Stipulated Facts; Claim of Appeal*)

6. On September 22, 2020, the WFD Fire Chief denied the grievance on the grounds that he "did not have the authority to rule on the grievance." (*Respondent's Opposition*)

7. On September 22, 2020, the Union filed the grievance for a Step III meeting which was held on October 7, 2020 before the Watertown Town Manager. (*Respondent's Opposition*)

8. By letter dated October 9, 2020, the Watertown Town Manager denied the grievance on the grounds that; (1) "The grievance is not arbitrable as the collective bargaining agreement contemplates, and the past practices between the parties confirms, that disciplinary appeals are to be filed at the Civil Service Commission" and (2) "[E]ven if the grievance were arbitrable, the Town had ample just cause to terminate Captain Walsh's employment . . ." (*Respondent's Opposition*)

9. On October 13, 2020, the parties appeared before the Commission for a duly scheduled pre-hearing conference (conducted remotely via videoconference). At the time of this conference, the Appellant stated that it was the intention of the Union to arbitrate the termination decision, but Watertown asserted that the matter was not arbitrable. Accordingly, the Commissioner presiding at the pre-hearing conference scheduled a Status Conference for December 17, 2020 to obtain an update on the status of the arbitration proceeding. Also, a date of January 12, 2020 was established for a full evidentiary hearing of the Appellant's appeal. (*Respondent's Opposition; Administrative Notice*; *Notice of Pre-Hearing Conference; Notice of Status Conference; Notice of Full Hearing*)

10. On October 27, 2020, the Union filed a Demand for Arbitration of the Grievance related to the Appellant's termination. (*Respondent's Opposition*)

11. On November 20, 2020, the AAA issued a Notice of Hearing on the Union's Demand For Arbitration on January 28, 2021 before an arbitrator selected by the parties. (*Appellant's Motion; Respondent's Opposition*)

12. At the December 17, 2020 Status Conference, I was informed of the scheduled arbitration hearing on January 28, 2021 and was further advised that Watertown intended to raise, as one of the issues to be decided by the arbitrator, whether the Union's grievance was arbitrable. The Appellant requested that the Commission appeal be "held in abeyance" pending a decision of the arbitrator on the issue of arbitrability. Watertown contended that the Appellant's election to arbitrate was binding and, whether the Union prevailed on the issue of arbitrability or not, his he has, in effect, the Commission is now divested of jurisdiction and this appeal must be dismissed with prejudice. (*Administrative Notice Procedural Order dated 12/13/2020*)

13. In view the dispute between the parties as to whether or not the current status of the arbitration proceeding precluded the Commission from retaining or exercising jurisdiction over the Appellant's appeal, I converted the scheduled full hearing into this Motion Hearing, and invited the parties to submit written motions to set forth their respective views, which they have done. I also encouraged the parties to collaborate and determine if the decision on the issue of arbitrability could be expedited in some fashion. (*Procedural Order dated 12/13/2020: Appellant's Motion; Respondent's Opposition*)

14. At the Motion Hearing, I was informed that the parties had met with the arbitrator and an agreement was reached providing that the January 28, 2021 hearing would address the issue of arbitrability, the parties would brief that issue on or before February 15, 2021, the arbitrator would endeavor to issue a decision on arbitrability within thirty (30) days thereafter, and that a hearing on the merits would be scheduled, if necessary, at a later time. (*Colloquy at Motion Hearing*)

APPLICABLE CIVIL SERVICE LAW

Public employees with civil service status who are also members of a collective bargaining unit derive their rights to contest adverse employment decisions under the panoply of several intersecting statutes as well as under contractual rights provided in negotiated collective bargaining agreements. *See*, *e.g.*, G.L. c. 31 (civil service law), and G.L. c. 150E (public employee collective bargaining)

G.L. c. 31, §41-45 provides that a tenured civil servant may be "discharged, removed, suspended . . . laid off [or] transferred from his position without his written consent" only for "just cause" after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states "fully and specifically the reasons therefore." G.L.c.31, §41. An employee aggrieved by such disciplinary action may appeal, within ten (10) days, to the Commission, pursuant to G.L.c.31, §42 and/or §43, for de novo hearing by the Commission "for the purpose of finding the facts anew." *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited; *Volpicelli* v. *City of Woburn*, 22 MCSR 448 (2009); *Williamson* v. *Department of Transitional*

Assistance, 22 MCSR 436 (2009)[1] G.L.c.31, § 43 also provides, in relevant part:

> If the commission determines that such appeal *has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section,* the commission shall forthwith dismiss such appeal.

G.L. c.31, §43, ¶1, third sentences *(emphasis added)*

The relevant collective bargaining statute, referred to in Section 43 above, states:

> **Grievance procedure; arbitration.** *The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration* to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. *In the absence of such grievance procedure, binding arbitration may be ordered by the [labor relations] commission upon the request of either party;* provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that *binding arbitration hereunder* shall be enforceable under the provisions of chapter one hundred and fifty C and *shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one,* section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and *where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance,* notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and and section fifty-nine B of chapter seventy-one.

G.L.c.150E, §8 (*emphasis added*)

ANALYSIS

The essential question presented by the present Motion turns on whether the Appellant, who had duly and timely filed an appeal with the Commission that challenged the just cause for his termination from the WFD, forfeits his right to pursue that claim under Civil Service Law, once his union made a Demand for Arbitration based on a grievance of that same termination as a violation of an applicable collective bargaining agreement, even when he knows that his appointing authority intends to challenge the arbitrability of such a grievance.

Watertown contends that once the Union filed its Demand for Arbitration, it triggered the application of the requirement of G.L. c.31, §43 which divested the Commission of jurisdiction because the same claim is "presently being resolved" in arbitration, as well as the provision of G.l.c.150E, §8 that "where such arbitration is elected by the employee as the method of grievance resolution" it becomes "the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination", notwithstanding any rights provided under Civil Service Law. Watertown asserts that it does not matter whether or not the grievance is arbitrable for purposes of divesting the Commission of jurisdiction because the "election" of arbitration was made at the time the Demand for Arbitration of the grievance was filed, knowing that arbitrability was an issue, and the Appellant thereby "elected" to "resolve" the dispute in arbitration, including its arbitrability, whether favorable to the Union or not. Thus, Watertown argues, there is no reason to abide the decision on arbitrability, because whatever the outcome, as a matter of law, the Commission now has been divested of jurisdiction to proceed to adjudicate the Appellant's civil service claim. Alternatively, Watertown argues that the Appellant must decide, before the January 28th hearing on arbitrability is held, whether he will proceed with that hearing or have the Union withdraw the Demand for Arbitration and proceed with a civil service hearing instead.

The Appellant contends that the Union's pursuit of an arbitration claim, in which arbitrability is contested, is distinguishable from a case in which arbitrability is not contested. He agrees that, if the arbitration proceeds to be litigated and decided on the merits, he would be bound by the outcome and the Commission could not retain jurisdiction. He disputes, however, that an arbitration in which the issue of arbitrability is asserted and is not yet decided, cannot be construed as an arbitration in which the just cause of his termination can be characterized as "presently being resolved" within the meaning of Chapter 31. He asserts that he cannot be required to forfeit his duly asserted civil service rights until it has been determined that the process affords him an equivalent opportunity for his Union to seek redress of his complaint. He asks that the appeal be dismissed nisi, to become final only if the arbitrator decides the grievance is arbitrable, but with the opportunity to reopen the appeal if the arbitrator decides the Union grievance is not arbitrable.

In *Ung* v. *Lowell Police Dep't*, 22 MCSR 471 (2009), the Commission addressed a similar issue to that presented here. In *Ung*, after duly filing a Section 43 disciplinary appeal, the Appellant withdrew the appeal after his Union filed a Demand for Arbitration. When the employer then challenged the Demand for Arbitration on the grounds that the grievance was not arbitrable, Ung moved to reopen his appeal. The Commission revisited its interpretation of Section 43 and concluded:

> "The Commission has concern that, by construing civil service law to force an Appellant to pull the plug on a civil service appeal upon filing a Demand for Arbitration, as prior decisions appear to have implied, when arbitrability of the grievance is uncertain, the

1. The ten-day filing deadline is jurisdictional and must be strictly enforced. *See, e.g.*, *Town of Falmouth* v. *Civil Service Comm'n*, 64 Mass. App. Ct. 606, 608-609 (2005), *rev'd other grounds*, 447 Mass. 814 (2006); *Poore* v. *City of Haverhill*, 29 MCSR 260 (2016); *Stacy* v. *Department of Developmental Services*, 29 MCSR 164 (2016).

> Commission may be facilitating a practice that will unwittingly chill the rights of public employers and employees to chose to resolve disputes through binding arbitration, which may not be appropriate as a matter of public policy. . . . [T]he Commission has decided that a limited modification of its interpretation of the intersection of the arbitration statute and the civil service law is appropriate."
>
> "Accordingly, the Commission construes the term "presently being resolved" in the third sentence of G.L. c. 31, §43, ¶1 to mean that a Demand for Arbitration has been filed on behalf of an appellant covering the same disputed matter as presented in a duly filed civil service appeal pending before the Commission and the merits of the dispute are "presently" on track to be "resolved" by an arbitrator, *i.e.*, arbitrability is not contested.[footnote omitted] When arbitrability of an issue covered by a parallel civil service appeal is contested, the Commission construes the subject statutory language to mean that the grievance should not be deemed "presently being resolved" . . . ."[2]

The Commission continues to apply the decision it reached in *Ung*. *See Kilson* v. *City of Fitchburg*, 27 MCSR 106 (2014).

Watertown seeks to distinguish this appeal from *Ung* on the grounds that Ung withdrew his appeal and, thereafter filed for arbitration, not knowing that Lowell would challenge the arbitrability of his grievance and that that it was many months later, when the issue of arbitrability had reached the courts, that Ung moved to reopen his civil service appeal. Here, Watertown notes that the Appellant was on notice that the arbitrability of his grievance would be an issue before his Union filed the Demand for Arbitration. I find that these distinctions actually reinforce the Appellant's claim that he had acted diligently and should not be required to forego his pending civil service rights solely because of an issue of arbitrability initiated by the Respondent which is wholly out of his control. He is entitled to know whether or not the subsequently filed arbitration proceeding will lead to a resolution of his grievance on the merits before his "election" to arbitrate is deemed "being resolved" for purposed of Section 43 of Chapter 31.

This is not a question of giving the Appellant more than "one bite at the apple" and is distinguishable from the cases on which Watertown relies. See, e.g., *Canavan* v. *Civil Service Commission*, 60 Mass. App. Ct. 910, *rev.den.*, 441 Mass. 1107 (2004) (appellant lost arbitration case and then sought review by the Commission); *DiNicola* v. *City of Methuen*, 22 MCSR 504 (2009) (grievance had not reached the "arbitration stage"). I agree (and the Appellant does not dispute) that the law entitles the Appellant to only one hearing on the merits and that this this appeal must be dismissed once his arbitration finally proceeds to "being resolved" on the merits. To be sure, there is some ambiguity in the applicable statutory language. I conclude, however, as the Commission held in *Ung*,, when Chapter 31 and Chapter 150E are read harmoniously and consistent with the accepted rules of statutory construction, they do not support an interpretation of legislative intent to mandate that the Commission divest itself of jurisdiction over a duly filed claim pending before us and defer to a Demand for Arbitration in which it was known that the employer intended to dispute, or was disputing, the issue of arbitrability before that issue was actually decided. Such an outcome is neither rational nor necessary and it potentially could deprive the Appellant of ever receiving a hearing on the merits.

The Appellant devotes considerable argument to his contention that Watertown's claim that his union's grievance is not arbitrable is wholly without merit, a point that Watertown vigorously disputes. That issue turns on the interpretation of the applicable collective bargaining agreement, which is a matter for decision by the arbitrator, not this Commission. The Commission's interest is not whether this dispute is resolved through arbitration or by adjudication in this forum. The Commission, however, is committed to ensure that civil service rights of tenured employees are fully protected as the legislature intended, i.e., that employees are not disciplined except upon proof of just cause after receiving a hearing on the merits. I conclude that the Appellant's Motion to Dismiss Nisi is the appropriate vehicle to preserves the Appellant's civil service rights without intruding on the collective bargaining rights of the parties or requiring the parties to endure duplicative proceedings or undue delay.[3]

CONCLUSION

Accordingly, the Appellant's Motion to Dismiss Nisi is granted, on the conditions set forth below:

1. The Appellant's appeal in Docket No. D1-20-0138 is dismissed nisi, to become final and effective on March 15, 2021.

2. If the issue of arbitrability in American Arbitration Association (AAA) Case No. 01-20-0015-4650 has not been finally determined before March 15, 2021, the Appellant may file a Motion to Extend the future effective date of the dismissal of this appeal for such additional reasonable time as the Commission may determine.

3. The Appellant may file a Motion to Revoke this Dismissal prior to March 15, 2021 or such further date as the Commission may prescribe as provided herein, together with notice of a final determination that the grievance asserted in the American Arbitration Association (AAA) Case No. 01-20-0015-4650 is not arbitrable. No additional filing fee shall be required.

4. In the absence of a Motion to Extend or Motion to Revoke, as provided herein, the dismissal of this appeal shall become final for purposes of G.L.c.31, §44, on March 15, 2021.

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2. In *Ung*, at the time of his motion to reopen, the issue of arbitrability was pending *sub judice* before the Appeals Court, and the Commission denied reopening pending a final decision on arbitrability and then, given the lengthy passage of time, conditioned any future reopening on an agreement to waive a claim to certain amounts of back pay. 22 MCSR at 476.

3. The Commission could reach the same result by dismissing the appeal and exercising its inherent authority to reopen an appeal in its discretion. *See, e.g.*, *Ung* v. *Lowell Police Dep't*, 22 MCSR 471 (2009). The Commission generally prefers the use of a dismissal nisi as a matter of administrative efficiency when the trigger for reopening can be defined, because it gives the parties greater certitude about the future course of the matter and, if the trigger does not occur, the decision becomes final without any further action on the part of the Commission or the parties.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on January 14, 2021.

Notice to:

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* * * * * *

VLADIMIR DAMAS

v.

BOSTON POLICE DEPARTMENT

G1-17-232, G1-19-010, and G1-20-006

February 11, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment to the Boston Police Department-Untruthfulness-Violent Conduct—The Commission rejected three bypass appeals from a candidate for original appointment to the Boston Police Department where he was shown to have made untruthful representations and given inconsistent statements during his background investigation regarding his expulsion from high school for carrying a knife. BPD's alternate reason for this candidate's bypass, that he resisted arrest following a 2008 night club brawl, was not found to provide a justifiable reason for bypass since it was not proven he acted in a disorderly manner and the charges were dismissed on the same day they were filed.

DECISION

Vladimir Damas (Mr. Damas or Appellant) filed the instant appeals at the Civil Service Commission (Commission) as follows: appeal docketed G1-17-232 on October 31, 2017; appeal docketed G1-19-010 on January 23, 2019; and appeal docketed G1-20-006 on January 13, 2020 under G.L. c. 31, § 2(b) challenging the decisions of the Boston Police Department (Respondent or BPD) to bypass him for appointment to the position of full-time Police Officer. Pre-hearing conferences were held as follows: G1-17-232 on November 21, 2017; G1-19-010 on February 19, 2019; and G1-20-006 on February 11, 2020 at the offices of the Commission. A hearing[1] was held on the appeal docketed G1-17-232 on January 19, 2018 at the Commission. The hearing was digitally recorded and the parties received a CD of the proceeding.[2] The parties filed post-hearing briefs. When the Appellant subsequently appealed the BPD's decision to bypass him in 2018 and 2019 for the same reasons it applied in its 2017 decision to bypass the Appellant, the parties agreed to consolidate the Appellant's three (3) appeals. Pursuant to 801 CMR 1.01(7)(j). For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Fifteen (15) exhibits were entered into evidence at the hearing and one (1) was ordered produced at the hearing and was filed post-hearing, together sixteen (16) exhibits. This included three (3) exhibits for the Appellant (A.Ex./s.) and thirteen (13) exhibits for the Respondent (R.Ex./s.), including the Respondent's one (1) post-hearing exhibit. Further, post-hearing I asked the parties to produce the Education section of the Appellant's applications to the BPD in 2018 and 2019, in connection with the appeals docketed G1-19-010 and G1-20-006, which appeals were consolidated with the appeal docketed G1-17-232. The Respondent produced the Education section of the Appellant's 2020 bypass appeal but the Respondent was unable to produce the Education section of the Appellant's 2018 bypass appeal. Thus, the total number of exhibits in the record is seventeen (17). Based on these exhibits, the testimony of the following witnesses:

Called by BPD:

- Detective Rafael Antunez, Recruit Investigation Unit (RIU), Boston Police Department (BPD)
- Nancy Driscoll, Director of Human Resources (HR), BPD

Called by Appellant:

- Michael Agostini
- Vladimir Damas, 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:

Stipulations

Appeal Docketed G1-17-232

1. On April 25, 2015, the Appellant took and passed the civil service examination for police officer and received a score of 97.

1. The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. c. 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. There is no formal stipulation in the record in G1-19-010. However, the parties were given copies of the information provided by HRD to the Commission with this information, pursuant to Commission practice, and there is no indication in the record that the parties disputed HRD's information.

2. On October 25, 2015, the state's Human Resources Division (HRD) established an eligible list of candidates for Boston police officer.

3. On February 22 and March 2, 2017, HRD, at the request of the BPD, sent Certification No. 04401 to the BPD, from which 130 candidates were selected for appointment.

4. The Appellant was ranked 72nd among those candidates.

5. Of the 130 candidates selected for appointment by the BPD, 48 were ranked below the Appellant.

6. On August 31, 2017, the BPD notified the Appellant that it was bypassing him for appointment.

Appeal Docketed G1-19-010[3]

7. On March 25, 2017, the Appellant took and passed the civil service examination for police officer and received a score of 94.

8. On September 1, 2017, HRD established an eligible list of candidates for Boston police officer.

9. On March 15, 2018, HRD, at the request of the BPD, sent Certification 05198 to the BPD, from which 10 candidates were selected for appointment

10. The Appellant was ranked 11th among those candidates.

11. Of the 10 candidates selected for appointment by the BPD, all were ranked below the Appellant.

12. By letter dated November 7, 2018, the BPD notified the Appellant that it was bypassing him for appointment for the same reasons he was bypassed in 2017.

Appeal Docketed G1-20-006

13. On March 25, 2017, the same exam at issue in appeal docketed G1-19-010, the Appellant took and passed the civil service examination for police officer and received a score of 94.

14. On September 1, 2017, HRD established an eligible list of candidates for Boston police officer.

15. On March 29, 2019, HRD, at the request of the BPD, sent Certification 06203 to the BPD, from which 121 candidates were selected for appointment.

16. The Appellant was ranked 40th among those candidates.

17. Of the 121 candidates selected for appointment by the BPD, 109 were ranked below the Appellant.

18. By letter dated November 15, 2019, the BPD notified the Appellant that it was bypassing him for appointment for the same reasons he was bypassed in 2017 and 2019.

Background of Appellant

19. At the time of the hearing in the appeal docketed G1-17-232, the Appellant was thirty-three (33) years old. He is a Black male who speaks Haitian-Creole fluently and lives in Dorchester. (Testimony of Appellant; R.Ex. 1)

20. The Appellant graduated from a Boston high school in 2003. He attended college for one semester but left to work when his father became ill. (Testimony of Appellant)

21. The Appellant worked for Harvard University for approximately eight (8) years after high school. He held positions as assistant cook and then storekeeper for dining services. (Testimony of Appellant)

22. In 2011, the Appellant became employed as a Correction Officer at the Massachusetts Department of Correction (DOC), a position he has held at least until the time of the full hearing in the appeal docketed G1-17-232. The Appellant was stationed at MCI Cedar Junction at that time. (Testimony of Appellant)[4]

23. The Appellant's DOC supervisor submitted two (2) Supervisor Form responses to BPD as part of its background investigation of the Appellant. In his March 6, 2017 Supervisor Form, a DOC Captain noted that he has known the Appellant for five (5) years and had been his supervisor for three (3) years. The Captain noted that the Appellant "has been a very dependable employee. He reports to duty on time and ready to perform his duties." The Captain added that the Appellant has a "positive relationship with his supervisors ... [and] with his co-workers." (A.Ex. 3)

24. In his March 24, 2018, Supervisor Form submitted to BPD as part of their investigation of the Appellant, the Captain noted that "Officer Damas has received positive performance evaluations. He takes pride in his duties and is a good role model." "Mr. Damas is noted to have a good relationship with his supervisors and is "well respected by his fellow co-workers." "Officer Damas treats everyone with respect. His ability to treat the very diverse inmate population fairly, would make him an excellent police officer." (A.Ex. 2)

25. The Appellant had never been disciplined as a Correction Officer. (Testimony of Antunez)

26. The Appellant has been through DOC training to handle stressful and dangerous situations he may encounter, including de-escalation tactics. (Testimony of Appellant)

27. Boston police training and DOC training share several common components. (Testimony of Antunez)

28. On August 20, 2012, the Appellant was issued a Class A License to Carry Firearms without restrictions by the Boston Police Commissioner. (A.Ex. 1; Testimony of Appellant)

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4. In a post-hearing email message to both parties shortly before this decision was rendered, I asked if Appellant's counsel if the Appellant was still employed as a Correction Officer at the state Department of Correction and his counsel replied in the affirmative.

Appellant's 2017 Application to the BPD

29. On or around March 18, 2017, the Appellant signed his application and submitted it to the BPD for consideration. Det. Antunez was assigned to review the Appellant's application and conduct a background investigation. (R.Ex. 1; Testimony of Antunez and Driscoll)

Appellant's High School Record

30. During a review of the BPD police incident reports involving the Appellant, Detective Antunez discovered a 2001 incident report involving the Appellant, at which time the Appellant was approximately 16 years old. In the BPD incident report regarding the charges, a police officer noted that the Appellant had been recently expelled from his high school in 2000. (R.Exs. 2 and 3; Testimony of Antunez)

31. The Appellant did not disclose that he attended or was expelled from the high school in his application in the section regarding education on the BPD application completed in 2017. In response to the application question asking if he had ever been suspended or received any disciplinary action at any of the schools you have attended beyond the eighth grade, the Appellant answered "No." (R.Ex. 1; Testimony of Antunez and Driscoll)

32. Det. Antunez called and spoke with the Appellant about the expulsion. The Appellant said that he had been expelled from the Catholic high school but that he did not include it in his application because it occurred a long time ago and had slipped his mind. The Appellant explained to Det. Antunez that he was expelled for carrying a knife to school in response to someone who tried to rob him 2 years before he was expelled. When asked by Det. Antunez, " '[D]oes this mean you were carrying that [knife] for two (2) years before you were expelled from school?' and he [the Appellant] said yes." (R.Ex. 11; Testimony of Antunez) At the conclusion of Det. Antunez and the Appellant's phone conversation, Det. Antunez asked the Appellant to provide a written statement describing his 2001 school expulsion and explaining why he did not include this information in his application. The Appellant produced the written statement as requested. Det. Antunez found that the Appellant wrote that the attempted robbery occurred one day before his expulsion instead of 2 years prior to his expulsion. In addition, the Appellant's written statement said,

> I did not intentionally withhold this information (sic) it simply slipped my mind since I was only in that school for a very short period time and it was over 16 years ago. Since then a lot has transpired in my life. I also noticed that inadequate space was left on the application in order for me to add additional schooling and the directions clearly state to list all of the schools after 8th grade beginning with the most recent which I did as much as spacing allowed me to and also on page 16 the question asked if I ever had disciplinary from these institutions which was true I never had any disciplinary actions from the schools I listed on the application, so not to be used as an excuse, but maybe also to be taken into account. This application process is also very complexed (sic). (R.Exs. 4 and 11; Testimony of Antunez)

33. In the spring of 2008, when he was approximately 23 years old, the Appellant was involved in a melee outside of the Caprice nightclub in Boston. According to the police incident report, Boston police officers were dispatched to the nightclub because there was a large crowd of people yelling and screaming at one another outside of the nightclub. The report states that: Ms. A, in the crowd, threatened some other women there; the officers repeatedly commanded Ms. A to desist; when officers attempted to arrest Ms. A for disturbing the peace, the Appellant's friend, Mr. B, intervened, saying "I'll take her." (R.Ex. 7)

34. The police report also states that Officers told Mr. B that Ms. A was being arrested; Mr. B yelled at the officers, including an obscenity; officers attempted to arrest Mr. B for disturbing the peace; and Mr. B violently resisted arrest and had to be taken to the ground, where he was finally taken into custody. (*Id.*)

35. In regard to the Appellant, the police reports states that : the Appellant approached Mr. B as the police arrested Mr. B; the Appellant yelled to Mr. B as he (Mr. B) was being arrested, telling him not to worry; a police officer ordered the Appellant to stop and leave the area because he was further inciting the crowd; when the Appellant failed to leave, the officers attempted to arrest him; the Appellant violently resisted arrest and disregarded verbal commands to comply. The report also states that the Appellant (like others arrested at the melee) were maced and officers were finally able to place the Appellant in handcuffs. The Appellant was charged with disorderly conduct and resisting arrest, but the charges against him were dismissed the same day. ((R.Exs. 2, 7 and 9; Testimony of Antunez)

36. The Appellant acknowledges that, as part of the above-referenced interaction with police, he may have referred to police officers as "f--king pigs". (Testimony of Appellant)

BPD Bypassed the Appellant

37. On or around July 12, 2017, Detective Antunez prepared a Privileged and Confidential Memorandum (hereinafter "PCM") which contained a summary of his investigation of the Appellant's background. (R.Ex. 11)

38. On or around July 12, 2017, the roundtable reviewed Detective Antunez's PCM and the Appellant's application, discussed the Appellant's background, and decided to bypass the Appellant. (Testimony of Driscoll)

39. By a letter dated August 31, 2017, the BPD informed the Appellant that it decided to bypass the Appellant based, in part, on his untruthful representations and inconsistent statements during the background investigation. Specifically, the BPD letter asserted that the Appellant made inconsistent statements regarding his expulsion from school in 2000 and regarding his involvement in the 2008 resisting arrest incident outside of the nightclub. (R.Ex. 12; Testimony of Driscoll)

40. The BPD also bypassed the Appellant in 2018 (appeal docketed G1-19-010) and 2019 (appeal docketed G1-20-006) for the same reasons the BPD found in 2017 (appeal docketed G1-17-232). (Administrative Notice) However, the Appellant noted in his application related to his G1-20-006 appeal that he attend-

ed a Boston high school briefly, that he had been disciplined in school and that he had been suspended or expelled from a school. (Respondent's exhibit provided in response to my recent request of both parties for the Education section of the Appellant's applications related to docket numbers G1-19-010 and G1-20-006 to BPD) The Respondent was unable to produce the Education section of the Appellant's application related to his appeal docketed G1-19-010. (Administrative Notice)

41. The Appellant timely filed the instant three (3) appeals with the Commission in 2017, 2019 and 2020. (Administrative Notice)

42. The parties agreed to consolidate the three (3) appeals. (Administrative Notice; 801 CMR 1.01(7)(j))

APPLICABLE LAW

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.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly* citing *Cambridge* at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington and another* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id*., 483 Mass. at 333-36.

ANALYSIS

For at least the past decade, it appears that Mr. Damas has been a model citizen. After eight (8) years of employment at Harvard, he was appointed as a Correction Officer at the Department of Correction, a paramilitary organization that conducts thorough background investigations on all applicants. He has now worked at DOC for many years and receives high praise for his demeanor and work ethic from his supervisors. He is actively involved with his child's life and was deemed suitable to be issued a license to carry a firearm by the Boston Police Commissioner. He has successfully passed multiple civil service examinations for police officer and scored high enough to be among those eligible for consideration. Mr. Damas has been rejected six times by the BPD.[5]

In two hiring cycles that preceded these bypasses, Mr. Damas was among a group of tied candidates who was not selected for appointment. Although there was no appealable bypass in those prior hiring cycles, Mr. Damas filed a non-bypass equity appeal. Specifically, Mr. Damas, at the time, questioned whether the method used by the BPD to select which candidates from his tie group would be offered employment violated basic merit principles because it appeared to have been influenced by nepotism. In particular, Mr. Damas referred to an article published by the *Bay State Banner* on July 28, 2016, in which it was reported that a BPD official had said that "three of the 15 recruits hired from among those who were tied at the bottom of the applicant list were related to BPD command staff." In its reply brief in that case, the BPD stated in part:

> " … the Department considered recommendations from sworn and civilian members of the Department and the [then] Police Commissioner's personal knowledge of a recruit's qualifications because the Department already possessed information about the applicant's background and qualifications and believed those credentials would contribute to the Department."

Although the Commission concluded that it lacked jurisdiction to hear the Appellant's appeal at the time, Commissioner Paul Stein wrote in part that:

> " … the Commission will continue to monitor the concerns that Mr. Damas has raised about the BPD's tie-breaking process to ensure they do not persist in the future. In particular, it is hard to understand how the fact that picking a candidate who happens to be personally acquainted with the [then] BPD Police Commissioner and/or knows other members of the BPD staff, over anoth-

5. The Appellant recently filed a new bypass appeal with the Commission, contesting a subsequent decision by the BPD to bypass him for appointment.

> er otherwise equally qualified candidate who does not have those relationships, fits the standards of a merit-based hiring process. Similarly, if the BPD does, in fact, discourage applicants to use BPD members as "references" but considers 'recommendations' from BPD staff for use as a tie-breaker, that problematic practice should be carefully reviewed." (*Damas* v. *Boston Police Dep't*, 29 MCSR 550 (2016)

In these three instant appeals, the BPD has bypassed the Appellant three times, appointing, cumulatively, more than 160 candidates who were ranked below the Appellant on the various Certifications involved here.[6] It is in this context that I carefully considered whether, after a fair, thorough and impartial review process, the BPD has shown, by a preponderance of the evidence, that there was reasonable justification to bypass Mr. Damas for appointment as a police officer.

The BPD's reasons for bypass, as stated in the bypass letters, can be grouped into two (2) categories: 1) alleged prior misconduct, some of which dates back well over a decade; and 2) alleged untruthfulness. Since this case can be decided solely on the issue of alleged untruthfulness, my findings and analysis are limited to that reason for bypass.

The BPD alleges that Mr. Damas:

1. Omitted material information on his 2017 application for employment by failing to state that he had attended and been expelled from a high school in Boston.

2. Provided conflicting information regarding the underlying misconduct that resulted in that suspension, first telling the background investigator that he had carried a knife to high school for 2 years and then providing a written statement to the investigator stating that he had only brought a knife to high school on one occasion.

3. Provided misleading information regarding whether he engaged in disorderly conduct and/or resisted arrest during the incident that occurred outside the Caprice nightclub in Boston.

I listened carefully to the Appellant's testimony regarding why he failed to disclose to BPD investigators that he attended and was expelled from a high school in Boston. Mr. Damas struggled to provide a plausible explanation for the omission, echoing much of what he wrote to the investigator (i.e. - time had elapsed; he didn't view it as important; there wasn't sufficient space to include the information). Had Mr. Damas, in his 2017 application, simply disclosed that he had been expelled from high school many years ago, it is unlikely that the expulsion, standing alone, would have provided BPD with reasonable justification to bypass him for appointment. Mr. Damas, however, appears to have omitted this negative information to the BPD to avoid painting himself in an unfavorable light. This is exactly the type of "fudging the truth" that the Commission, and years of precedent-setting judicial decisions, has determined to be a valid reason for bypassing an otherwise acceptable candidate for appointment as a police officer.

The second instance of alleged untruthfulness is related to the above-referenced expulsion. The background investigator has a specific memory, as noted in his testimony and his written summary completed at the time, that the Appellant acknowledged carrying a knife to high school for two years. Thus, the background investigator was surprised to read the Appellant's written statement stating that he had only brought a knife to school on one occasion. I credit the background investigator's testimony in this regard. He appeared to have a firmer recollection of the conversation and was genuinely surprised, at the time, when he read the Appellant's written statement in this regard.

That leads to the final allegation of untruthfulness: whether or not the Appellant was untruthful by denying that he engaged in disorderly conduct and/or resisted arrest during the incident outside the Caprice nightclub many years ago. I carefully listened to the Appellant's testimony and gave the appropriate weight to the police report, the fact that the criminal charges against him were dismissed the same day; and that it was a chaotic scene on the night in question. Although the Appellant acknowledged that he made incendiary statements that night, I credit his testimony that he did not act in a disorderly manner and/or resist arrest. I did not give weight to the background investigator's double hearsay testimony that a prior investigator spoke with the arresting police officer, who was purportedly able to recall specific statements and actions of the Appellant from a chaotic incident many years ago. In short, the BPD has not shown, by a preponderance of the evidence, that the Appellant engaged in disorderly behavior and/or resisted arrest. Thus, the Appellant's denials in this regard do not constitute untruthfulness.

As noted above, however, the Appellant did, either through omission or conflicting statements, make untruthful statements that provided the BPD with reasonable justification to bypass him for appointment. While the Appellant apparently sought to correct the omission regarding his expulsion from high school in at least one subsequent hiring cycle (2019), the BPD was justified in relying on the prior omission in its decision to bypass Mr. Damas for appointment.

Left unaddressed here is whether the Appellant should be permanently disqualified for appointment as a Boston Police Officer, a position apparently held by the BPD. To ensure clarity, I don't believe that the BPD can simply recycle these same reasons without conducting a reasonably thorough review on a going-forward basis. The Appellant has over a decade of being a good citizen; he has been a model employee at DOC; and he was deemed suitable by the Boston Police Commissioner to be issued a license to carry a firearm. It would seem prudent for the BPD, going forward, to grant the Appellant a discretionary interview, so that members of the BPD command staff can decide whether the Appellant poses

6. The six non-selections include: 2 in which the Appellant was not bypassed; the 3 instant appeals; and 1 new appeal recently filed by the Appellant.

too high of a risk to appoint as a police officer. To me, such a review would be consistent with the need to provide all applicants, including those with past transgressions, with a fair and impartial review.

For all of the above reasons, the Appellant's three consolidated appeals are ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 11, 2021.

Notice to:

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Quincy, MA 02169

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Anthony Rizzo, Esq.
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Boston, MA 02120

* * * * * *

JAMES S. WHITE

v.

HUMAN RESOURCES DIVISION

B2-20-146

February 11, 2021
Christopher C. Bowman, Chairman

Education and Experience Credits-Fire Chief Examination-Lack of Aggrievement-Kinesiology—A candidate looking to improve his score on a promotional exam for District Fire Chief lacked standing to challenge his reduction in E & E credits from six to four for a bachelor's degree in exercise science where the higher credit would not have resulted in a more favorable position given the scores of two other competing candidates. Moreover, HRD subsequently notified the Commission that the Appellant's college major "Kinesiology" was no longer considered a Category 1 major as it had been in the past, resulting in a reduction in credits.

ORDER OF DISMISSAL

On October 5, 2020, the Appellant, James S. White (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to credit him with 4.0 education and experience points for a bachelor's degree in exercise science, as opposed to 6.0 points as, according to the Appellant, he had been credited in two prior promotional examinations.

2. On October 27, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated that the Appellant received a score of 86.8 on the District Fire Chief examination which, rounded up, resulted in a score of 87 for the purposes of the eligible list. According to HRD, even if the Appellant was given 2.0 additional E&E points, his total score would only increase to 87.2, which, for the purposes of establishing the eligible list, would still be considered an 87, not changing his ranking.

4. According to the Appellant, the Boston Fire Department receives scores down to the hundredth decimal point in order to break ties. The Appellant is tied with two other applicants on the relevant eligible list.

5. Based on a further review by HRD, both of the candidates tied with the Appellant received a score higher than 87.2, thus, even for the purposes of the tie-breaking method used by the Boston Fire Department, prevailing in this appeal would not result in a more favorable position.

6. Finally, the Appellant stated that, regardless of the above, he does not understand why, according to him, HRD gave him 6.0 points for this degree on two prior examinations, but only 4.0 points on this current examination. The Appellant argues that clarification on this issue (either from the Commission or HRD) would be beneficial to him on a going forward basis should he take promotional examinations in the future.

7. Based on the discussion at the pre-hearing conference, HRD agreed to research the matter further to determine whether HRD, as part of this examination process, changed how many points are given for this particular degree and, if so, the reasons for the change.

8. HRD subsequently notified the Commission that HRD, after consulting with its subject matter experts, determined over the years that "Kinesiology" should no longer be considered a "Category 1" major, as it had in the past.

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, s. 2(b) authorizes the Commission to:

"Hear and decide appeals by a person aggrieved by any decision, action, or failure to act by HRD, except as limited by the provisions of section twenty four (24) relating to the grading of Examinations; provided that no decision or action of the administrator shall be reversed or Modified nor shall any action be ordered in the case of a failure of the administrator to act, Except by an affirmative vote of at least three members of the Commission, and in each such Case the Commission shall state in the minutes of its proceedings the specific reasons for its decisions.

No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in

writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause ***actual harm*** to the person's employment status." (emphasis added)

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.'"

ANALYSIS

Based on the undisputed facts here, the Appellant is not an aggrieved person. Specifically, HRD's decision to grant him only 4 points, instead of 6, for his bachelor's degree, did not cause actual harm to his employment status; the Appellant's rank on the eligible list was not impacted by HRD's determination, even if the Commission considers the internal tie-breaking method used by the Boston Fire Department.

Had HRD's determination impacted the Appellant's rank on the eligible list, a full evidentiary hearing may be warranted regarding how HRD determined that the Appellant's particular major should only be credited with 4, as opposed to 6 points, as HRD had previously determined.

For the sake of clarity and transparency, it may be beneficial for HRD to consider keeping a public log of changes made to the experience and education schedule, accompanied by an explanation of why the subject matter experts recommended such a change.

Since the Appellant cannot show that he is an aggrieved person, his appeal under Docket No. B2-20-146 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 11, 2021.

Notice to:

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* * * * * *

TIMOTHY CALLINAN, GIULIO BONAVITA and SHAWN McCARTHY

v.

TOWN OF WINTHROP

E-18-203 (Callinan)
E-18-204 (Bonavita)
E-18-205 (McCarthy)

February 25, 2021
Cynthia A. Ittleman, Commissioner

Examination Appeals-Reinstatement of Discharged Police Officer-Eligibility to Take Promotional Examination—A Winthrop police officer, who had been reinstated by a favorable Appeals Court decision following his discharge, was properly added to the eligibility list for promotion to sergeant where the Court had upheld an arbitrator's decision to reinstate him and return him to his position without loss of compensation or other rights. Three of the Appellant's colleagues had challenged his inclusion on the list, and attendant right to take a make-up exam, hoping to improve their own chances by his exclusion.

DECISION ON RESPONDENT'S MOTION TO DISMISS

On October 19, 2018, the Appellants (Timothy Callinan, Giulio Bonavita & Shawn McCarthy) (Appellants), all police officers at the time in the Town of Winthrop (Town)'s Police Department (Department), filed appeals with the Civil Service Commission (Commission).

2. Each of the Appellants attached an identical statement in which they wrote:

> "The Town of Winthrop entered into an agreement with an individual authorizing the individual to sit for a 'make-up' promotional exam and to have the individual's name added to the already established list. The individual did not participate in the April 3, 2018 Sole Assessment Center Examination. This agreement was made on the sole basis of reducing future liability and not based on civil service law. The Town and the individual requested that an arbitrator protect the enforcement of the agreement by turning the agreement into an arbitrator's order, so it would supersede the Civil Service Commission's authority. The arbitrator issued the order. This agreement / order was not discussed with the Local Union, as it was conducted without their knowledge. An investigation revealed the order's existence."

3. On November 13, 2018, I held a pre-hearing conference which was attended by the Appellants, counsel for the Appellants and counsel for the Town.

4. Based on the information provided at the pre-hearing conference, the following appears to be undisputed:

> A. On May 2, 2018, an eligible list for Winthrop Police Sergeant was established.
>
> B. Appellant Callinan was ranked 1st; Appellant McCarthy was ranked 2nd; and Appellant Bonavita was ranked 4th.

C. The name of Ferruccio Romeo, who had been terminated from his position as a Winthrop Police Officer in 2015, did not appear on the May 2, 2018 eligible list.

D. In 2016, an Arbitrator reinstated Romeo to his position as police officer; the Town appealed.

E. In 2017, the Superior Court vacated the Arbitrator's decision; Romeo and the Union appealed.

F. In 2018, the Appeals Court reinstated the Arbitrator's decision and ordered Romeo reinstated.

G. Since Romeo was not employed by the Town as a police officer when the sergeant's promotional examination was administered, he did not have the opportunity to take the examination and/or have his name appear on the eligible list, which was established in May 2018.

H. In September 2018, pursuant to a stipulated order, an Arbitrator entered an Order permitting Romeo to take part in a make-up promotional examination on October 25, 2018.

I. Six days before Romeo was scheduled to take the make-up promotional examination, the Appellants filed the instant appeals.

5. Romeo took and passed the promotional examination.

6. On April 1, 2019, Romeo's name was added to the Winthrop Police Sergeant promotional list. Romeo's name appeared below Callinan and McCarthy; and above Bonavita.

7. According to information posted on HRD's website, Callinan and McCarthy were promoted to Police Sergeant on May 12, 2019; Romeo was promoted to Police Sergeant on December 18, 2019; Bonavita has not been promoted and his name appears first among those remaining on the eligible list for Police Sergeant.

ANALYSIS / CONCLUSION

These appeals are dismissed for the following reasons. First, the appeals of Callinan and McCarthy are moot as they have both been promoted to Police Sergeant with an effective date prior to Romeo. Second, the Appellants' argument that the Arbitrator's decision to allow Romeo to take the make-up examination was inconsistent with civil service law is misplaced. The Appeals Court upheld an Arbitrator's decision to reinstate Romeo, effectively restoring his rights. When a civil service employee is reinstated to his/her position, G.L. c. 31, s. 43 requires that the person be "returned to his position without loss of compensation *or other rights*." (emphasis added) Therefore, the Arbitrator's decision to allow Romeo to take the make-up promotional examination, upon his reinstatement, was not inconsistent with this provision of the civil service law.

For these reasons, the Town's Motion to Dismiss is allowed and the Appellant's appeals are hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 25, 2021.

Notice to:

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* * * * * *

LOUIS DeBENEDICTIS

v.

BOSTON FIRE DEPARTMENT

D-17-252

February 25, 2020
Cynthia A. Ittleman, Commissioner

Disciplinary Action-30 Day Suspension of Boston Firefighter-Conduct Unbecoming-Insubordination—A much disciplined Boston firefighter lost his third disciplinary appeal before the Commission, this one for conduct unbecoming and insubordination arising from two inappropriately aggressive confrontations with members of the public over parking spaces. The Department's 30-day suspension was affirmed.

DECISION

On December 14, 2017, the Appellant, Louis DeBenedictis (Appellant), pursuant to G.L. c. 31, § 42 (Procedural Appeal) and § 43 (Just Cause Appeal), filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Boston Fire Department (BFD) to suspend him for thirty (30) days based on violations of Sections 18.4, 18.44(a), and 18.44(j) of the Rules and Regulations of the Fire Department of the City of Boston (BFD Rules) for allegedly failing to obey a supervisor; engaging in conduct unbecoming to a member, whether on or off duty, which tends to lower the service in the estimation of the public; and engaging in conduct prejudicial to good order.

A prehearing conference was held at the offices of the Commission on January 9, 2018. The full hearing was held at the same location on April 2, 2018.[1] The hearing was digitally recorded and both parties were provided with a CD of the proceeding.[2] Both parties submitted proposed decisions, the BFD on May 9, 2018 and the Appellant on May 11, 2018.

1., 2. [See next page.]

FINDINGS OF FACT

Twenty (20) exhibits were entered into evidence (BFD Exhibits 1-15 and APP Exhibits 1-5) Based on these documents, the testimony of:

For the BFD:

- David Messina, Lieutenant, BFD
- Robert Kelly, Lieutenant, BFD
- Michael Ruggere, Deputy Chief of Division 1, Group 2, BFD
- Gerard Fontana, Chief of Operations for Field Services, BFD

For the Appellant:

- Louis DeBenedictis (Appellant)

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence; I make the following findings of fact:

1. At the time of the full hearing, the Appellant was a firefighter for the BFD and was employed in this position since August, 2014. (Stipulated Facts).

2. Lieutenant Kelly was the Appellant's direct supervisor during September, October and November, 2017 (Kelly, Tr. 165:22 and 131:15) at fire station Engine 8, Ladder 1 on Hanover Street in the North End in Boston, Engine 8, Ladder 1. (Kelly, Tr. 138:12)

3. Engine 8, Ladder 1 is a high-visibility firehouse very close to the Freedom Trail. Firefighters there have multiple daily interactions with the public. (Kelly, Tr. 105:20-24).

4. Sometime in early fall 2017, Lieutenant Kelly witnessed a loud verbal altercation between the Appellant and another, more senior firefighter, regarding the Appellant's assignment to drive. The Appellant told Lieutenant Kelly that he would not drive that day despite being assigned to drive. (Kelly, Tr. 125:1) Lieutenant Kelly instructed some of the crew involved, including the Appellant, of the chain of command at the station (Kelly, Tr. 125:1-11) and did not discipline the Appellant for the interaction with other firefighters.

5. While driving a firetruck through the narrow alleys of the North End, during approximately September-October 2017, (Kelly, Tr. 132:8-24), the Appellant became upset at Lieutenant Kelly for giving him driving instructions on the narrow street. (Kelly, Tr. 133-134). The Appellant did not feel that Lieutenant Kelly should be instructing him because the Appellant has a commercial driver's license (Kelly, Tr. 133:24), had been driving those streets for months before Lieutenant Kelly came to the firehouse, (Appellant, Tr. 349:15) and because he believes that Kelly's instructions were "micromanagement". (Appellant, Tr. 354; 346:14). Lieutenant Kelly's response to the Appellant, in a private conversation later that day, was that the Appellant's statements were inappropriate. (Kelly, Tr. 135:7). No discipline arose from this interaction.

6. On October 12, 2017, (Kelly, Tr. 119:5 and Ex. 9, p.2), Lt. Kelly saw the Appellant instructing the driver of a vehicle to not park in a parking spot near the firehouse. Lieutenant Kelly told the Appellant he would be given an oral warning [Kelly, Tr.120-121]. Lieutenant Kelley ordered the Appellant "not to enforce parking regulations and… not to talk to people in the general public like that" (Kelly Tr. 121:2) and told the Appellant that he would be disciplined if he did not follow those orders. (Kelly, Tr. 121:8). Lieutenant Kelly documented this incident on October 28, 2017. (Kelly, Tr. 121:12-13).

7. On October 28, 2017, Lieutenant Kelly heard a disturbance outside of the firehouse and went outside to investigate (Kelly, Tr. 139:13). He saw that the Appellant and a member of the public were engaged in a verbal altercation across the street from the fire station. (Kelly, Tr. 100:12). He noted that the Appellant and the member of the public were "hostile toward each other" (Kelly, Tr. 104:5) and were disputing parking on Hanover Street. (Kelly, Tr. 103:20). Their voices were raised and it took a while for Lieutenant Kelly to separate them (Kelly, Tr. 103- 12-24 and 104). The private citizen told Lieutenant Kelly that the Appellant instructed a customer coming into her shop to not park in a space reserved for the fire station. (Kelly, Tr. 103-104).

8. Lieutenant Kelly discussed this incident later that day in his office in the firehouse with the Appellant and others. [3] The Appellant had union representation during this meeting. (Kelly, Tr. 109:6-9). Lieutenant Kelley told the Appellant that he was recommending an oral warning as discipline. (Kelly, Tr. 109). At the time of writing up the "5-A," or record of discipline to be further reviewed, Lieutenant Kelly did not know of any prior discipline imposed on the Appellant. (Kelly, Tr. 117:16).[4]

9. Department procedure for Rules violations are to interview the members involved, and make recommendations considering the facts, the member's past performance, equal treatment and past practices, and if in-house discipline has been imposed. The first officer making the recommendation forwards Form 5A to the Personnel Officer through the chain of command. (Ex. Resp. 15). All "5-A" reports are ultimately be reviewed by Deputy Fire Chief Ruggere (Ruggere, Tr. 227:21) after being reviewed by other BFD senior members. (Ex. Resp. 15).

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. The Commission subsequently had a transcript prepared which is the official record of the proceeding.

3. There were four firefighters in the office, Lieutenant Kelly, the Appellant, Firefighter Considine and the shop steward Firefighter Ross. (Kelly, Tr. 107-108). Included in the record is the memorandum that Firefighter Considine submitted to the personnel department. (Ex. Resp. 6).

4. Lieutenant Kelly examined the Appellant's file at the fire station and found no history of discipline. (Kelly, Tr. 116:20).

10. Upon review, Deputy Fire Chief Ruggere did not approve Lieutenant Kelly's recommendation (Ruggere, Tr. 112:19) because he knew of discipline imposed on the Appellant in the past. (Ruggerre, Tr. 223-225 and 277:3; Ex. Resp. 3, 4).

11. The usual course of action after a "disproval" is to interview those involved. (Ruggere, Tr. 210:15). The third incident for similar conduct would warrant a hearing and a suspension longer than 5 days. (Ruggere, Tr. 212:14-16).

12. Deputy Fire Chief Ruggere interviewed Lieutenant Kelly on October 31, 2017 and requested that Kelly write a fuller, more complete "5-A" report (Ruggerre, Tr. 232:4).

13. Deputy Fire Chief Ruggere interviewed the Appellant on November 5, 2017 (Tr. 249:23; Ex. Resp. 12). The Appellant was concerned that the interview during this investigation lasted only approximately ten (10) minutes (Appellant, Tr. 251- 252).

14. Deputy Fire Chief Ruggere wrote his own "5-A" form, in effect canceling Lieutenant Kelly's recommendation. (Ruggere Tr. 243:1; Ex. Resp. 15). No verbal warning was given for the Oct. 28, 2017 incident because the Appellant was already engaged in progressive discipline and it was the third time he had engaged in this type of conduct. (Ruggere. Tr. 243:3; Ex. Resp. 13).

15. On November 16, 2017, the Department notified the Appellant that there would be a local appointing authority hearing on December 1, 2017 regarding these charges. (Ex. Resp. 11)

16. A BFD hearing was held on Dec. 1, 2017. The Appellant testified. (Ex. App. 5). The BFD found that the facts supported findings of violations of the following: failing to obey a supervisor; engaging in conduct unbecoming to a member, whether on or off duty, which tends to lower the service in the estimation of the public; and engaging in conduct prejudicial to good order.

17. The Appellant was notified of the 30-day suspension on December 8, 2017. (Stip. Facts).

18. The Appellant received notice of the hearing within the regulatory timeline. (Appellant Tr. 54: 1-20).

PRIOR DISCIPLINE

19. On September 21, 2015, the Appellant engaged in argumentative conduct during an emergency that resulted in a two-week suspension (Ex. Resp. 3).

20. The BFD imposed discipline on the Appellant in June, 2016 that consisted of a two-tour suspension. (Stipulated Facts). The reason for this discipline was that the Appellant had argued with a colleague about medical care for a patient in front of the patient and in a public place, after which he disobeyed a direct order by a superior. (Rugerre Tr. 222-224)

21. The BFD also imposed discipline on the Appellant that consisted of a two-week suspension in November of 2017. (Stipulated Facts).

LEGAL STANDARD

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 (2001), citing *Cambridge* v. *Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300 (1997), rev. den., 426 Mass. 1102 (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, § 1. It is a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance." *Id*. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Commission to act. *Cambridge* at 304.

A person aggrieved by a decision of an appointing authority may appeal to the Commission under G.L. c.31, s. 43. Under section 43, the Commission conducts a de novo review "for the purpose of finding the facts anew." *Town of Falmouth* v. *Civil Service Comm'n.*, 447 Mass. 814, 823 (2006). The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *Cambridge* at 304, See also *City of Leominster* v. *Stratton*, 58 Mass.App. Ct. 726, 728, *rev. den.,* 440 Mass. 1108 (2003); *Police Dep't. of Boston* v. *Collins*, 48 Mass. App.Ct. 411, *rev. den*., 726 N.E.2d 417 (2000); *McIsaac* v. *Civil Service Comm'n.*, 38 Mass. App.Ct. 473, 477 (1995); *Town of Watertown* v. *Arria*, 16 Mass. App. Ct. 331, *rev. den*., 390 Mass. 1102 (1983). The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there". *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (2006) and cases cited.

An action is justified if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971); *Cambridge* at 304, *Selectmen of Wakefield* v. *Judge of First Dist. Ct*., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm.* v. *Civil Service Comm'n.*, 43 Mass. App. Ct. 486, 488, *rev. den.,* 426 Mass. 1104 (1997); *Murray* v. *Second Dist. Ct*., 389 Mass. 508, 514 (1983).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions and ensuring that the appointing authority conducted an "impartial and reasonably thorough re-

view" of the applicant. *City of Beverly* v. *Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 189, 190-191 (2010), citing Falmouth at 824-826 (2006). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly*, citing *Cambridge* at 305, and cases cited.

ANALYSIS

This appeal was filed under both G.L. c. 31, § 43, contesting whether there was just cause to suspend the Appellant and G.L. c. 31, § 42, contesting whether the BFD properly followed procedural requirements.

The BFD has shown by a preponderance of the evidence that the Appellant engaged in substantial misconduct which adversely affected the public interest. The Appellant inappropriately engaged with the public in front of the fire station on two occasions in October 2017.

On October 12, 2017, the Appellant was given clear instructions to not enforce parking regulations. Nonetheless, about two weeks later, he and a member of the public were arguing about parking for all those present in the vicinity to hear and see. The Appellant's conduct in this regard is unacceptable. Specifically, his conduct was hostile, raising his voice and directly disobeying orders from his supervisor not to be involved in enforcement of parking regulations. Notwithstanding having been warned not to engage with the public in that manner, he testified at hearing that he was never told to not engage with the public. (Appellant, Tr. 340:13). I find this testimony to be less credible than that of Lieutenant Kelly. There is just cause for the thirty-day suspension imposed for his conduct. The Appellant engaged in misconduct on October 28, 2017 even after being issued a warning about not confronting the public about parking on October 12, 2017. A prior disciplinary incident in June 2016 stemmed from the Appellant's argumentative behavior with a colleague in a public space during an emergency and not following orders. There was just cause, given the Appellant's previous discipline and actions on October 28, 2017, for a 30-day suspension.

Procedurally, the Appellant was provided with written notice of the contemplated suspension in a timely manner, he was given a hearing by the BFD; he was notified of the decision to impose a 30-day suspension in a timely manner and he was informed of his ability to appeal the BFD's decision to the Commission.

Having determined that the Appellant engaged in misconduct, the Commission must determine wither the level of discipline was warranted. *Falmouth* at 823-825.

> "Unless the commission's findings of fact differ significantly from those reported… or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty… on the basis of essentially similar fact finding without adequate explanation."

My findings do not substantially diverge from the facts found by the BFD during the December 2017 hearing. The Appellant had received a two-tour suspension in June 2016 and a two-week suspension in November 2017. The Appellant's interactions with the public, once in June 2016 and twice in October 2017, constituted a disturbance and could cause a breach in public confidence in the BFD. The BFD was justified in its charges and subsequent findings of violations of failing to obey a supervisor, engaging in conduct unbecoming to a member, whether on or off duty, which tends to lower the service in the estimation of the public and engaging in conduct prejudicial to good order.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. D-17-252 is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 25, 2021.

Notice to:

Louis DeBenedictis
[Address redacted]

Jessica Dembro, Esq.
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* * * * * *

RODNEY MARSHALL

v.

HUMAN RESOURCES DIVISION

B2-20-153

February 25, 2021
Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Boston Deputy Fire Chief Promotional Exam—The appeal from a Boston firefighter from the award of four rather than six points for his undergraduate degree was dismissed for lack of aggrievement since an additional two points would not have changed his rank on the eligible list. Had HRD's determination impacted the Appellant's rank on the list, the Commission would have gone further and held a full evidentiary hearing to examine why a bachelor of science degree with a concentration in accounting merited two less points than a bachelors degree in business administration.

ORDER OF DISMISSAL

On October 9, 2020, the Appellant, Rodney Marshall (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to award him only 4 points, as opposed to 6 points, on the education and experience (E&E) portion of the promotional examination for Deputy Fire Chief.

2. On November 17, 2020, I held a remote pre-hearing via Webex videoconference that was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing, the parties stipulated to the following:

A. On July 24, 2020, the Appellant took the promotional examination for Deputy Fire Chief.

B. The deadline for completing the E&E portion of the examination was 7/31/20.

C. On September 1, 2020, the scores were released.

D. The Appellant received a written score of 70.0 and an E&E score of 91.5, resulting in a total score of 76.

E. The Appellant filed an E&E appeal with HRD contesting HRD's decision to grant him only 4 points for his bachelor's degree, as opposed to 6 points. (The date of that appeal, and whether it not it was timely filed, was not known at the time of the pre-hearing conference.)

F. On 9/23/20, HRD denied the Appellant's appeal.

G. Also on 9/23/20, HRD established an eligible list for Boston Fire Department Deputy Fire Chief. The Appellant is ranked 5th.

H. On 10/9/20, within seventeen days of 9/23/20, the Appellant filed the instant appeal with the Commission.

4. As part of his written appeal, the Appellant stated that he had a bachelor's degree in accounting, which he had received 6 E&E points for in prior examinations.

5. Based on the information reviewed at the pre-hearing conference, it appears that the Appellant has a Bachelor of Science degree with a Concentration in Accounting from Boston College.

6. According to HRD, in order to receive 6 points here, the Appellant would need to have received a bachelor's degree in business administration.

7. At the time of the pre-hearing conference, it was unknown whether the addition of 2 points to the Appellant's E&E score would impact his total score and/or his standing on the eligible list (e.g. - would it move him into the fourth position on the eligible list, as opposed to fifth).

8. For all of the above reasons, the parties agreed to submit the following additional information after which the Commission would determine the procedural next steps of this appeal:

a. HRD was to provide information regarding when the Appellant filed his appeal with HRD and whether or not it was a timely appeal.

b. HRD was to provide information regarding whether the Appellant's score and/or rank on the eligible list would be impacted if the instant appeal were to be allowed.

c. HRD was to provide information regarding whether the Appellant previously received 6.0 points for his bachelor's degree and, if so, why he was only awarded 4.0 points for the same degree in this examination cycle.

d. The Appellant was to provide any relevant information regarding whether the School of Management at Boston College awards a bachelor's degree in business administration and/or whether Boston College distinguishes between a bachelor of science degree and a bachelor's degree in business administration.

9. On December 8th and 13th, 2020, the Appellant provided information which was not directly responsive to Paragraph 8d above.

10. On December 14, 2020, HRD provided information responsive to the Procedural Order stating:

i. The Appellant was awarded 6.0 points for his bachelor's degree in 2014 in error.

ii. The Appellant was awarded 4.0 points for his bachelor's degree in 2016 and he did not file an appeal.

iii. In 2018, the Appellant was awarded 4.0 points for his bachelor's degree. He filed an appeal which HRD denied.

iv. In 2020, the Appellant was awarded 4.0 points for his bachelor's degree and he filed a timely appeal with HRD, which was denied.

11. Also as part of the December 14th response, HRD provided information indicating that the Appellant's score would not change if he were to be awarded 6.0 points.

12. In response, I asked HRD to verify whether, if the Appellant's score was broken down to the one-hundredth decimal point,

which is the score used by the Boston Fire Department to break ties, awarding 6.0 points would place him above any other candidates (as opposed to receiving 4.0 points.)

13. Both HRD and the Boston Fire Department, after reviewing their records, confirmed that the Appellant's adjusted score would *not* place him above any candidates with a higher score, when broken down to the one-hundredth decimal point.

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, s. 2(b) authorizes the Commission to:

> "Hear and decide appeals by a person aggrieved by any decision, action, or failure to act by HRD, except as limited by the provisions of section twenty four (24) relating to the grading of examinations; provided that no decision or action of the administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the Commission, and in each such case the Commission shall state in the minutes of its proceedings the specific reasons for its decisions.
>
> No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause ***actual harm*** to the person's employment status." (emphasis added)

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.'"

ANALYSIS

Based on the undisputed facts here, the Appellant is not an aggrieved person. Specifically, HRD's decision to grant him only 4 points, instead of 6, for his bachelor's degree, did not cause actual harm to his employment status; the Appellant's rank on the eligible list was not impacted by HRD's determination, even if the Commission considers the internal tie-breaking method used by the Boston Fire Department.

Had HRD's determination impacted the Appellant's rank on the eligible list, a full evidentiary hearing may have been warranted regarding how HRD determined that a bachelor of science degree with a Concentration in Accounting from Boston College is not equivalent to a bachelor's degree in business administration. It would appear, based on a cursory review of the material submitted by the Appellant and the information available online at Boston College's website, that a further review may be warranted by HRD independent of this appeal.

However, since the Appellant cannot show that he is an aggrieved person, his appeal under Docket No. B2-20-153 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 25, 2021.

Notice to:

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MICHAEL BURNS

v.

DEPARTMENT OF CORRECTION

G2-18-147 (Bypass Appeal)
D-19-017 (Discipline Appeal)

March 11, 2021
Cynthia A. Ittleman, Commissioner

Michael Burns

Norman Chalupka, Esq.[1]

Disciplinary Action-Suspension of Correction Officer-Conduct Toward Inmate-Bypass Appeal-Tie Score—In a consolidated appeal over the suspension and bypass of a CO I at DOC's Massachusetts Treatment Center, Commissioner Cynthia A. Ittleman dismissed the appeal from a one-day suspension imposed for targeting an inmate and removing his personal items from a refrigerator without cause. The Appellant had previously been issued a letter of reprimand in 2017 for the same conduct toward the same inmate. Also dismissed was the Appellant's promotional bypass appeal because no bypass had occurred since the DOC had promoted a candidate whose score was tied with the Appellant.

DECISION

The Appellant, Michael D. Burns (Appellant), filed two (2) appeals with the Civil Service Commission (Commission). The first appeal, filed under G.L. c. 31, §2(b), contested the Department of Correction (DOC)'s decision to bypass him for promotional appointment to Correction Officer II (CO II) for "pending discipline." Subsequent to the Appellant filing that bypass appeal, DOC completed its internal investigation and suspended the Appellant for one (1) day. The Appellant then filed an appeal with the Commission under G.L. c. 31, § 43 to contest the suspension. The two (2) appeals were subsequently consolidated and I held a full hearing regarding both matters on March 15, 2019.[2] DOC submitted a Motion to Dismiss and an Amended Motion to Dismiss the bypass appeal, which were taken under advisement.

The hearing was private. The full hearing was digitally recorded and both parties received a CD of the proceeding.[3]

FINDINGS OF FACT

I entered eleven (11) exhibits from the Respondent regarding the discipline appeal, plus three (3) post-hearing exhibits, and seven (7) exhibits from the Respondent regarding the bypass appeal. I entered five (5) exhibits from the Appellant that applied to both the bypass and discipline appeals. Based on the documents submitted into evidence and the testimony of:

Called by DOC:

- Alfred Saucier, Deputy Superintendent of Operations, Massachusetts Treatment Center
- Patrick Smith, Superintendent's Special Investigator, Massachusetts Treatment Center

Called by the Appellant:

- Michael Burns (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:

1. The Appellant works as a Correction Officer (CO I) at the Massachusetts Treatment Center of the DOC (DOC or Agency). He has been employed with DOC since 2013 (Appellant Testimony).

2. In June 2018, the Appellant's name was ranked 7th on Certification No. 05558 for Correction Officer II (CO II). (Resp. Ex. B-6, B-6).

3. No candidate with the rank of 8th or below from Certification No. 05558 was promoted to CO II. (Resp. Ex. B-6).

PRIOR DISCIPLINE

4. On September 12, 2017, an informal complaint was filed against the Appellant. The basis of the complaint involved the Appellant removing items belonging to Inmate A from the refrigerator used by residents. This was alleged to have occurred on multiple occasions. (App. Ex. 1)

5. The inquiry into the September 12, 2017 informal complaint was extended to a formal investigation on October 17, 2017. (Resp. Ex. D-9). Patrick Smith, who has conducted over 100 investigations and interviews, investigated the September 2017 complaint about the Appellant. (Smith Testimony at 1:16).

6. The investigator determined that the practice and policy in the unit provides that inmates may store items in the refrigerator overnight when the items are stored in the original container and are clearly marked with the resident's name. (Resp. Ex. D-9).

7. As part of the inquiry, the Appellant was interviewed on September 14 and 20, 2017. (Resp. Ex. D-9). During the interviews, the Appellant stated that he had removed Inmate A's items from the refrigerator on September 12, 2017, as well as in the past. This interview was not recorded (Appellant Testimony). Video

1. Attorney Chalupka has retired from DOC. This decision will be sent to Attorney Earl Wilson at DOC.

2. The Standard Adjudicatory Rules of Practice and Procedures, 801 CMR §§ 1.00 (formal rules) apply to adjudication before the Commission with Chapter 31 or any Commission rules taking precedence.

3. 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

surveillance showed the Appellant in September 2017 removing items that were improperly stored, and that he also removed items belonging to Inmate A that were properly stored. (Resp. Ex. D-9).

8. As result of the investigation, in his Memorandum to the Superintendent, the investigator wrote that by removing items belonging to Inmate A from the refrigerator on September 12, 2017, the Appellant was not acting in accordance with institutional rules, policies, or procedures. He wrote that the complaint should be sustained because the Appellant's actions violated General Policy I and Section 8 (Conduct between Employee and Inmate) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (DOC Rules). (Resp. Ex. D-9).

9. On October 31, 2017, the Appellant was issued a Letter of Reprimand for removing Inmate A's items from the unit refrigerator. The Reprimand specified the violations and DOC Rules. (Resp. Ex. D-9).

10. No discipline other than the Letter of Reprimand issued as a result of the September 12, 2017 incident. (Appellant Testimony).

Discipline Relating to Promotion/Bypass

11. A complaint regarding the Appellant was filed in June 2018. The same person who had previously filed a complaint, Inmate A, stated that, on March 18, 2018, the Appellant removed soda, drinks and apple juice, which was part of Inmate A's diabetic snack, from the unit refrigerator. Inmate A claimed that this conduct was "ongoing" and had continued even after a similar matter had been investigated earlier. (Resp. Ex. D-6)

12. The complaint also stated that, on March 20, 2018, the Appellant told Inmate A that he would discipline Inmate A, search Inmate A's cell, and "lock him up" if Inmate A continued to file complaints against him. (Resp. Ex. D-6)

13. The investigation was conducted by Investigator Smith. Video footage showed the Appellant removing items belonging to Inmate A and placing the items on top of the refrigerator on March 18, 2018 and on March 19, 2018. (Smith Testimony; Resp. Ex. D-6). Additionally, video footage from March 20, 2018 showed the Appellant walking to Inmate A's cell and talking to Inmate A at approximately 8:30 P.M. (Smith Testimony, Resp. Ex. D-6).

14. On June 4, 2018, the Appellant was interviewed about the Appellant removing Inmate A's items from the refrigerator in March. (Resp. Ex. D-6). The Appellant had union representation at the interview. (Appellant Testimony). The Appellant stated that he had removed Inmate A's items from the refrigerator. He stated that Inmate A was insolent to him and that he wanted to make a point that Inmate A could not be disrespectful towards him. (Resp. Ex. D-6; Appellant Testimony).

15. The investigator took into account the Appellant's interview, the allegations in the complaint, and videos of the room where the unit refrigerator was located. (Resp. Ex. D-6).

16. In his Memorandum to the Superintendent dated June 11, 2018, the investigator found that the Appellant had violated Sections 1,12(a) and 19(c) of the DOC Rules; #28 of the SDP/Temporary Civil Commitment Orientation Handbook, Unit Regulations and Room Standards (detailing use of refrigerator); and MTC Procedures 103 DOC 400.01. These state, in relevant part:

- Nothing in… these rules and regulations shall be construed to relieve an employee of his/her… constant obligation to render good judgment full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations and policy…
- Employees should give dignity to their position…
- Employees shall exercise constant vigilance and caution in their duties,
- Retaliation or harassment of any kind against inmates for exercising their rights, filing a grievance, or otherwise lodging a complaint shall not be tolerated and is strictly prohibited.

17. The Memorandum and Superintendent's review of the Memorandum were completed by June 11, 2018. (Resp. Ex. D-5).[4]

18. On November 29, 2018, the MTC Superintendent imposed a one-day suspension on Mr. Burns which he served on January 29, 2019. (Resp. Ex. D-4). The suspension was imposed in accordance with DOC's progressive discipline as detailed in section 230.04 of the Discipline and Termination Policy 103 DOC 30. (Resp. Ex. B-2).

19. The Appellant appealed the one-day suspension to the Agency and a hearing was held on December 17, 2018. (Resp. Ex. D-Resp. Post-Hearing Ex. aa). On December 28, 2018, the discipline decision was upheld. (Resp. Ex. B-3, B-4).

20. The Appellant received the DOC's discipline decision by the time of the full hearing at the Commission.[5]

Promotion/Bypass

21. On August 22, 2018, DOC decided not to promote the Appellant from a CO I to a CO II because of "pending discipline." (Resp. Ex. B-6).

22. The DOC decision regarding the promotion was made within a month after the investigator wrote his memorandum of findings to the Superintendent, which had not yet resulted in discipline. (Resp. Ex. D-7; B-6).

4. On June 11, 2018 the Superintendent sent a letter to the former Chief, Internal Affairs, requesting the review of the Category I investigation and approval to proceed with a one-day suspension for Mr. Burns. (Resp. Ex. D-5).

5. The Commission issued a procedural order after the pre-hearing conference, on November 27, 2018, ordering, among other things, that the DOC decide whether to impose discipline on the Appellant and must conduct a hearing and issue a final decision if the Appellant decided to appeal the discipline. At hearing, no witness explained why the Appellant's discipline pending for such a long time, from June 2018 until the pre-hearing conference at the Commission on November 27, 2018.

23. The DOC Discipline and Termination Policy 103 DOC 230 states that the DOC "shall consider an employee's discipline history prior to a transfer, promotion, or reassignment and *they may be denied based on the date of the incident which resulted in discipline being imposed*." (Resp. Ex. B-2). The DOC's practice is to disqualify an employee for promotion if discipline is pending against the employee. (Resp. Ex. B-6).

24. When candidates are tied on a Certification, DOC used a tie-breaking method based on the candidates' seniority at DOC, based on date of hire. (Resp. Ex. B- 6).

LEGAL STANDARD

The Commission's purpose is "to guard against political considerations, favoritism, and bias in governmental employment decisions .... When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *Town of Falmouth* v. *Civil Serv. Comm'n*., 61 Mass. App. Ct. 796, 800 (2006) (quoting *Cambridge* v. *Civil Serv. Comm'n*., 43 Mass. App. Ct. 300, 304 (1997)) *rev. den*. 426 Mass. 1102 (1997).

Disciplinary Appeals

Under G.L. c. 31, § 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth* v. *Civil Serv. Comm'n*., 447 Mass. 814, 823 (2006). The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *Cambridge* at 303. Further, as the Massachusetts Supreme Judicial Court stated in *Falmouth* v. *Civ. Serv. Comm'n*., 447 Mass. 814 (2006): "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to 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." *Falmouth*, 447 Mass. at 823, citing *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983).

An agency's action is justified if it is done "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." *Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge* at 303. "Unless the commission's findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." *Falmouth*, 447 Mass. at 823 (citations omitted). When reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. *Falmouth* v. *Civil Serv. Comm'n*., 61 Mass. App. Ct. 796, 800 (2004).

APPLICABLE LAW WHEN CANDIDATES ARE TIED ON A CERTIFICATION

"The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass" *Paolantonio* v. *Dep't. of Correction*, 32 MCSR 249, 250 (2019), citing *Edson* v. *Reading*, 21 MCSR 453 (2008); *see Bartolomei* v. *Holyoke*, 21 MCSR 94 (2008); *Coughlin* v. *Plymouth*, 19 MCSR 434 (2006); *Kailas* v. *Franklin School Dep't*., 11 MCSR 73 (1998); *Servello* v. *Dep't. of Correction*, 28 MCSR 252 (2015); *see also Thompson* v. *Civil Service Comm'n*., Suffolk Superior Ct. No. MICV 1995-5742 (1996) (concluding that selection among tied candidates does not present a bypass).

ANALYSIS

As a preliminary matter, the Appellant was not bypassed for promotional appointment. As referenced above, the Commission has long held that choosing from among tied candidates on a Certification does not constitute a bypass. It is undisputed that no candidate ranked below the Appellant was promoted to CO II. Rather, DOC, pursuant to its rules and established policy, declined to promote the Appellant because there was discipline pending against the Appellant at the time. Instead of promoting the Appellant, DOC promoted a candidate with whom the Appellant was tied. That the promoted candidate had less seniority than the Appellant, an established tie-breaking policy at the DOC, does not constitute a bypass since the Appellant had a pending discipline against him during the promotion process and he was tied with the selected candidate. For these reasons, the Appellant's bypass appeal is ***dismissed***.

That turns to the Appellant's appeal regarding his one-day suspension. DOC, by a preponderance of the evidence, has shown that there was just cause to impose this discipline against the Appellant. The evidence shows that the Appellant did not follow policy and procedure and he targeted one inmate in particular by removing that inmate's items from the refrigerator on multiple occasions. An inquiry by DOC in the Fall of 2017 into the reason the Appellant removed two items that were properly marked with Inmate A's name and were in their original packaging resulted in a Letter of Reprimand to the Appellant. The Letter specified that, after removing Inmate A's items from the refrigerator, the Appellant did not inform Inmate A, did not document his actions, and provided reasons for doing these actions that were not credible.

In March 2018, the Appellant again removed items from the unit refrigerator that belonged to Inmate A. The investigator found that the Appellant had violated the same rules he had violated in September 2017. The Appellant's testimony in the DOC hearing and the hearing at the Commission, though consistent, did not offer a clear explanation of the reason he removed Inmate A's belongings but not items belonging to other inmates. Rather, the

Appellant described how Inmate A's behavior was difficult to manage. The Appellant believed that his actions in March 2018 did not warrant discipline because they were relatively minor incidents and because he had the authority to determine which items should be thrown away. The Appellant's assertions about his authority to remove Inmate A's items from the unit refrigerator are incorrect. In fact, the Appellant should have known that continuing to remove Inmate A's items from the refrigerator, under the circumstances as described here, violated DOC Rules.

Repeatedly targeting one inmate with conduct for which the Appellant had received a Letter of Reprimand demonstrates not only the Appellant's lack of good judgment, but his propensity to disregard rules which he knew he had already violated. A one-day suspension is warranted and in keeping with DOC's progressive discipline policies.

CONCLUSION

For all of the above reasons, the Appellant's bypass appeal under Docket No. G1-18-147 is ***dismissed*** and the Appellant's disciplinary appeal under Docket No. D-19-017 is ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

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[Address redacted]

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Joseph S. Santoro, Labor Relations Advisor
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* * * * * *

TODD GLIDDEN, KEITH SWEENEY and JOHN WOSNY

v.

DEPARTMENT OF STATE POLICE

D-19-141 (Glidden)
D-19-146 (Sweeney)
D-19-147 (Wosny)

March 11, 2021
Christopher C. Bowman, Chairman

Jurisdiction-State Police-Duty Status Boards-Superior Court Reversal—The Commission dismissed disciplinary appeals for lack of jurisdiction from three state troopers suspended without pay after a Duty Status Proceeding. It was compelled to do so after a Superior Court ruling on an identical matter involving other troopers that had found that the Commission's jurisdiction did not reach the decisions of Duty Status Boards but was limited to State Police Trial Boards.

DECISION ON RESPONDENT'S MOTION TO DISMISS

In July 2019, the Appellants, John Wosny, Keith Sweeney and Todd Glidden (Appellants), all Troopers employed by the Department of State Police (Department), filed appeals with the Civil Service Commission (Commission), arguing that they were "suspended without pay" by the Department (as part of a Duty Status Board proceeding); that there was no just cause for said suspension and that the Department failed to follow procedural requirements of the civil service law.

2. On, July 23, 2019, the Department filed a Motion to Dismiss with the Commission, arguing in part that the Commission lacks jurisdiction to hear the appeal as, according to the Department, the underlying matters do not fall within the limited grant of authority to the Commission under G.L. c. 22C, s. 13.

3. The Appellants filed oppositions arguing, in part, that the Commission, for the same reasons articulated by the Commission in *Reger et al* v. *Dep't of State Police*, 32 MSCR 136 (2019) including the Commission's decision on reconsideration, 32 MCSR 212 (2019) does have jurisdiction to hear these appeals. The Commission's decision in *Reger, et al* was appealed to the Superior Court and was pending a decision at that time

4. Both parties, as part of their written submissions, asked that the Commission take administrative notice of the above-referenced decisions, which I did.

5. Subsequent to the completion of multiple days of hearing regarding the instant appeals, but prior to the submission of post-hearing briefs, the Superior Court, in *Dep't of State Police* v. *Civ. Serv. Comm'n & Reger et al*, Suffolk Sup. Crt. No. 2019-1370-G (2020), allowed the Department's judicial appeal, stating in part that: "The Legislature has specifically authorized Commission review of Trial Boards, but not decisions of Duty Status Boards"

and further stated in part that " … The Commission does not have jurisdiction to hear appeals of Duty Status Board decisions."

6. In light of this recent Superior Court decision, which involves the same jurisdiction issues as the instant appeals, I provided the Department with the opportunity to submit a renewed motion to dismiss and for the Appellants to file a reply. The Department subsequently filed a renewed Motion to Dismiss and the Appellants did not file a reply.

ANALYSIS

The Department's renewed motion to dismiss these appeals comes to the Commission on the heels of a recent judicial decision which seeks to reconcile the unique statutory relationship between the broad disciplinary authority of the Colonel of the Massachusetts State Police over State Troopers under his/her command (G.L. c. 22C §§ 1,10 & 43) with appellate rights granted to State Troopers pursuant to Civil Service Law (G.L. c. 31, §§ 41-45). State Troopers are not "civil service employees" as defined by G.L. c. 31, § 1. See G.L. c. 22C, § 10. State Troopers are granted the right to appeal certain discipline imposed on them for de novo review by the Commission pursuant to a specific provision of Chapter 22C which provides:

> "*Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a trial board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45 inclusive of chapter 31.* A uniformed officer of the state police who has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel."

G.L. c. 22C, §13 (*emphasis added*).

Chapter 22C, § 3 and § 43 authorize the Colonel of the State Police to make rules, regulations and orders governing the operation of the Department and the supervision and control of its officers. Pursuant to that authority, the Department promulgated "Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty" that establish the process through which the Colonel may act to impose good order and discipline within the Department.

- Sections 6.4 through 6.9 of the regulations establish the process for "Trial Boards" convened pursuant to G.L. c. 22C, §13, *infra*,. The Trial Board is "analogous to a military court martial." *See Burns* v. *Commonwealth*, 430 Mass. 444, 448 n.6 (1999). After an officer against whom charges have been preferred is provided an opportunity to be heard, represented by counsel, present evidence and cross-examine witnesses, the Trial Board makes a finding of "guilty" or "not guilty" and, if guilty, recommends the discipline to be meted out, subject to approval by the Colonel, which may include discharge, suspension, reduction in rank as well as a variety of other sanctions specific to the State Police, such as reassignment or forfeiture of accrued leave, detail opportunities and overtime. An officer aggrieved by a finding of the Trial Board may appeal to the Commission as provided by G.L. c. 22C, § 13, *infra*.
- Section 6.2 of the regulations establishes an alternative procedure for addressing the "Duty Status" of officers who, among other things, are the subject of criminal proceedings, domestic abuse proceedings and other violations of Department procedures and orders. After hearing before a "Duty Status Board", the board is authorized to recommend, subject to the Colonel's approval, whether to retain the officer on full duty, restricted duty or suspension with or without pay. An officer who is aggrieved by a finding under G.L. c. 22C, §43 may appeal that decision for judicial review by the Superior Court as provided by that statute. If and when charges are ultimately preferred, the officer may request a Trial Board under G.L. c. 22C, §13.

In *Reger et al*, the Superior Court vacated the Commission's decision to take jurisdiction over an appeal from a group of State Troopers who had been suspended indefinitely without pay after a "Duty Status" hearing, but before formal "charges" had been "preferred" and a Trial Board decision had been made. In its opinion, the Superior Court rejected the Commission's conclusion that the indefinite suspension violated the officers' rights to a "pre-deprivation" administrative hearing under G.L c. 31, § 41 and was an unlawful use of G.L. c. 22C "duty status" hearings to make an end run around the officer's right to rectify such procedural irregularities by appeal to the Commission under G.L. c. 31, § 41 & § 43. The Superior Court held that (1) the question as to when the Commission had subject matter jurisdiction to hear the appeals was a question of statutory interpretation of G.L c. 22C, to be decided de novo by the Court; (2) since the Department, not the Commission, is the agency charged with enforcement of Chapter 22C, the Commission's interpretation of that statute, while "relevant" was not entitled to the "special deference" the Commission would receive in construing civil service law contained in Chapter 31; and (3) Chapter 22C expressly limited the Commission's subject matter jurisdiction to appeals from Trial Board decisions rendered under G.L. c. 22C, §13, but not otherwise, and, specifically, the Commission "does not have jurisdiction to hear appeals of Duty Status decisions." *Id*.

While the Commission may have good reason to question the logic of this decision, *Reger et al*, while not binding, per se, remains the sole holding interpreting the scope of jurisdiction granted to the Commission under Chapter 22C to hear appeals by State Troopers.

Since the instant appeals raise the identical issues addressed in the Court's decision in *Reger et. al*, and for all the reasons stated above, the Department's Motion to Dismiss is allowed and the Appellants' appeals are hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

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* * * * * *

RICK GRIFFIN

v.

CITY OF REVERE

D1-20-145

March 11, 2021
Paul M. Stein, Commissioner

Jurisdiction-Tenured Employee-Police Officer Probationary Period—In a decision by Commissioner Paul M. Stein, the Commission dismissed an appeal from a Revere police officer for lack of jurisdiction since he had been terminated during his one-year probationary period and had yet to become a tenured employee. The officer was found to have violated his COVID quarantine order and been responsible for a serious motor vehicle accident that caused substantial property damage. The Appellant's attorney desperately cited irrelevant New York civil service law and an off-point Supreme Judicial Court ruling on race-based traffic stops in a "well intentioned but fatal effort to stave off the dismissal of his appeal" on black letter jurisdictional grounds.

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Rick Griffin, appealed to the Civil Service Commission (Commission), purporting to act pursuant G.L. c. 31, § 41 - § 43, to contest his termination by the City of Revere (Revere) from his position as a full-time police officer with the Revere Police Department (RPD). On November 17, 2020, Revere filed a Motion to Dismiss the appeal for lack of jurisdiction and submitted a set of proposed Exhibits A through J (which are Bates Stamped R0001 through R0029). The Appellant duly opposed the Motion to Dismiss and submitted a set of proposed Exhibits A through H (which are Bates Stamped A0001 through A0024). On January 21, 2021, I heard oral argument from counsel on the Motion to Dismiss via remote videoconference (Webex). For the reasons stated below, Revere's Motion to Dismiss, which I have treated as a Motion for Summary Decision, is granted and this appeal is dismissed.

FINDINGS OF FACT

Based on the submission of the parties, I find the following material facts are not disputed:

1. By letter dated January 17, 2019, the Appellant, Rick Griffin, was appointed by Revere Mayor Arrigo to the position of a permanent full-time RPD Police Officer, subject to passing a physical abilities test, psychological screening, drug test, and successful completion of the required Police Academy. (*Appellant's Exh. A [A0002]; Respondent's Exh. A [R0002]*)

2. Officer Griffin passed the required tests and graduated from the Police Academy on October 17, 2019. (*Appellant's Exh. B [A0004]; Respondent's Exh. B [R0004]*)

3. On or about October 19, 2019, Officer Griffin was assigned to RPD Platoon 1 PM shift (4:30 pm to 2:30 am) under command of (then) Lt. Callahan. He began to perform the duties of a full-time RPD police officer. (*Appellant's Exh. B [A0004]; Respondent's Exh. B [R0004]*)

4. Mayor Arrigo was first elected Mayor in 2015 and re-elected in November 2019. He sought the endorsement of the Revere Police Patrol Officers Union, which decided to remain neutral. Officer Griffin's brother was the Union Shop Steward. (*Appellant's Opposition, p. 7*)[1]

5. On or about March 7, 2020, shift assignments were changed and Officer Griffin was transferred to Platoon 1 AM shift (9:30 pm to 7:30 am), also under the command of (then) Lt. Callahan. (*Appellant's Exh. C [A0006]*)

6. By Memorandum to All Personnel dated May 13, 2020, then-RPD Chief Guido confirmed his retirement, effective June 30, 2020. (*Appellant's Exh. G [A0015]*)

7. On or about August 11, 2020, RPD Lt. Callahan, who had been appointed by Mayor Arrigo to replace Chief Guido, contacted Officer Griffin by telephone and informed him that another RPD officer had tested positive for COVID-19. Chief Callahan informed Officer Griffin that he (Officer Griffin) may have been exposed and ordered him to "quarantine for 14 days", which he understood to mean he was "to lay low and stay away from crowds as well as work and the police station." *(Appellant's Exh. H [A0022]; Respondent's Exhs. C & G [R0011, R0019]*)

8. Over the next three or four days, Officer Griffin remained home, leaving several times to go on bike rides, get coffee at a drive thru,

1. The Appellant asserts that the "Griffin family" supported Mayor Arrigo for election in 2015 but switched to publicly support his opponent, former Mayor Rizzo in 2019, and that Lt. Callahan was known to be a strong public supporter of Mayor Arrigo. The Appellant also asserts that the animus between Officer Griffin's father and Mayor Arrigo persisted at least through July 2020. (*Appellant's Opposition, p.7*)

pick up some packages left on the porch of his mother's house, sat at the beach and did a few errands. (*Respondent's Exh. G [R0020])*

9. At some point on or before August 15, 2020, Officer Griffin received notice that he had tested negative for COVID-19. He did not receive notice from Chief Callahan that his quarantine status had changed. (*Respondent's Exh. G & H [R00019, R00022-0023]*)

10. On August 15, 2020, Officer Griffin left his home, stopped at Blanchard's in Revere and Stop and Shop on Squire Road, and arrived at a friend's residence on Festa Road at approximately 6:00 or 6:30 pm. He dropped off the food he had purchased in the house and then spent most of his time in the backyard barbequing and watching a hockey game with a group of approximately five or six other people, including his girlfriend. (*Respondent's Exhs. C, F & G [R0007-R0009, R0017, R0019]*)

11. At approximately 11:30 p.m. (for reasons that are disputed) Officer Griffin left the Festa Road gathering and proceeded to his vehicle (a pick-up truck), which was parked on the street in front of the residence he had been visiting. As shown on a video recording, the truck lurched across the street, colliding four seconds later (without apparently slowing down) with a utility pole and two other vehicles parked in the driveway of the residence on the opposite side of Festa Road. (*Respondent's Exhs. E [video] & F [R0017]*)

12. RPD officers responded to the scene after receiving a 911 call from a neighbor on Festa Road. Officer Griffin did not call or speak to anyone at the RPD prior to the responding officers' arrival on scene. He did not promptly file a Motor Vehicle Crash Report which is required when a person is involved in an accident that caused property damage in excess of $1,000. (*Appellant's Exh. H [A0017, A0021]; Respondent's Exhs. C & F [R0006, R0010, R0017]*)

13. By letter dated August 17, 2020, Chief Callahan informed Officer Griffin that he had been placed on administrative leave with pay and ordered him to surrender his RPD issued firearm, badge, police identification and access key fob. (*Appellant's Exh. D [A0009]; Respondent's Exh. J [R0029]*)

14. Chief Callahan ordered Officer Griffin to prepare a "To/From" memorandum as well as provide responses to specific questions regarding his conduct before and during the August 15, 2020 incident. He also solicited reports from the officers who responded to the accident and ordered Lt. LaVita to conduct an internal affairs investigation.[2]

15. On August 18, 2020, Lt. LaVita reported the results of her investigation. Lt. Lavita's report contained, among other things, her record of interviews with eleven witnesses (who were at the barbeque or lived in the neighborhood), as well as a description of the video footage retrieved from a home surveillance camera at the residence where Officer Griffin's truck came to rest, and her findings that Officer Griffin had committed five specific instances of misconduct.[3] (*Appellant's Exh.H [R0016-R0022]; Respondent's Exhs. C, F.G, & H [R0006-R0011, R0017, R0019-R0020, R0022-R0023], Respondent's Exh. E [Video]*)

16. By letter dated September 21, 2020, without prior notice or hearing, Mayor Arrigo terminated Officer Griffin from his position as an RPD Police Officer on the grounds that "your conduct during your probationary period has been unsatisfactory and renders you unfit to be a police officer with the Revere Police Department." Mayor Arrigo cited the August 15, 2020 accident that occurred on August 15, 2020, the quarantine order which Officer Griffin was under at the time of the accident, and alleged discrepancies between the reported version of events attributed to Officer Griffin and the video footage of the accident. (*Appellant's Exh. E [A0011]; Respondent's Exh. D [R0014]*)

17. By Personnel Order dated 9/28/2020, Chief Callahan informed all RPD personnel that Officer Griffin had been terminated. The Personnel Order noted that Officer Griffin had not completed his probationary period. It also cited the five findings of misconduct contained in Lt. LaVita's investigative report: Operating to endanger; Failure to file an accident report; Failure to take Police Action; Insubordination (violating quarantine); and Untruthfulness. (*Appellant's Exh.F [A0013]*)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case." *See, e.g., Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005)

ANALYSIS

G.L. c. 31, §§ 41-45 provide that a "tenured employee" may be "discharged, removed, suspended . . . laid off [or] transferred from his position without his written consent" only for "just cause" after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states "fully and specifically the reasons therefore." G.L. c. 31, §41. An employee aggrieved by

2. The Appellant asserts that Lt. LaVita had a past history of altercations with the Griffin family, including his father, brother and sister, as far back as 2004. (*Appellant's Opposition, pp. 5-6*)

3. In deciding this Motion to Dismiss, I do not need to find, and do not find, whether or not to credit the truth of disputed hearsay statements in Lt. LaVita's report, or the conclusions she or any of the other RPD officers made, but take notice only that those statements and conclusions were reported to Chief Callahan and Mayor Arrigo.

such disciplinary action may appeal, within ten (10) days, to the Commission, pursuant to G.L. c. 31, §42 and/or §43, for de novo hearing by the Commission "for the purpose of finding the facts anew." *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited; *Volpicelli* v. *City of Woburn*, 22 MCSR 448 (2009); *Williamson* v. *Department of Transitional Assistance*, 22 MCSR 436 (2009)

G.L. c. 31, § 61 provides:

> "Following his [sic] original appointment as a permanent full-time police officer. . .in a city or town where the civil service law and rules are applicable to such position, *a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he [sic] shall be considered a full-time tenured employee in such position*, except as otherwise provided by civil service law rules. . . ." (*emphasis added*)

See also, G.L. c. 31, §1. Definitions. ("Tenured employee" is "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law")

Under well-established precedent, the Commission has consistently applied these statutes according to their plain meaning to hold that a probationary employee has no right to a Section 41 hearing or to bring a Section 42 or Section 43 appeal to the Commission from an appointing authority's decision to suspend, terminate or otherwise discipline him or her. *See, e.g., Police Comm'r of Boston* v. *Cecil*, 431 Mass. 410, 414 (2000); *Brouillard* v. *City of Holyoke*, 74 Mass. App. Ct. 1128 (2009) (Rule 1:28) ; *Selectmen of Brookline* v. *Smith*, 58 Mass. App. Ct.813, 815 (2003); *New Bedford* v. *Civil Service Comm'n*, 6 Mass. App. Ct. 549, 551 (1978); *Brandao* v. *Boston Police Dep't*, 32 MCSR 255 (2019), *aff'd*, *Brandao* v. *Boston Police Dep't*, Suffolk C.A. No. 1984CV2606 (Sup.Ct. 2020) (Gordon, J.); *Lydon* v. *Town of Stoughton*, 32 MCSR 194 (2019); *Cardarelli* v. *Medford*, 28 MCSR 22 (2015); *Carriveau* v. *City of Chicopee*, 27 MCSR 191 (2014); *Peterson* v. *Town of North Attleborough*, 16 MCSR 44 (2003).

It is not disputed that the Appellant was terminated within his probationary period. The Appellant mounts two arguments in a well-intentioned but fatal effort to stave off the dismissal of his appeal based on this undisputed fact and the considerable weight of authority against him.

First, he claims that the Commission should follow New York civil service law which, as a general rule, also "is well-settled that a probationary employee may be discharged without a hearing and without a statement of reasons", but makes an exception and allows a judicial inquiry into whether "dismissal was for a constitutionally impermissible purpose", "in violation of statutory or decisional law" or "in bad faith", citing *Beacham* v. *Brown*, 215 A.D.2d 358, 627 N.Y.S.2d 358 (1st Dept. 1995); *Garcia* v. *Bratton*, 225 A.D.2d 123, 649 N.Y.S.2d 703 (1st Dept. 1996); *Vaillancourt* v. *New York State Liquor Auth*, 2153 A.D.2d 531, 544 N.Y.S.2d 609 (1st Dept.1989). I do not find these New York intermediate appellate court decisions persuasive.

> "Our courts have repeatedly recognized the critical role played by the probationary period . . . Nothing in [Massachusetts civil service law] or judicial interpretations thereof suggest a legislative intent to accord different tenure-crediting treatment to probationary employees based on the . . . underlying circumstances . . . .To the contrary, the unmistakable purpose of § 61 of the statute is to ensure that *all employees receive a full 12 months of oversight in their 'actual' performance on the job before being invested with tenure." Brandao* v. *Boston Police Dep't,* Suffolk C.A. No. 1984CV2606 (Sup.Ct. 2020) (Gordon, J.), *aff'g*, *Brandao* v. *Boston Police Dep't*, 32 MCSR 255 (2019)[4] .

Second, the Appellant asks the Commission to apply the "reasonable inference" test recently adopted by the Supreme Judicial Court as the threshold quantum of evidence necessary to suppress evidence of a motor vehicle stop on the grounds it was racially motivated. *Commonwealth* v. *Long*, 485 Mass. 711 (2020). The distinctions between the issues presented in that criminal matter and in this civil service administrative proceeding are obvious on their face and need no further analysis. Absent clear judicial direction to the contrary, the Commission will continue to conform to the standards prescribed by the applicable civil service statutes and rules of adjudicatory procedure.

Finally, contrary to the Appellant's assumption, I note that some courts have suggested that, although he has no right of appeal to the Commission, he or she is not left entirely without recourse. A termination that concerns allegations about an employee's reputation, as it appears the Appellant asserts, may entitle the employee to a judicial "name-clearing" hearing or civil action for declaratory relief in court. *See, e.g. Brouillard* v. *City of Holyoke*, 74 Mass. App. Ct. 1128 fnt.2 (2009) (Rule 1:28). *See also*, G.L. c. 31, §42,¶3 ("The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged . . . Such civil action shall be filed within six months next following such alleged illegal act,unless the court upon a showing of cause extends such filing date.")

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4. Under G.L. c. 31, §2(a), the Commission is also vested with discretion to open an investigation when persuaded that the rights of civil service employee(s) have been violated. After a careful review of the Appellant's allegations that politics and personal animus contributed to the decision to terminate him, however, I find these allegations are too speculative and do not rise to the level that warrant a discretionary investigation. On the one hand, the Appellant relies largely on circumstantial evidence, much of which he would attempt to proffer through disputed testimony and impeachment of adverse witnesses with remote and tenuous nexus to the Appellant's situation. On the other hand, the preponderance of undisputed evidence strongly detracts from any conclusion of bias and tends to support the conclusion that good reason existed to terminate the Appellant based on his admission that he violated his quarantine order and documented proof that he was responsible for a serious motor vehicle accident that caused substantial damage. It is also irrational to infer that the Mayor, who appointed the Appellant to his position, would have fired him just months later out of spite and for no good reason. The Commission exercises its power of investigation sparingly and this is not a case in which to do so.

CONCLUSION

In sum, for the reasons stated herein, Revere's "Motion to Dismiss" is hereby ***granted*** and the appeal of the Appellant, Rick Griffin, CSC Docket No. D1-20-145, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

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* * * * * *

ADAM HEALEY

v.

CITY OF PITTSFIELD

E-21-010

March 11, 2021
Christopher C. Bowman, Chairman

Other Personnel Actions-Seniority Date-Pittsfield Firefighter-Timeliness of Appeal—The Commission dismissed an appeal as untimely from a Pittsfield firefighter seeking an earlier seniority date where he had filed the appeal almost four years after he was initially bypassed for appointment. The Appellant was appointed three months later from another certification.

ORDER OF DISMISSAL

On December 30, 2020, pursuant to G.L. c. 31, § 2(b), the Appellant, Adam Healey (Appellant), a full-time firefighter in the City of Pittsfield (City)'s Fire Department (PFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission), seeking a retroactive adjustment in his civil service seniority date *from* May 15, 2017 *to* February 20, 2017. On February 16, 2021, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant, counsel for the City and the City's Human Resources Director.

As part of that pre-hearing conference, the parties stipulated to the following:

1. On April 16, 2016, the Appellant took and passed the civil service examination for firefighter.

2. On December 1, 2016, the state's Human Resources Division (HRD) established the eligible list for firefighter.

3. On December 14, 2016, HRD issued Certification No. 04275 to the City from which the City appointed nine (9) firefighters, effective February 20, 2017. For reasons discussed below, the Appellant was not appointed from this Certification.

4. On March 10, 2017, HRD issued Certification No. 04469 to the City from which the City appointed three (3) firefighters, effective May 15, 2017. The Appellant was appointed from this Certification.

In his appeal to the Commission, filed almost four (4) years after his appointment as a firefighter, the Appellant argues that he should receive a retroactive civil service seniority date back to February 20, 2017.

According to the Appellant, he signed Certification No. 04275 and was contacted, via phone, by an employee of City's Fire Department who told the Appellant that he was scheduled for an interview on January 10, 2017. The City states that no interviews were scheduled for January 10th and that the Appellant was told to appear for an interview on January 4, 2017 at 10:00 A.M. On Saturday, January 7, 2017, a City firefighter contacted the Appellant to inquire why he had not appeared for his interview on January 4th. The Appellant, who had written January 10th on his calendar, contacted the Fire Department the same day and was told to call back on Monday and speak directly to the Fire Chief. According to the Appellant, he (the Appellant) contacted the Fire Chief on January 9th and was told that the interview process had already concluded. That same day, the Appellant sent an email to HRD, asking HRD for assistance in allowing him to be interviewed.

On January 11, 2017, the Appellant penned the following email to the Fire Chief:

> "Sir,
>
> I am just following up with you about possibly being able to interview for a position as a firefighter with the Pittsfield Fire Department. I was hoping you may be able to find time for me because of the miscommunication that occurred resulting in my unintended absence. I have worked very hard and dedicated a lot of time to try and become a firefighter. Please understand that I went through extensive measures to try and remedy the situation as soon as it was brought to my attention and that I have never been a no show to anything in my life. I have gone through immense measures to put myself in a place of possible employment with the Pittsfield Fire Department and am simply seeking a fair

> and honest chance. If you could please help me it would be very appreciated, my contact information has been listed below."

As referenced above, the Appellant was not appointed on February 20, 2017 from Certification No. 04275. He was, however, subsequently appointed on May 15, 2017 from Certification No. 04469.

As part of the pre-hearing conference, the Appellant confirmed that he was seeking relief in large part to obtain a more favorable seniority date in regard to *collective bargaining agreement*-related matters (e.g.—shift bids, vacation time, etc.) which would not be impacted by a retroactive civil service seniority date. Rather, a retroactive civil service seniority date would only be relevant if the City engaged in layoffs of firefighters with civil service seniority dates back to May 15, 2017, a highly unlikely scenario given the large number of firefighters that have been appointed by the City since May 15, 2017.

In light of the above information, I asked the Appellant to inform the Commission by February 19, 2021 if he wished to withdraw his appeal. On February 19th, the Appellant indicated that he would not be withdrawing his appeal stating in part: "If the claim goes in my favor, I will attempt to resolve the seniority issue with the City at a later date. In regard to this claim, I was wronged during the hiring process and would like to establish a better system of communication and professionalism for future candidates so they do not have to suffer the same fate."

Even when the facts are viewed most favorable to the Appellant, he knew, *for years*, that candidates ranked below him on Certification No. 04275 were appointed to the Pittsfield Fire Department. The Commission has squarely addressed this issue in the past. In *Pugsley* v. *City of Boston et al*, 24 MCSR 544, 547 (2011), the Commission stated that the Commission:

> " … embraces the principle that a party coming before the Commission to seek equitable relief … must exercise reasonable diligence in pursuit of that relief. Accordingly, where a person has had actual notice—whether in writing or not—of an action or inaction by HRD or an appointing authority that the person reasonably knew or show have known was a violation of civil service law or rules, that person cannot sit on those rights indefinitely. Thus, it is a fair requirement that once such a person discovers that he or she has been harmed by an action or inaction of HRD, he had an obligation to promptly file a claim of appeal, or lose the right to press it."

See also Mulligan v. *Boston Police Department*, 28 MCSR 57 (2015) (The Commission denied the Appellant's appeal which was filed years after the Appellant was purportedly bypassed for appointment, but did not receive a written notice at the time.)

Applied here, the Appellant's appeal, filed with the Commission almost four years after he knew he was bypassed for appointment, is not timely. For that reason, the Appellant's appeal will be dismissed.

To ensure clarity, even if the Appellant's appeal were timely (which it is not), there is no reasonable likelihood that he would prevail. He has no written documentation to show that he was told to appear on January 10th; it appears to be undisputed that no interviews were held on January 10th; and the Appellant's email communication to the Fire Chief makes no mention that he was purportedly told to appear on January 10th, as opposed to January 4th at 10:00 A.M. Finally, given that the City appointed the Appellant during the next hiring cycle, it is unlikely that the Appellant could show that there were any impermissible factors in play here (i.e.—personal or political bias against him).

Since the Appellant failed to file a timely appeal with the Commission, his appeal under Docket No. E-21-010 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

Adam Healey
[Address redacted]

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* * * * * *

NICHOLAS J. HOLDEN

v.

DEPARTMENT OF STATE POLICE

D1-20-124

March 11, 2021
Paul M. Stein, Commissioner

Jurisdiction-State Police-Discharge of State Trooper-Settlement Agreement-Waiver of Rights to Trial Board Procedure—The Commission ruled that it lacked jurisdiction to hear an appeal from a state trooper who had been discharged summarily without a Trial Board hearing in compliance with a Settlement Agreement and Release. The trooper had entered into the agreement in 2017 for misconduct involving the unauthorized recording of traffic stops and other charges. After being reinstated following his lengthy suspension under the SAR, the Appellant was dismissed summarily in 2020 for social media violations without a Trial Board and in accordance with the terms of the 2017 Settlement Agreement under which he forfeited his rights to a Trial Board. This appeal was nonjusticiable by the Commission because it presented contractual claims relating to the SAR and constitutional issues outside the Commission's purview.

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Nicholas J. Holden, appealed to the Civil Service Commission (Commission), purporting to act pursuant to G.L. c. 22C, §13 and G.L. c. 31, § 41 - §43, to contest his termination by the Department of State Police (Department) from his position as a tenured State Trooper. On September 9, 2020, the Department filed a Motion to Dismiss the appeal for lack of jurisdiction, which the Appellant duly opposed. I heard oral argument from counsel for both parties via remote videoconference hearing (Webex) on October 29, 2020. For the reasons stated below, the Department's Motion to Dismiss, is granted and this appeal is dismissed.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. Mr. Holden was appointed as a State Trooper on August 22, 2002. (*Procedural Order dated 9/17/20; Stipulated Facts*)

2. On August 17, 2017, Trooper Holden signed a "Settlement Agreement & Release" (SAR) with the Department. (*Department Motion, Exh.A; Appellant's Opposition, Exh, A*)

3. The SAR memorialized the parties' mutual agreement to settle all preferred charges then pending against Trooper Holden that emanated from four separate internal affairs investigations conducted by the Department into Trooper Holden's conduct over a period of approximately four years beginning in March 2014, as well as his agreement to withdraw, with prejudice, a civil action brought against the Department. (*Department Motion, Exh. A; Appellant's Opposition, Exh, A*)

4. Pursuant to the SAR, Trooper Holden agreed to waive his right to a Trial Board hearing on the charges against him and accepted the discipline stipulated in the SAR, including, among other things, an 18-month suspension without pay, and, as a condition to a return to duty, satisfactory completion of a prescribed program of testing, counseling and treatment during the period of his suspension. (*Department Motion, Exh.A; Appellant's Opposition, Exhs, A & B*)

5. The terms of the SAR also included the following:

> ¶1(xv) "Trooper Holden acknowledges and agrees that if he is, at any time after execution of this Settlement Agreement & Release, charged with any violation of a Department Rule and such violation/charge is sustained against him, he shall, without the right to a trial board or hearing and/or any right of grievance, claim or appeal pursuant [to] Article 6 of the Department's Rules and Regulations, MGL c. 22C, §13, MGL c. 22C, §43 and/or the Commonwealth-State Police Association of Massachusetts Collective Bargaining Agreement, be immediately discharged and terminated from the Massachusetts State Police"
>
> ¶6. "Trooper Holden understands and acknowledges that, by executing this Agreement, he forever waives, forfeits and abandons any and all rights, claims, actions, grievances or appeals he possesses or ever may possess in connection with his employment with the Department as a result of, or in relation to, in any manner, the facts and circumstances attending [the four internal affairs investigations or the civil action he brought against the Department]. Trooper Holden hereby forever discharges, releases, and relieves the Commonwealth, the Department of State Police, the Colonel and their designees, employees and assigns from any any all such all [sic] rights, claims, actions, grievances or appeals."
>
> ¶7. "The terms of this Agreement shall be considered a complete and total settlement of all issues related to or arising from the facts and circumstances associated with attending the four internal affairs investigations or the civil action he brought against the Department].and shall not, except to enforce the terms of this Agreement, be disputed or grieved in any forum."
>
> ¶8. "Trooper Holden and the Department acknowledge and understand that their respective reasons/justifications for entering into this Agreement are particular and unique to the Parties and the facts and circumstances surrounding this matter only and that the disciplinary measures and other terms and conditions agreed upon and imposed by this Agreement are the produce of a negotiated settlement that shall not serve as precedent in any future discipline . . ."
>
> ¶9 "The parties acknowledge by signing this Agreement that they have been given every opportunity to consult with their respective representatives and attorneys, that they fully understand all the terms of the Agreement, and that they voluntarily accept and agree to all such terms"

(*Department Motion, Exh. A; Appellant's Opposition, Exh, A*)

6. In or after March 2019, upon satisfactory completion of the terms of the SAR, Trooper Holden returned to full duty with the Department. (*Stipulated Facts*)

7. In or about June 2020, the Department initiated an internal affairs investigation which resulting in a sustained finding that Trooper Holden was responsible for an improper social media post in violation of the Department's Rules and Regulations. (*Department Motion, Exh. B; Procedural Order dated 9/17/20*)

8. On August 4, 2020, after a "Duty Status Hearing" at which Trooper Holden testified and other evidence was presented, the Department terminated Trooper Holden from his position as a Massachusetts State Trooper. (*Department Motion, Exh. B; Procedural Order dated 9/17/20*)

9. Also, on or about August 4, 2020, the Department suspended Mr. Holden's license to carry a firearm issued by the Colonel of the Massachusetts State Police. (*Procedural Order dated 9/17/20*)[1]

10. The Department granted Mr. Holden an opportunity to pursue a "Section 43" appeal (pursuant to G.L. c. 22C, §43), limited to certain evidence on the merits of the 2020 alleged violation of Department rules, but excluding other evidence proffered by Mr. Holden and declining to allow Mr. Holden to raise objections to the validity of the SAR. The Department also declined, based on the SAR, to grant his request for a Trial Board hearing but agreed that, but for the SAR, the Department would have convened a Trial Board on the ultimate decision to discharge Mr. Holden. (*Procedural Order dated 9/17/20; Colloquy at Motion Hearing*)

11. On August 10, 2020, Mr. Holden brought this appeal to the Commission (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case." *See, e.g., Milliken & Co.*, v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005)

ANALYSIS

This appeal comes to the Commission on the heels of recent judicial decisions which seek to reconcile the unique statutory relationship between the broad disciplinary authority of the Colonel of the Massachusetts State Police over State Troopers under his/her command (G.L. c. 22C §§1,10 & 43) with appellate rights granted to State Troopers pursuant to Civil Service Law (G.L. c. 31, §§41-45). State Troopers are not "civil service employees" as defined by G.L. c. 31, §1. See G.L. c. 22C, §10. State Trooper are granted the right to appeal certain discipline imposed on them for de novo review by the Commission pursuant to a specific provision of Chapter 22C which provides:

> "*Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a trial board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45 inclusive of chapter 31.* A uniformed officer of the state police wo has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel."

G.L. c. 22C, §13 (*emphasis added*).

Chapter 22C, §3 and §43 authorize the Colonel of the State Police to make rules, regulations and orders governing the operation of the Department and the supervision and control if its officers. Pursuant to that authority, the Department promulgated "Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty" that establish the process through which the Colonel may act to impose good order and discipline within the Department.

- Sections 6.4 through 6.9 of the regulations establish the process for "Trial Boards" convened pursuant to G.L. c. 22C, §13, *infra*,. The Trial Board is "analogous to a military court martial." *See Burns* v. *Commonwealth*, 430 Mass. 444, 448 n.6 (1999). After an officer against whom charges have been preferred is provided an opportunity to be heard, represented by counsel, present evidence and cross-examine witnesses, the Trial Board makes a finding of "guilty" or "not guilty" and, if guilty, recommends the discipline to be meted out, subject to approval by the Colonel, which may include discharge, suspension, reduction in rank as well as a variety of other sanctions specific to the State Police, such as reassignment or forfeiture of accrued leave, detail opportunities and overtime. An officer aggrieved by a finding of the Trial Board may appeal to the Commission as provided by G.L. c. 22C, § 13, *infra*.

- Section 6.2 of the regulations establishes an alternative procedure for addressing the "Duty Status" of officers who, among other things, are the subject of criminal proceedings, domestic abuse proceedings and other violations of Department procedures and orders. After hearing before a "Duty Status Board", the board is authorized to recommend, subject to the Colonel's approval, whether to retain the officer on full duty, restricted duty or suspension with or without pay. An officer who is aggrieved by a finding under G.L. c. 22C, §43 may appeal that decision for judicial review by the Superior Court as provided by that statute. If and when charges are ultimately preferred , the officer may request a Trial Board under G.L. c. 22C, §13.

In *Doherty* v. *Civil Service Comm'n*, the Supreme Judicial Court, held that the G.L c. 22C, §13 right of appeal to the Commission from a Trial Board decision was limited to those sanctions that were expressly contained in G.L. c. 31, §43. In *Doherty*, because the sanction imposed was a forfeiture of accrued leave, which the SCJ held was not the type of discipline listed in G.L c. 31, § 41[2] and, therefore, could not be appealed to the Commission.

In another recent decision, the Superior Court vacated the Commission's decision to take jurisdiction over an appeal from a group of State Troopers who had been suspended indefinitely without pay after a "Duty Status" hearing, but before formal

1. I was informed at the motion hearing that the revocation of the LTC is under judicial review but this has not been documented. (*Colloquy with Counsel*)

2. "Except for just cause . . . a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, . . . lowered in rank or compensation without his written consent, nor his position be abolished." G.L. c. 31, §41.

"charges" had been "preferred" and a Trial Board decision had been made. *See* "Memorandum of Decision and Order on Parties' Cross Motions for Judgment on the Pleadings", *Massachusetts State Police et al* v. *Civil Service Commission et al.*, C.A. No. 2019-1370 (Suffolk Sup.Ct. 2020) (Donatelle, J.) ("*MSP* v. *CSC*"). In its opinion in *MSP* v. *CSC*, the Superior Court rejected the Commission's conclusion that the indefinite suspension violated the officers' rights to a "pre-deprivation" administrative hearing under G.L c. 31, §41 and was an unlawful use of G.L c. 22C "duty status" hearings to make an end run around the officer's right to rectify such procedural irregularities by appeal to the Commission under G.L. c. 31, §41 & §43. The Superior Court held that (1) the question as to when the Commission had subject matter jurisdiction to hear the appeals was a question of statutory interpretation of G.L c. 22C, to be decided de novo by the Court; (2) since the Department, not the Commission, is the agency charged with enforcement of Chapter 22C, the Commission's interpretation of that statute, while "relevant" was not entitled to the "special deference" the Commission would receive in construing civil service law contained in Chapter 31; and (3) Chapter 22C expressly limited the Commission's subject matter jurisdiction to appeals from Trial Board decisions rendered under G.L. c. 22C, §13, but not otherwise, and, specifically, the Commission "does not have jurisdiction to hear appeals of Duty Status decisions."

While the Commission may have good reason to question the logic of these decisions, *Doherty* is binding on the Commission and *MSP* v. *CSC*, while not binding, per se, remains the sole holding interpreting the scope of jurisdiction granted to the Commission under Chapter 22C to hear appeals by State Troopers. With this recent precedent in mind, I turn to the specific issues presented in this appeal.

Jurisdiction To Hear Appeal From The Appellant's Discharge Prior To A Trial Board.

To the extent the Appellant's appeal challenges the Department's decision to summarily discharge him because of a flawed process that deprived him of a Trial Board, that claim can be summarily rejected on the basis of the *Doherty* and *MSP* v. *CSC* decisions. The undisputed facts establish that the Department did not "prefer charges" against Trooper Holden and that no Trial Board was convened prior to his discharge. Thus, in that respect, this appeal is on all fours with *Doherty* and *MSP* v. *CSC*, i.e., the statutory prerequisite to an appeal to the Commission has not been met. Thus, unless that precedent is overruled, based on the current state of judicial construction of Chapter 22C, the Commission is without subject matter jurisdiction to hear the Appellant's appeal, no matter how meritorious it may seem.

Jurisdiction to Hear An Appeal Challenging the Enforceability of the SAR

The Appellant seeks to distinguish his appeal on the grounds that, unlike the officers in cases such as *MPS* v. *CSC*, who are ultimately entitled to a Trial Board on charges when and if they are preferred, here, the Department contends that Trooper Holden forever waived his right to a Trial Board and the Department has no intention of ever granting him a Trial Board. The Appellant argues that the Department's decision is the result of an unlawful and erroneous application of the SAR. But for the SAR he would have been afforded the right to a Trial Board with further right to appeal to the Commission, a matter that the Department does not dispute.

Specifically, the Appellant contends that (1) the conduct in which he allegedly engaged that resulted in his termination was not a "violation of a Department Rule" that would have triggered his immediate discharge under Section 1(xv) of the SAR; (2) his conduct, at most, was a minor infraction in which other Department personnel also engaged without discipline; and (3) the so-called "last chance" provision in Section 1(xv) and prospective waiver of a right to a Trial Board is unenforceable as a matter of law and as applied to the specific facts of the Appellant's case. The Department contends that the Commission has no authority to interpret the SAR and, if the Appellant is aggrieved by any such violations, his sole recourse is an appeal to Superior Court under G.L. c. 22C, §43 (or, perhaps a civil action for declaratory and injunctive relief).[3] *See, e.g.*, *Bickford* v. *Colonel*, 76 Mass. App. Ct. 209, 212-213 (2010). Alternatively, the Department argues that, as a matter of law, the "last chance" provision of Section 1(xv) is valid and enforceable as written to justify the Department's decision to terminate Trooper Holden without recourse to a Trial Board or any other right of grievance, claim or appeal. The Appellant retorts that the remedy of a Section 43 appeal is narrowly limited to an "arbitrary and capricious" standard, *citing Sullivan* v. *Superintendent*, 92 Mass. App. Ct. 1128 (2018), that makes it an unsuitable alternative in a case that involves complex and novel questions of law.

I have carefully considered the authorities presented by the parties and arguments of counsel. I agree with the Department that, in order to reach the issues raised by the Appellant, it would require the Commission to conduct an evidentiary hearing to make inquiry into the Appellant's contentions that the underlying circumstances which resulted in his termination constituted a violation of a Department rule and/or disparate treatment of the Appellant, and possibly, whether the Appellant's waiver of his Chapter 22C rights to a Trial Board for any and all future discipline was valid and enforceable. Moreover, assuming there were bona fides disputed issues of fact on any of those matters (which I need not decide), none of those issues would raise questions that call for application of Massachusetts civil service law but, rather, as the authorities cited by the parties demonstrate, call for interpretation of the public policy that would enable or prohibit waiver of a State Trooper's Chapter 22C rights, as well as the application of constitutional law and contract common law. *See, e.g., BourgeoisWhite LLP* v. *Sterling Lion, LLC*, 91 Mass. App. Ct. 114, 119 (2017); *Smart* v. *Gillette Company LTD Plan*, 70 F.3d 173, 181 (1st Cir. 1995); *Higgins* v. *Town of Concord*, 322 F.Supp.3d 218, 225 (D.Mass. 2018); *cf. Emma* v. *Department of Correction*, 30 MCSR 287, *clarified*, 30 MCSR 404 (2017) (invalidating prospective waiv-

3. Counsel appear to agree that the Collective Bargaining Agreement would not authorize a grievance to contest the validity of the SAR, but might have permitted grievance of the whether the alleged conduct properly triggered the application of the immediate termination provision in Section 1(xv).

er of civil service employee's disciplinary hearing and appeal rights of civil service employee); *Kenney* v. *Cambridge Housing Auth.*, 20 MCSR 160 (2007) (invalidating prospective waiver of rights of housing authority employee granted the same rights to a pre-deprivation hearing and appeal to the Commission "as if said office or position were classified under [c.31]")

In sum, Mr. Holden's appeal must be dismissed for lack of jurisdiction. I conclude that Appellant's claim that his summary discharge was unlawful depend, in essence, on a determination as to whether or not his 22C rights have been violated by application of the "last chance' provision of the SAR. This issue is not within the purview of the Commission whose jurisdiction has been narrowly construed, as a general rule, to be limited to appeals from Trial Board decisions, and does not encompass adjudication of whether the waiver of the Chapter 22C right to a Trial Board was unlawful as a matter of civil service law. The Appellant's recourse to redress such claims lies in a different forum. Of course, should a court order that the Commission is vested with jurisdiction or that the Appellant is entitled to and receives a duly appealable adverse finding by a Trial Board on any or all of the claims he has raised, further proceedings before the Commission would become appropriate.

CONCLUSION

In sum, for the reasons stated herein, the Motion to Dismiss is hereby ***granted*** and the appeal of the Appellant, Nicholas J. Holden, CSC No. D1-20-124, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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* * * * * *

In Re: HOLYOKE RESIDENCY INVESTIGATION

I-19-137

March 25, 2021
Paul M. Stein, Commissioner

Investigation by Commission-Holyoke Fire Department Residency Preference-Unlawful Appointment Based on Misrepresentation of Residency-Conversion to Provisional Employment-Revival of List and Appointment of Minority Candidate—As the result of a bypass appeal by an unsuccessful candidate for original appointment to the Holyoke Fire Department who claimed that a successful candidate had lied about his residency status to secure appointment, Commissioner Paul M. Stein concluded after an investigation that the successful candidate had indeed not been resident in Holyoke and that his appointment was unlawful. As a remedy, the Commission downgraded the status of the successful candidate from a tenured employee (with now four years of service) to a provisional one whereby he was not entitled to any civil service benefits such as seniority in layoffs and sitting for promotional exams. Under the decision, the successful candidate would be able to regain his civil service status as of March 2024, provided he takes and passes the exam and ranks high enough on the eligibility list. The decision also adjusts the seniority date of a minority candidate who has now been appointed but was originally bypassed. Holyoke is under a consent decree requiring it to redress prior discrimination by actively hiring minorities.

AMENDED FINDINGS AND CONCLUSION OF INVESTIGATION

A Civil Service Commission (Commission) investigation, conducted pursuant to G.L. c. 31, §§ 2(a) and 72, showed that a Holyoke firefighter, who resided in Easthampton during the qualifying period, was erroneously granted a residency preference in the City of Holyoke which resulted in his invalid appointment as a Holyoke firefighter in 2017. This invalid appointment harmed at least one other applicant who qualified for the residency preference in Holyoke, a community with a large minority population whose Fire Department remains under a court-ordered consent decree until it achieves parity in hiring. To address this invalid appointment, and to rectify the harm done to another candidate, the Commission is issuing appropriate remedial orders pursuant to its authority under civil service law and Chapter 310 of the Acts of 1993.

BACKGROUND

On December 19, 2019, as result of information provided to the Civil Service Commission (Commission) in *Bacon* v. *City of Holyoke*, 32 MCSR 219 (2019) [*Bacon*], and after a show cause conference held on December 11, 2019, the Commission voted 5-0 to initiate this investigation pursuant to G.L. c. 31, § 2(a) and § 72. The purpose of the investigation was to inquire whether there had been a violation of the civil service law and rules related to residency regarding the appointment of a certain Firefighter (Firefighter S) to a permanent, full-time position in the Holyoke Fire Department (HFD). Specifically, the Commission reviewed whether or not Firefighter S, as required by the statute and as he had represented to the state's Human Resources Division (HRD), had resided continuously in Holyoke for the one-year period preceding the April 2016 civil service examination so as to be entitled

to claim a statutory residency preference on the Certification from which candidates who passed that examination were appointed. Without such residency preference, Firefighter S would not have been ranked high enough on the eligible list for consideration for appointment, his selection would be unlawful and the appointment would have deprived another candidate who was a bona fide Holyoke resident from appointment.

On June 24, 2020, the Commission conducted a remote video investigative conference (via Webex). Holyoke and Firefighter S appeared and were represented by Counsel. Eleven (11) Exhibits were introduced into evidence, testimony was received from the HFD Fire Chief, two HFD Fire Lieutenants and Firefighter S. The Commission also requested and received copies of additional documents from HRD concerning Firefighter S, and Certifications 04132 and 03147, issued to Holyoke and the City of Easthampton, respectively.

Based on the evidence received, on November 19, 2020, the Commission issued "Interim Findings and Conclusion of Investigation", which ordered Holyoke to further address the "red flags" identified by the Commission that tended to infer that Firefighter S did not reside in Holyoke for a full year prior to taking the April 2016 Firefighter Examination. In particular, the record before the Commission at the time established that:

- Firefighter S grew up in Easthampton. He represented that he moved from Easthampton in October 2014 to live with an acquaintance who was an HFD Firefighter (Firefighter D), who, according to Firefighter S, provided Firefighter S a room in his house. However, Firefighter D did not return the "Tenant Verification Form" that he was requested to submit to the HFD to verify the landlord-tenant relationship.
- Firefighter D did provide a personal reference for Firefighter S which did not mention any landlord-tenant relationship. Firefighter S did not call Firefighter D to testify at the investigative conference.
- Firefighter S testified that he moved from Easthampton in 2014, where he lived with his girlfriend, after they agreed to separate. He hoped they would reconcile and expected the separation would be temporary.
- Firefighter S renewed his Massachusetts Driver's License in December 2014 using his Easthampton address.
- Firefighter S's name was listed as an Easthampton resident on Certification 03147 dated 8/14/2015 issued to the Town of Easthampton for appointment of Firefighter/EMTs to the Easthampton Fire Department but was not hired.
- On his application to the HFD in December 2016, Firefighter S stated that he had applied to become an Easthampton firefighter in November 2014. He did not mention any application in 2015. HRD issued no certification to Easthampton for appointment of firefighters in 2014.
- Despite being given the opportunity to do so, Firefighter S produced none of the usual indicia that would show that he had relocated his residence from Easthampton to Holyoke: no voting records, insurance policies, motor vehicle registration, tax records, or other documents (e.g. - proof that he had paid rent to Firefighter D, as alleged) showing that he had resided in Holyoke during the statutorily required time period.
- Firefighter S's former girlfriend eventually married another person and moved out of the Easthampton home where they had lived together. Firefighter S purchased that property in July 2018.

In addition, the Commission investigation confirmed that the HFD remains a so-called "Consent Decree" appointing authority, which means that HRD is required to rank candidates in an order so that certain minority candidates were afforded an enhanced opportunity for appointment, as a remedial action for prior proof of discriminatory hiring practices. Based on the ordering of the candidates on Holyoke Certification 04132, the next candidate in line after Firefighter S was a bona fide Holyoke resident who would likely have been a minority candidate.

The Commission ordered Holyoke to provide, on or before December 19, 2020, additional indicia that confirmed Firefighter S's residence in 2014 through 2016 such as a Landlord Verification Form from Firefighter D, voting records, excise tax statements, motor vehicle registrations, insurance policies, bank statements and/or other mail addressed to him in Holyoke. The Commission also ordered that Holyoke confirm that it has promulgated rules and procedures for future hiring cycles that will include specific requirements providing for heightened due diligence in the confirmation of a candidate's residency preference claim.

On December 19, 2020, Holyoke responded to the Commission's order with a two-page memorandum. Holyoke stated that it had complied with the Commission's order to ensure heightened scrutiny of a candidate's residency preference on a going forward basis. However, as to the production of additional indicia of Firefighter S's residency claim, Holyoke stated:

> "The City of Holyoke requested this information from the Union but did not receive any additional information from the Union. The City of Holyoke has already provided all of the information in its possession to the Commission."

Holyoke requested that, in view of its promise of prospective compliance with civil service rules requiring better scrutiny of residency preference claims, as well as staffing issues facing the HFD due to COVID-19, Firefighter S be allowed to continue in the HFD's employ.

On December 31, 2020, the Commission also received a "RESPONSE BY UNION AND FIREFIGHTER S TO INTERIM FINDINGS AND CONCLUSIONS OF INVESTIGATION." The Union's response provided no new information to demonstrate the validity of Firefighter S's status to residency preference in Holyoke. The gravamen of the Union's response argues that the Commission investigation was an unnecessary excess of authority and that the Commission could draw no adverse inferences from the failure to call Firefighter D or to produce documents because that would put an unreasonable burden on Holyoke or Firefighter S to produce evidence.

In January 2021, the Commission filed public record requests to Holyoke and Easthampton, seeking copies of Firefighter S's voting records and excise tax records, if any, for the period 2014 through 2016. The response to those requests established that:

- Firefighter S was not registered to vote in Holyoke or Easthampton during the three year period from 2014 through 2016.
- Holyoke issued Firefighter S was no excise tax bills for any motor vehicles or boats registered to him with a Holyoke address
- Firefighter S received twelve excise tax bills for motor vehicle(s) registered to him with an Easthampton address, five issued in 2014, two issued in 2015, and four in 2016.

THE COMMISSION'S STATUTORY AUTHORITY

G.L. c. 31, §2 states in relevant part:

> In addition to its other powers and duties, the commission shall have the following powers and duties:
>
> (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth."

G.L. c. 31, §72 states in part:

> The commission or the administrator may investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services. The commission or the administrator may report the results of any such investigation to the governor or the general court.
>
> The commission or administrator, upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations.

G.L. c. 31, §73, provides, in relevant part:

> If, in the opinion of the administrator, a person is appointed or employed in a civil service position in violation of civil service law and rules, the commission or the administrator shall mail a written notice of such violation to such person and to the appointing authority. The commission or the administrator shall then file a written notice of such violation with . . .the officer whose duty it is to pay the salary or compensation of such person . . . .
>
> The payment of any salary or compensation to such person shall cease at the expiration of one week after the filing of such written notice . . . .

The Commission also is authorized to "assess a fee upon the appointing authority when inappropriate action has occurred." *See, e.g.*, Acts of 2019, c. 41, §2, Line Item 1108-1011

Finally, Chapter 310 of the Acts of 1993, an emergency act entitled "An Act Providing For The Protection Or Restoration Of The Rights of Certain Public Employees", provides:

> "If the rights of any person acquired under the provisions of this chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of their own, the civil service commission ma take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

These statutes confer significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate and what remedies are in order when illegal or inappropriate action has occurred. *See Boston Police Patrolmen's Association et al* v. *Civ. Serv. Comm'n*, No. 2006-4617, Suffolk Superior Court (2007). *See also Dennehy* v. *Civ. Serv. Comm'n*, No. 2013-00540, Suffolk Superior Court (2014) ("The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion."). The Commission has consistently acted to protect the civil service rights of those who were prejudiced by systemic violations. *See In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield*, 24 MCSR 627 (2011) (Commission opened an investigation and ordered relief when it became known that the Deputy Fire Chief of the Springfield Fire Department had been involved in the hiring of a class of firefighters which involved the bypassing of certain more highly ranked candidates in favor of the Deputy Chief's son) *In Re: Town of Oxford's 2011 Review and Selection of Permanent Intermittent Police Officer Officers*, CSC No. I-11-280 (2011) (Commission took action after investigation of appointments made in Oxford in which the direct involvement of the appointing authority compromised a selection process which favored certain relatives of the appointing authorities); *In Re: City of Methuen's Review and Selection of Reserve Police Officer Candidates in the Fall of 2008*, CSC No. I-09-290 (2010) (same). *Request by John Mograss, et al. to Investigate the Failure To Administer Civil Service Examinations the Public Safety Position of Captain at the Massachusetts Department of Correction*, 28 MCSR 601 (2015) (Commission entertained a request for investigation by a group of Lieutenants and Captains of the Department of Correction, to determine why no examinations had been held since 1981 for promotion to the civil service position of Captain, which deprived them of the opportunity to obtain civil service permanency in this position)

THE RESIDENCY PREFERENCE

Among the paramount "basic merit principles" which govern Massachusetts Civil Service law is the requirement for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment." G.L. c. 31, §1. The opportunity for consideration and selection of candidates based on their relative ranking on eligible lists after competitive examinations, based on examination scores and statutory preferences, is the core means by which this mission is accomplished. G.L. c. 31, §26 & §27. Among the statutory preferences incorporated into the civil service law, residents of a civil service community are entitled to be considered for original appointment to public safety positions ahead of non-residents. G.L. c. 31, §58,¶3 provides:

> "*If any person who has resided in a city or town for one year immediately prior to the date of examination for 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 ex-*

> *amination 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 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*." [1]

This statutory preference for residents, along with the application of the so-called "2n+1" formula, which requires selection of candidates from the first "2n+1" names on a certification, means, when a candidate is erroneously placed on a certification as a resident, that error carries significant consequences for other qualified residents (or otherwise higher ranked non-residents) who, thereby would be excluded from consideration because the insertion of the candidate who was not entitled to claim residency bumps them out of consideration. Because of the serious consequence for candidates, e.g., Holyoke residents who did meet the statutory residency requirement (which in this case included at least one minority candidate) and who may have lost the opportunity for appointment through no fault of their own, and may not even become aware that they were aggrieved by the violation, the Commission takes violations of the residency preference law with the seriousness it deserves.

In *Layton* v. *Somerville*, 24 MCSR 440 (2011), *on reconsideration*, 24 MCSR 619 (2011), in concluding that candidates were improperly granted residency preference, the Commission determined that the word "residence" means ". . . the physical location of the employee's house or other dwelling place." *Crete* v. *City of Lawrence*, 18 MCSR 22, 23 (2005) citing *Doris* v. *Police Commissioner of Boston*, 374 Mass. at 445 (1978). HRD's Verification of Applicant's Residence Preference form, states, in part, " … [p]ursuant to G.L. Chapter 31, Section 58 [a job applicant] [must] [ ] *maintain residence* in the Appointing Authority's community for a *full year* preceding the date of the examination. Residence means the principal place of domicile of the applicant. *Principal place of domicile means an applicant's true, fixed and permanent home*." *Id*. (emphasis added). *See also Investigation Re: Residency Preference of Certain Pittsfield Firefighters*, 32 MCSR 230 (2019) (after investigation, candidates appointed who did not meet residency preference resigned)

FINDINGS AND CONCLUSION

Based on all of the information provided to the Commission, the preponderance of the evidence leaves no room for a conclusion that Firefighter S was qualified to claim a residency preference at the time he was appointed from the December 2016 Certification issued by HRD at Holyoke's request. It must also be inferred that, by erroneously affording him that preference, another duly qualified candidate, likely a minority candidate who did meet the residency preference requirement, was denied the opportunity to be considered and appointed. This violation of civil service law cannot stand without some appropriate remedial action.

The Commission does not overlook the good faith efforts that Holyoke is making to ensure that future hiring cycles do not repeat the mistakes made in the 2016 HFD hiring of Firefighter S. The Commission also recognizes that, save for the lack of candor about his residency, Firefighter S has been employed by the HFD for more than four years and has shown that he is a good firefighter that Holyoke does not want to lose. The Commission recognizes that it must consider balancing these factors with its statutory responsibility to enforce the civil service law and ensure that ALL applicants and civil servants are treated fairly and equitably.

In regard to what action should be taken by the City, the initial question is whether this firefighter's statutory ineligibility to be appointed as Holyoke firefighter in 2017 should bar him from continued employment in that civil service position with the City today. What occurred here is not an administrative oversight which resulted in an invalid appointment of a firefighter through no fault of his own. Here, the firefighter affirmed to HRD, at the time of the examination, that he had continuously resided in Holyoke for one year prior to the examination. The preponderance of the evidence does not support the Appellant's material representation to HRD.

Also, as previously referenced, the firefighter's invalid appointment caused harm to a non-selected candidate who did meet the Holyoke residency preference at the time of the examination. That is particularly important when, as here, the firefighter is claiming residency preference in a community that is subject to a consent decree related to minority hiring. Effectively, the firefighter's appointment here subverted the statutory residency preference requirements, the spirit of the consent decree and basic merit principles, which requires the 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 …"

Balancing the seriousness of the offense here against the fact that Firefighter S has now been employed by the City for four years, I conclude that remedial equitable action must be taken to rectify the harm that was done to the minority candidates whose names appeared as minority ("C") candidates on Certification 04132 who should have been considered for appointment but for the invalid appointment of Firefighter S, as well as to HFD firefighters hired after Firefighter S whose civil service seniority would be before him but for his invalid appointment.

In the Motion For Reconsideration filed by Holyoke on March 16, 2021 from the Commission's initial Findings and Decision (dated March 11, 2026, Holyoke provided information that confirmed the Commission's concern that the invalid appointment of Firefighter S did, in fact, prejudice another firefighter who would have been hired but for the invalid appointment of Firefighter S, and, further identified that person as the minority "C" candidate listed as

1. Holyoke applies the proviso requiring preference of all residents over all non-residents.

Candidate #19 on the Form 16 , who was tied on Certification 04132 with the minority "C" candidate listed as candidate #18 on the Form 16, who was the last candidate hired from that certification.. Holyoke also confirmed that all other minority candidates ranked above Candidate #19 were considered and bypassed and that Candidate #19 was eventually hired and is currently serving as an HFD Firefighter.

Thus, it is no longer necessary to revive Certification 04132 in order to identify which minority candidate was prejudiced by the invalid appointment of Firefighter S. The identity of that candidate is now the known to be Candidate #19 and (since it is also known that he was eventually hired), it is also undisputed that, but for the unlawful appointment of Firefighter S, Candidate #19 should have been appointed no later than March 20, 2017, the same date that Candidate #18 was appointed.

The subsequent hiring of Candidate #19, however, does not fully remediate the on-going harm that his invalid appointment has caused or may cause to other duly appointed HRD firefighters, or those appointed in the future, by unlawfully obtaining a civil service seniority date to which his is not entitled. Thus, my initial recommendation with respect to the appointment of Firefighter S stands, namely, that, rather than invalidate the appointment of Firefighter S, his status should be converted, effective immediately, to the status of a provisional firefighter until March 31, 2024, which will remains sufficient remedial relief for this additional harm. As a provisional employee, Firefighter S will be able to continue employment with the HFD, but he shall not be entitled to any civil service benefits that accrue to permanent, tenured employees, including, but not limited to, civil service seniority in layoffs and the ability to sit for promotional examinations. G.L. c. 31, §39 & §59. Should Firefighter S wish to maintain his employment as a civil service employee in the HFD after March 31, 2024, he must, between now and March 31, 2024, comply with all statutory requirements under the civil service law to do so (e.g. take and pass a future civil service examination and rank high enough on an eligible list and Certification to be within the statutory 2N+1 for consideration. To ensure clarity, should Firefighter S wish to improve his chances of appearing high enough on an eligible list between now and 2024 by claiming a Holyoke residency preference, he must now follow the statutory requirements, and only claim such preference if he continuously resides in Holyoke for one year prior to taking a future civil service examination. In short, instead of taking the steps to vacate this unlawful appointment, as would be warranted, the Commission is allowing Firefighter S three years to become eligible for appointment as a civil service firefighter in Holyoke, something he has yet to do. This three-year time period is established in consideration of the likely examination schedule and providing Firefighter S with the opportunity to establish continuous residency in Holyoke one year prior to taking such an examination should Firefighter S wish to apply for the statutory residency preference.

AMENDED RECOMMENDED ORDERS

Pursuant to the authority granted to the Commission under G.L. c. 31,§2 & §72, and the powers of equitable relief provided under Chapter 310 of the Acts of 1993, I recommend that the Commission issue the following orders:

1. Firefighter S's civil service status is converted to *provisional firefighter* and he may remain employed by the Holyoke Fire Department, as a *provisional firefighter,* until March 31, 2024.

2. So long as Firefighter S remains a *provisional firefighter,* he may continue employment with the HFD through March 31, 2024, but he shall not be entitled to any other civil service benefits that accrue to permanent, tenured employees, including, but not limited to, the ability to retain employment in layoffs over other permanent firefighters and/or sit for any civil service promotional examinations in the HFD.

3. HRD and the City of Holyoke shall take such actions as may be necessary to document or implement the terms of the Commission's orders as stated above.

4. HRD and the City of Holyoke shall adjust the civil service seniority date of the candidate listed as 19th (C Tie -End) on Form 16-II from Certification No. 04132 to March 20, 2017, the same civil service seniority date granted to the last candidate appointed from Certification No. 04132.

* * *

By a 5-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 25, 2021. the Commission accepted and adopted as orders the amended recommendations of Commissioner Stein.

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* * * * * *

ASHLEY HURST

v.

CITY OF BROCKTON

G1-20-026

March 11, 2021
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as Brockton Fire Alarm Operator-Lack of Interview Documentation-Misrepresentation of Employment—The Commission affirmed the bypass of a candidate for original appointment to the Brockton Fire Department as a Fire Alarm Operator for lack of compliance with its Tattoo Policy. The candidate had a tattoo on her finger that would be visible when she was in uniform which is proscribed. The Commission rejected an alternate reason for bypass in concluding that the Appellant had not misrepresented her employment as a "per diem" brand ambassador for a beverage concern. It also found Brockton's rejection of this candidate based on a poor interview could have been better documented.

DECISION

The Appellant, Ashley Hurst, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), from her bypass by the City of Brockton (Brockton) for appointment to the position of Fire Alarm Operator (FAO) in the Brockton Fire Department (BFD).[1] A pre-hearing was held on April 10, 2020 and a full hearing was held on July 24, 2020, both via videoconference (Webex). The full hearing was audio/video recorded.[2] Twenty exhibits (*Exhs 1-11, 13-20, PHExh.21)* were received in evidence and one document marked for Identification (*Exh.12-ID*) Proposed Decisions was received from the Appellant and Brockton on October 30, 2020. For the reasons stated below, Ms. Hurst's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Michael F. Williams, BFD Fire Chief
- Joseph Solomon, BFD Deputy Fire Chief

Called by the Appellant:

- Ashley M. Hurst, Appellant
- Business Owner of Company A

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Ashley Hurst, took and passed the civil service examination for FAO on June 15, 2019 and her name was placed on the FAO eligible list established by the Massachusetts Human Resources Division (HRD) on July 10, 2019. (*Stipulated Facts; HRD Prehearing Submission 4/7/20*)

2. An FAO is the "lifeline" for the BFD, taking emergency calls and fire prevention inquiries and inspection requests from the public, dispatching equipment and communicating with fire service personnel on scene. FAOs work in teams of two, on 10 hour and 14 hour shifts. It is a busy, high intensity position. (*Testimony of Dep. Chief Solomon*)

3. On September 26, 2019, HRD issued Certification 06647 authorizing Brockton to appoint two (2) FAOs for the BFD. Ms. Hurst's name appeared on the Certification ranked tenth in a tie group with two other candidates. (*Exh.3*)

4. Ms. Hurst signed the Certification as willing to accept appointment and completed the required application package. Deputy Chief Solomon conducted a background investigation and Ms. Hurst was interviewed by a panel consisting of BFD Fire Chief Williams, Deputy Chief Solomon and BFD Firefighter Rodrick. (*Exhs. 7-9; Testimony of Williams & Solomon*)

5. By letter dated December 18, 2019, Brockton Mayor Rodrigues informed Ms. Hurst that she was not selected for appointment as an FAO for four reasons:

- "You are ineligible for employment by the Brockton Fire Department at this time due to your non-compliance with the department's Tattoo, Body Piercing & Mutilation Police [sic] for New Hires."
- "You gave an underwhelming interview and did not show a true desire or passion to be a Fire Alarm Operator and member of the Brockton Fire Department. Your answers to questions were short and lacked depth."
- "In the oral interview, you stated you still worked per-diem for [Company A], but the company stated you have not worked there in over a year."
- In 2015, you were [iinvovled in an incident reported by] the Bridgewater Police . . . ."

(*Exh.4*)

6. One of the FAO candidates (Candidate A) selected for appointment was tied with Ms. Hurst and the second candidate (Candidate B) selected for appointment was ranked below Ms. Hurst on the Certification. (*Exhs. 3, 8 & 9*)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of the recording the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

7. This appeal to the Commission duly ensued. (*Claim of Appeal*)

Tattoo Policy

8. Pursuant to the authority vested in the BFD Fire Chief under Brockton Ordinances and BFD Rules and Regulations, in August 2019, the BFD promulgated a policy applicable to all future BFD hires, entitled "Department's Tattoo, Body Marking, Body Piercing, and Mutilation policy for new hires."(BFD Tattoo Police) (BFD Body Art Policy). (*Exhs.1, 2, 5, 12 & 14; Testimony of Williams*)

9. The BFD Tattoo Policy states its purpose:

> "a. To establish a policy concerning the professional appearance of all employees and to ensure we are maintaining a professional image."
>
> "b. The Brockton Fire Department (BFD) has the responsibility of ensuring public safety, maintaining order, and attending to particularly vulnerable and sensitive persons, and to achieve these goals the public must trust and respect its firefighters. Maintaining a professional and uniform fire department is critical to advancing such public trust and respect."
>
> "c. Tattoos and body modifications, as form of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted."
>
> "d. Misinterpretation of visible tattoos and other body modifications worn by firefighters while on duty can cause members of the public to question a firefighter's allegiance to the safety and welfare of the community, as well as the Department's. This misinterpretation can damage the public's trust and respect that is necessary for the Department to ensure public safety and maintain order."

(*Exh. 5*)

10. The BFD Tattoo Policy prohibits two categories of tattoos, brands and body art: (1) those which depict offensive subjects, such as racial, sexist or other similar hatred or intolerance, are prohibited, whether visible in uniform or not; and (2) tattoos, brands and body art (tongue splitting, disfiguring ears, nose and lips) on the face, head, neck or hands are prohibited if they are "visible to public view while wearing any department issued uniform." (*Exh. 5*)

11. An applicant who has a prohibited tattoo, brand or mutilation may remove it and be considered for appointment at a future date. The BFD also has indicated that, if a candidate removes a tattoo before the hiring cycle has been completed, reconsideration of an applicant may be possible. (*Testimony of Williams*)

12. The BFD proffered examples of similar tattoo policies adopted by the Brockton Police Department, the Lexington Fire Department, the Stoneham Fire Department; and the Massachusetts Department of State Police; Tattoo Policies of the United States Marine Corp, Navy, Army, Coast Guard and Air Force; and Article XXI, Personal Grooming and Appearance, Body Art" contained in the 2016-2019 Collective Bargaining Agreement between the Town of Duxbury and the Duxbury Permanent Firefighters Association (*Exhs.14 through 20*)

13. Several current BFD firefighters have tattoos, brands or body art of the type that the BFD Tattoo Policy prohibits. The policy was promulgated for new hires only because the BFD has entered into a collective bargaining agreement with the local firefighters' union and application of the policy to current firefighters who are union members would require agreement of the union. (*Testimony of Williams*)

14. Ms. Hurst has five tattoos, none of which fall into the offensive category that would be strictly prohibited. Three floral tattoos and one numerical tattoo are not visible to the public while in uniform. One tattoo, on the side of one finger, an abstract figure Ms. Hurst described as a mustache to honor her father, is visible while in uniform and therefore prohibited under the BFD Tattoo Policy. (*Exhs. 6 & 7; Testimony of Appellant*).

Poor Interview

15. Dep Chief Solomon briefed the BFD interview panel on the results of the background investigation of each candidate and the panel then conducted a structured interview with the candidate, asking the same 15 questions of all candidates, plus several questions tailored to each candidate's circumstances. The candidate also performed a speaking exercise simulating a dispatch call. The panelists took notes and rated the candidates in four categories. Scores were not assigned. The interviews were not recorded (*Exhs.7 -9; Testimony of Williams & Solomon*)

16. At the Commission hearing, Chief Williams and Dep. Chief Solomon relied substantially on the notes they took to testify about what they recalled about each candidate's interview. They testified that they both stood by their assessment that Ms. Hurst's interview performance was next to last among the six candidates interviewed and well-below that of the two successful candidates. (*Testimony of Chief Williams & Dep. Chief Solomon*)

17. At the Commission hearing, Ms. Hurst thought she had done well during the interview but admitted she was nervous. She recalled going into more detail than Chief Williams and Dep. Chief Solomon. (*Testimony of Appellant*)

Misrepresentation of Employment

18. Ms. Hurst stated in her application packet that she had two current employments: a full-time job as a "nail tech" at a salon from October 2015 to present and a "brand ambassador" at events held by a Company A, beverage tasting caterer, from 9/15 to present (per-diem). (*Exh.7*)

19. Ms. Hurst was asked about her employment as a "brand ambassador" and responded that she worked for Company A on a per-diem basis. Dep. Chief Solomon found this answer dishonest because he understood from a brief telephone conversation with the owner/manager of Company A the day before the interview that Ms. Hurst was "very personable" but that she had not worked

an event for over a year. (*Exhs. 7& 11: Testimony of Dep. Chief Solomon*)

20. At the Commission hearing, Ms. Hurst called the owner/manager of Company A and introduced text messages exchanged between them which confirmed that Ms. Hurst had been one of the "go to" people for several years and that the owner/manager of Company A continued to offer Ms. Hurst the opportunity to work events, most recently, one month before Ms. Hurst's application to the BFD in November 2019. Ms. Hurst was never terminated or removed from the "call list" maintained by Company A and was never told that she was no longer considered a per-diem "employee").[3] (*Exhs. 13 & 21; Testimony of Appellant & Business Owner*)

21. At the Commission hearing, Ms. Hurst explained that she had been accepting jobs as a "brand ambassador" less frequently after 2017 than in prior years, mainly because her current job at the salon became a full-time job, which made it more difficult to work the tasting events, especially on short notice. At no time did she end the relationship with the beverage tasting company, either voluntarily or involuntarily. (*Testimony of Appellant*)

22. Ms. Hurst texted the business owner on November 4, 2019, informing her that she was applying to the BFD as a dispatcher and asked "What's my job position. The owner replied: "Brand ambassador." Ms. Hurst thanked her and the business owner texted back: "No prob." (*Exh. 21; Testimony of Appellant & Business Owner*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban,* 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*.,423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n,* 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton,* 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211,214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission "cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L. c. 31, §2(b) , also gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id*.

ANALYSIS

This appeal is one of two related BFD bypass decisions that the Commission decides today, upholding the two bypasses based on the candidate's non-compliance with the BFD Tattoo policy. *See Matchem* v. *City of Brockton*, CSC No. G1-19-234, 34 MCSR 52 (2021) (*Matchem Decision*) The Commission's analysis of the bypass for noncompliance with the BFD Tattoo Policy is substantially the same as the analysis set out in detail in the *Matchem Decision* which is incorporated herein and will be briefly summarized below. In this appeal, two of the additional reasons given for bypassing Ms. Hurst, her interview performance and the 2015 Bridgewater incident are close calls, but the Commission need not address them as they could not change the Commission's decision to uphold the bypass. In future hiring cycles, the BFD is encouraged to make a stronger record of interview performance to avoid the risk that, upon review, the Commission may find the process overly subjective and insufficient to establish a basis for bypass by

3. The owner/manager of Company A often called her brand ambassadors "employees" but she knows that is a misnomer. Ms. Hurst did not receive "wages" or benefits, was hired on an "as needed basis." Technically, she worked as an "independent contractor." (*Testimony of Appellant, Business Owner & Solomon*)

a preponderance of the evidence. The BFD should also take care to ensure that Ms. Hurst has a full and fair opportunity to present her side of the Bridgewater incident during any future application process. Finally, the claim that Ms. Hurst was dishonest in her description of her work as a brand ambassador was not proved by a preponderance of the evidence and should not be used as a reason to bypass her in the future.

On the Appellant's noncompliance with the BFD Tattoo Policy, as more fully stated in the *Matchem Decision,* I am persuaded that the BFD has established, by a preponderance of evidence, that the adoption of that policy is rationally related to legitimate purposes of maintaining order and a uniform and professional image of the BFD that the public will trust and respect, and preserving public confidence in the ability of the BFD to maintain public safety and attend to particularly vulnerable and sensitive persons. The Commission must give appropriate deference to what a public safety department believes to be necessary to regulate its mission and achieve those goals.

I did not overlook the fact that, in this particular situation, it is likely that Ms. Hurst will rarely be on duty in public and that her visible tattoo is barely noticeable. The Commission, however, cannot begin to micromanage the application of this policy and substitute its judgment for that of the BFD, as the Appellant effectively asks us to do, at least so long as the policy does not intrude on constitutional rights, which is not the case here.[4]

The BFD's claim that the Appellant was dishonest about her current status as a "brand ambassador requires a brief comment. An appointing authority is entitled to bypass a candidate who has "purposefully" fudged the truth as part of the application process. *See, e.g*., *Minoie* v. *Town of Braintree*, 27 MCSR 216 (2014). However, providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Kerr* v. *Boston Police Dep't*, 31 MCSR 25 (2018), *citing Morley* v. *Boston Police Department*, 29 MCSR 456 (2016) Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. *See* G.L. c. 31, §27,¶2.

The corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g., Boyd* v. *City of New Bedford*, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); *Morley* v. *Boston Police Dep't*, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); *Lucas* v. *Boston Police Dep't*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history)

In this case, the preponderance of the evidence established that Ms. Hurst was not intentionally untruthful about her status as a "per diem" brand ambassador. She actually confirmed her status with Ms. Parsons before submitting her application to the BFD and was totally blindsided by the claim of dishonesty. A discrepancy, if any, between her understanding of her on-going business relationship with Company A and her actual legal status was understandable and, any misunderstanding was no more than an honest mistake that cannot serve a reasonable justification to bypass her.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Ashley Hurst, CSC No. G1-20-020 is ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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* * * * * *

4. It is also apparent that the policy treats new hires differently from current BFD members. Grandfathering a new requirement is not, per se, unlawful under civil service law. *See, e.g*., Personnel Administration Rules, PAR.23 Smoking Prohibition Rule (effective prospectively 10/6/1988). *See also Jucha* v. *City of North Chicago*, 63 F.Supp.3d 820 (N.D. Ill. 2014) (rejecting tattoo artist's equal protection claim for being treated differently than others who were grandfathered under the zoning policy)

ANNE LLOYD

v.

DEPARTMENT OF CONSERVATION AND RECREATION

C-17-245

March 11, 2021
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Conservation and Recreation-Office Support Specialist to Program Coordinator I-Scope of Responsibilities—A reclassification appeal from an Office Support Specialist with DCR seeking the position of Program Coordinator I was dismissed by Hearing Officer Cynthia A. Ittleman where 90% of her duties involved the accounts payable function of her current position. The Appellant argued improbably that her use of a fuel-monitoring program, entitled Gasboy, was equivalent to "running a program" and should entitle her to a higher classification.

DECISION

On November 27, 2017, the Appellant, Anne Lloyd (Appellant), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the October 23, 2017 decision of the Department of Conservation and Recreation (DCR or Agency)'s denial of the Appellant's appeal of its decision to deny her request for reclassification from the position of Office Support Specialist I (OSS I) to Program Coordinator I (PC I). On January 16, 2018, the Commission held a pre-hearing conference and a full hearing was held at the Commission on March 28, 2018.[1] The hearing was digitally recorded and a CD was made of the hearing and sent to the parties.[2] The parties filed post-hearing briefs. As explained herein, the appeal is denied.

FINDINGS OF FACT

I entered three (3) exhibits for the Appellant and twenty-five (25) exhibits for DCR. Based on the documents submitted into evidence and the testimony of:

Called by DCR

- Kimberlee Costanza, Classification and Compensation Specialist, Human Resources, Executive Office of Energy and Environmental Affairs (EOEA);
- Danielle Daddabbo, Classification and Compensation Specialist, Human Resources, EOEA;
- Frederick Yule, Director of Park Operations, DCR, EOEA;
- Martha Gallagher, Business Management Specialist, Program Coordinator III, DCR, EOEA;

Called by Ms. Lloyd

- Appellant Anne Lloyd.

and after taking administrative notice of all matters filed in the case, and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I find that a preponderance of the evidence establishes:

1. At the time of the hearing, the Appellant served as an Office Support Specialist I (OSS I) at DCR. She has worked in her current classification within DCR for 18 years and is seeking to be reclassified to PC I (Stipulated Facts).

2. The summary of the OSS Spec series states, in part, that "[e]mployees in this series perform administrative support functions such as preparing and analyzing correspondence, reports and other materials as needed; arrange meetings with internal and external contacts; respond to inquiries, assist in various office programs and perform related work …." (Resp. Ex. 23) The OSS Spec provides the following examples of duties common to all levels in the series, in part,

> provides administrative support to assigned personnel, schedules and attends meetings,
>
> conducts research, maintains electronic meeting and event calendars,
>
> uses computer software of databases to prepare reports and compile data,
>
> creates and maintains database and spreadsheet files,
>
> responds to inquiries to internal and external contacts,
>
> coordinates programs and activities,
>
> ensures that office activities are operational and in compliance with standards,
>
> acts as liaison with local, state and federal agencies,
>
> screens calls and
>
> is responsible for the organization and upkeep of detailed filing systems. (*Id.*)

3. The summary of the PC Spec series states, in part, that PCs "coordinate and monitor assigned program activities, review and analyze data concerning agency programs; provide technical assistance and advice to agency personnel and others; respond to inquiries; maintain liaison with various agencies …." (Resp. Ex. 24) The duties common to all PCs include, in part,

> Coordinates and monitors assigned program activities in order to ensure effective operations and compliance with … standards.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with this transcript to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion.

> Reviews and analyzes date concerning assigned agency programs in order to determine programs and effectiveness, to make recommendations for changes … and to devise methods of accomplishing program objectives.
>
> Provide technical assistance and advise to agency personnel and others concerning assigned programs …, resolve problems and to ensure compliance …
>
> Respond to inquiries from agency staff and others … concerning agency programs.
>
> Maintain liaison with various private, local, state and federal agencies to exchange information and or to resolve problems.
>
> Performs related duties such as attending meetings and conferences; maintaining records; and preparing reports. (*Id.*)

4. The Appellant's Form 30 provides the following general statement of her duties and responsibilities, "… include administering all aspects of the Gasboy Fuel Site Monitoring system. They also include maintaining all aspects of assigned accounts payable functions (encumbrances, payments, related account activity), providing technical assistance to DCR vendors, responding to inquiries and performing related work as required." (Resp. Ex. 17) Her detailed statement of duties include,

> administering the Gasboy Fuel Site monitoring system,
>
> reviewing Gasboy generated data and encumbering and processing related accounts payable paperwork,
>
> provides unit director with Gasboy System reports,
>
> performs accounts payable functions utilizing MMARs system,
>
> prepares encumbrance and payment documents for diesel and gas expenses,
>
> provides financial information on request on expenses,
>
> inputs payment and encumbrance documents into MMARS for vendors,
>
> answers phones and directs calls to proper person and sorts mail. (*Id.*)

5. The Appellant's Employee Performance Evaluation (EPRS) form indicates that her duties included,

> Performs accounts payable administrative duties including processing diesel, gasoline, and vehicle related service and commodity encumbrance documents and payment vouchers according to MMARS standards so that vendors receive payment for services and materials.
>
> Coordinates the Gasboy Fuel Site monitoring system which includes but is not limited to making keys and providing PSO Director with numerous reports relative to regional vehicle fuel site activities.
>
> Staffs the Snow Desk during snow events and utilizes the Massachusetts Geographic Information System (GIS).
>
> Answers phones and performs related duties as assigned to support division operations. (Resp. Ex. 7)

6. In her position, the Appellant also prepared spreadsheets and work documents pertaining to maintenance work orders and interacted with vendors to verify work such as "rebooting the system" of fuel delivery had been completed. (App. Tr. 46-47).

7. For a period of time, the Appellant was the only person using the "Gasboy" system, which system tracked the fuel used by certain authorized state personnel. DCR no longer uses the Gasboy system. (Testimony of Appellant).

8. On December 30, 2014, the Appellant submitted a request to appeal her classification. (Resp. Ex. 2). As part of the audit process, she completed an Appeal Audit Interview Guide (Interview Guide), where she listed her job duties as paying bills for park support, scheduling vehicle stickers, maintaining vendor accounts, "autoparts maintenance" on vehicles, working with problem fuel sites, and working with engineering about issues related to fuel. The Interview Guide asked how many times per week the Appellant performed the pertinent duties (not the percentage of her time spent performing the pertinent duties) but she did not provide that information in her Interview Guide. (Resp. Ex. 7).

9. The Appellant characterized the Gasboy program as "equipment" she operated and as a "software program." (Resp. Ex. 7; App. Tr. 48-7). She asserted that a reason her job had changed was that she "started as accounts payable [and] was given Gasboy program." (Resp. Ex. 7).

10. The work duties involving the "Gasboy" system included making and logging keys, reviewing Gasboy generated data and encumbering and processing related accounts payable paperwork. (Resp. Ex. . 7). The Appellant's responsibilities with Gasboy involved 25 vehicles, 2 fuel pumps per location, and 12 locations (Yule, Tr. 281) and communicating with multiple vendors and users of the fleet vehicles. (Resp. Ex. 7). Making each key took approximately 15 minutes and there were some occasions, but not many, when making keys would last several hours, (Gallagher, Tr. 343) Making keys were not continuous during the day, but would interrupt her "usual" work of accounting, (App. Tr. 51-52). Each morning, after running all night, the Gasboy system could create daily reports. (Gallagher, Tr. 341). The system allowed the Appellant to perform her job duties such as encumbering and processing related accounts payable paperwork. (Resp. Ex. 17; Gallagher Tr. 343).

11. The Appellant believed that utilizing the Gasboy system in the way her job required constituted "running a "program." (App. Tr. 55:22). She asserted that making keys and using the Gasboy program took up 51% or 53% of her time. (App. Tr. 63; App. Tr. 54). However, there is no documentary evidence in the record that supports this assertion.[3]

12. The PC I classification is utilized for those positions responsible for coordinating, monitoring, developing and implementing programs for an agency. (Resp. Ex. 9).

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3. The Appellant submitted supportive letters from several state employees expressing gratitude for her work involving the Gasboy system but they did not indicate that she performs the function of a Program Coordinator more than 50% of the time.

13. After DCR expanded the fleet operations in 2012, the DCR fleet maintenance system doubled in size. (Yule, Tr. 248:14). New positions were added, including a PC I position for which the Appellant did not apply. (Yule, Tr. 249, 252).

14. The position for the PC I, Parks Service Operations, Service Desk Coordinator was posted in 2014. (Resp. Ex. 7). As an OSS I, the Appellant performed most of the job duties listed for this position, but did not perform the following:

- Determine appropriate distribution and dispatch work orders to applicable trades' staff members or contracted vendors, and
- Review and analyze data concerning Park Support Operations, Facility Administration and Maintenance Information System (FAMIS) and recommend methods/changes in order to improve work methods, determine progress, revise established procedures and/or to provide information to superiors." (Resp. Ex. 7; App. Tr. 69).

15. DCR began the process of the Appellant's classification audit on January 3, 2015. (Resp. Ex. 2). The audit process included a review of the Appellant's Interview Guide. DCR's Human Resources Officer conducted an interview with the Appellant on March 3, 2017 (Resp. Ex. 7) and considered the Appellant's supervisor's written remarks. (Resp. Ex. 8). Human Resources staff compared the information about job duties presented by the Appellant with the specifications of the job and reviewed the Appellant's Employee Performance Review (EPRS) and Form 30 job description. (Daddabbo, Tr. 180-181).

16. Mr. Yule, the Director of Park Operations and the Appellant's supervisor, described the Appellant's job duties as "administrative" and "accounting" in nature. (Yule, Tr. 225, 226; Ex. 8). Mr. Yule, in consultation with the Appellant's immediate supervisor, Ms. Gallagher, (Yule, Tr. 296:2-6) disagreed with the Appellant's characterization of her work as stated on the Interview Guide. Mr. Yule wrote,

> "I strongly disagree with Anne's appeal. Anne's position is 90% accounts payable. Her responsibilities are primarily maintaining account balances, encumbering funds, and MMARS [data system] data entry. Scheduling vehicle stickers are done by the driver through the Fleet service desk and Fleet Response not Anne… Prior to the new Fleet Department, she encumbered and paid for Park Support vehicle repairs and parts. She currently encumbers funds and pays invoices for a small amount of vehicle supplies that are not available through the Fleet Department. One of the vendors Anne handles is Northeastern Petroleum. They have the contract to service the fuel pumps. She has the administrative function of calling Northeastern Petroleum when issues with fuel pumps are called in by a region. She also makes fuel keys when requested. She does send emails to IT and engineering as directed. This work is a small percentage of her time…. Anne does not dispatch any service work, or enter any work orders into FAMIS [system]. This is done by the trained service staff." (Resp. Ex. 9).[4]

17. The Appellant's position at DCR-Cambridge Lower Basin was eliminated on March 10, 2017 because of budget cuts. (Resp. Ex. 12). The Appellant began working as an OSS I within DCR, at a different location, on March 20, 2017, after exercising her rights under the civil service bargaining agreement to accept a position at the same title for which she was qualified. (Resp. Ex. 13).

18. DCR denied the Appellant's request for an appeal on March 16, 2017. (Resp. Ex 9).[5]

19. The Appellant appealed DCR's decision to the state's Human Resources Division (HRD), which denied her appeal on October 23, 2017. (Administrative Notice).

20. The Appellant timely filed the instant appeal. (Administrative Notice).

LEGAL STANDARD

"Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal…. Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it." G.L. c. 30, s. 49.

Applied here, the Appellant must show that she performs the level distinguishing duties of the PC I title more than 50% of the time. *See Gaffey* v. *Dept. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also Ghandari* v. *Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015) (finding that "in order to justify a reclassification, an employee must establish that he is performing duties encompassed with in the higher level position the majority of the time…."). Further, "[w]here duties are equally applicable to both the lower and higher titles, although they may be described slightly differently for each title, those types of overlapping duties are not "distinguishing" duties of the higher title." *Saunders* v. *Dep't. of Labor Standards,* 32 MSCR 413, 415 (2019).

ANALYSIS

The term "running a program" takes on particular significance in determining whether the Appellant is performing the distinguishing duties of the PC I title more than 50% of the time. The evidence presented at hearing highlights the disagreement between the Appellant's and Agency's understanding of a "running a program." The Appellant, believing that utilizing the fuel tracking system Gasboy, was, in effect, being in control of the fuel tracking "program", argues that this work warrants a reclassification. "Gasboy" is a *system* that tracks fuel; produces reports; tracks data and allows the Appellant to make and log gas keys and allows for encumbering and processing related accounts payable paper-

4. The letter is dated March 16, 2017. The Appellant received a copy of this letter via email on March 20, 2107. (Resp. Ex. 9).

5. The parties stipulated at the prehearing conference that DCR denied the Appellant's reclassification request on March 8, 2017. Respondent's Exhibit 9 states that DCR denied the request on March 23, 2017. The time difference between the two dates does impact the decision.

work. Although the Appellant made use of this *system*, she did not coordinate, monitor, develop or implement a *program* for DCR.

Even if utilizing the Gasboy system were considered to be "running a program," which it is not, the Appellant has not met the burden of showing she performed this duty more than 50% of the time. Her testimony about working in this role more than 50% of the time was not substantiated by the documents in the record. In addition, the detailed testimony of Ms. Gallagher and Mr. Yule clearly undermined the Appellant's assertion in that regard. In fact, Ms. Gallagher specifically testified that it took approximately 15 minutes to make a key for the fuel pumps and there were few instances when that would occur and there were few occasions when making the keys would last several hours. Further, Mr. Yule's testimony and written comments in response to the Appellant's Interview Guide supported Ms. Gallagher's testimony.

That the Appellant's OSS I position had overlapping job responsibilities and nearly identical qualifications needed at hire as the PC I position posted at DCR in 2014 does not indicate that these are level distinguishing duties of the PC I position. During the time of the first appeal, the DCR was undergoing a reorganization which involved adding more staff to the Appellant's unit. The responsibilities of the additional staff at the PC I level included reviewing and analyzing data concerning DCR's Facility Administration and Maintenance Information System (FAMIS). The Appellant did not work with the FAMIS system and did not analyze data.

In sum, at the time of her reclassification appeal, the Appellant performed her core duties of accounting and utilizing the Gasboy Fuel Site monitoring system to make and log gas keys, review Gasboy-generated data and encumber and process related accounts payable paperwork. These duties represent work that squarely fall within the administrative duties that are generally expected of an OSS I. Her duties of communicating with vendors, answering phone calls, and processing accounts payable paperwork through the Gasboy system fits within the written job functions.

There is no question that the Appellant is a dedicated state employee who has performed her job diligently and effectively for many years and is appreciated for the work that she has performed. However, based on a careful review of all of the evidence, the Appellant did not meet her burden to establish that she performs the duties of a PC I more than half of her time. That the Appellant did not establish that she performed the work of a PC I a majority of the time should in no way be interpreted as critical of the valuable service that the Appellant provides to the Commonwealth.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. C-17-245 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

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* * * * * *

HARUNA MALIANI

v.

DEPARTMENT OF PUBLIC HEALTH

C-18-100

March 11, 2021
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Public Health-Tewksbury Hospital-Registered Nurse IV to V-Scope of Responsibilities— The Commission dismissed an appeal from an Appellant seeking a reclassification from Registered Nurse IV to V because he did not perform two of the most significant responsibilities that distinguished the two positions—supervisory responsibilities over a period of 24 hours rather than eight, and writing evaluations of other employees.

DECISION

On May 30, 2018, the Appellant, Haruna Maliani (Maliani or Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to affirm the determination of the Department of Public Health (DPH) / Executive Office of Health and Human Services (EOHHS) denying the Appellant's appeal to be reclassified from Registered Nurse IV(RN IV) to Registered Nurse V (RN V) at Tewksbury State Hospital. On July 10, 2018, a pre-hearing conference was held at the offices of the Commission; a full hearing was held at the same location on October 17, 2018.[1] The hearing was digitally recorded and a CD of the recording was provided to both parties.[2] The parties filed post-hearing briefs. For the reasons stated herein, the appeal is denied.

1., 2. [See next page.]

FINDINGS OF FACT

I entered twenty-one (21) exhibits from the Respondent and eight (8) exhibits from the Appellant. Based on the documents submitted into evidence, the testimony of:

Called by the Appellant:

- Haruna Maliani, Apellant;
- Victoria Pike, Assistant Director of Nursing;
- Alex Adusei, RN V Night Shift Nursing Supervisor;
- Sergie Piedad, RN V Evening Shift Nursing Supervisor;

Called by the Respondent:

- Janice Bishop, Chief Nursing Officer;
- Margaret Sydlowski, Employment and Staffing Coordinator;
- Veronica Gjino, Classification Coordinator for EOHHS;
- Deborah Cory, Deputy Director of Labor Relations.

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Haruna Maliani has been employed at Tewksbury Hospital since 2006. He began his employment there as a Licensed Practical Nurse II. He became a Registered Nurse II in 2007. He was promoted to Registered Nurse III, Clinical Charge Nurse, in 2014. In June 2015, he applied for and was promoted to RN IV, Nursing Supervisor, on the Evening Shift, which is the 3 to 11 p.m. shift. (App.Testimony at 1:50-55 ; Resp. Ex. 3). He currently works as an RN IV Supervisor on the evening shift (App. Testimony).

2. According to DPH's Classification Specifications for the Registered Nurse Series, the duties of an RN IV Nurse Supervisor include the duties of the lower classifications of RN III as well as the following:

- Direct the nursing activities for two or more wards or full-time programs for all shifts;
- Authorize overtime for shift personnel and transportation of patients to other hospitals;
- Authorize transportation of patients to other health care facilities in emergency situations.

3. The Program Description for Registered Nurse IV, Nursing Supervisor, Evenings, ("Form 30") for the Appellant, dated June 2015, describes the overall job responsibilities of his position as an RN IV as a position that:

> "Provides, directs, coordinates, supervises, and evaluates nursing care to patients… on several units of the evening shift within the established philosophy, objectives and standards of the hospital and Nursing Department. Provides guidance and leadership to nursing staff as needed. Performs related work as required."
>
> Among the twenty (20) job responsibilities listed on the Appellant's Form 30 most relevant to this appeal include the following:
>
> - Performs administrative functions of the nursing department and addresses administrative issues promptly, calling the D.O.N. designee and the duty officer as necessary and/or required by policy.
> - Takes a leadership role in the guidance of personnel regarding problems of an immediate nature and implements the disciplinary process when appropriate.
> - Assist with special projects such as data collection related to attendance, incident reports, etc.
> - Compliance with all applicable state and federal laws, including the Health Insurance Portability and Accountability Act (HIPAA) regulations… (Resp. Ex. 14).

4. The duties of an RN V, according to DPH's Classification Specifications for Registered Nurse Series, include the duties of the RN IV and "may also" include:

- Inspect physical facilities to ensure compliance with Federal and State laws and regulations;
- Oversee and implement the quality assurance program and examine medical and other records relative to utilization review to ensure compliance with federal, state and professional standards, regulations and laws designed to ensure and control quality of care;
- Analyze statistical reports such as reports on patient census, personnel changes, accidents and time and attendance in order to recommend action concerning patient census deployment of personnel and effective use of available resources. (Resp. Ex. 13).

5. In the spring of 2015, Chief Nursing Officer Jan Bishop (Ms. Bishop) reviewed the duties and responsibilities of those employees holding RN V position and determined that the duties were more aligned with the classification of RN IV. This decision was applied prospectively only. (Bishop Testimony). The Appellant's position was the first position to be filled after the classification change. (Bishop Testimony).

6. The Appellant requested a reclassification to an RN V (Nurse Supervisor) on December 14, 2016.[3] (Administrative Notice)

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1. The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the copy of the CD provided to the parties to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. The Appellant contends that a colleague is an RN V but has the same duties as the Appellant. DPH promoted that employee into the Nursing Supervisor position at Tewksbury Hospital and classified him as RN V in January 2015. This promotion would have occurred *before* the administrative decision to prospectively change the RN IV and RN V duties in the spring of 2015 and occurred well before the Appellant filed his appeal for classification.

7. The process for reviewing a reclassification request at EOHHS includes the Appellant completing an Interview Guide, an interview with the employee seeking reclassification, a review of the employee's history, and a review of current job specifications and the job specifications of the job sought. After reviewing of all pertinent material, a recommendation is made to DPH. (Sydlowski Testimony at 5:57).

8. The Agency denied the Appellant's request for reclassification on April 10, 2017. The Appellant appealed to the Human Resources Division (HRD), and HRD denied the Appellant's appeal on May 16, 2018. (Stipulated Facts).

9. The Appellant stated on his Interview Guide that he was seeking classification because he had been performing the duties of an RN V for over a year, including when an RN V is unavailable because of vacation, sick time, or when alone on a shift, as he is on assigned rotating weekends. He listed the time spent on his RN IV responsibilities as equally distributed, totaling 100 % of "what he does," and indicated that each day the responsibilities shift according to that day's situation. (Resp. Ex. 3).

10. On his Interview Guide, the Appellant listed the three duties that distinguished the RN IV and RN V positions and provided specific examples of how he believed he performed each of the three duties. The three distinguishing duties and the Appellant's comments are summarized as follows:

- **Inspect physical facilities to ensure compliance with Federal and State laws and regulations**: The Appellant ensures that the patient environment is safe and meets OSHA standards during every shift. For instance, he ensures that all hospital items and equipment are functional.

- **Oversee and implement the quality assurance program and examine medical and other records relative to utilization review to ensure compliance with federal, state and professional standards, regulations and laws designed to ensure and control quality of care.** The Appellant detailed several actions that ensured compliance with Healthcare Quality, the guidelines of CMS and DPH, including infection control, timely medication supply, overseeing guidelines; and overseeing admissions that generally occur after business hours.

- **Analyze statistical reports such as reports on patient census, personnel changes, accidents and time and attendance in order to recommend action concerning patient census deployment of personnel and effective use of available resources:** The Appellant ensures all units are staffed adequately, including deployment of overtime nursing hours, and reviews daily reports of restraint use and prevalence and fall rates and injury incidents. (Resp. Ex. 3).

11. Ms. Pike, the Appellant's supervisor, and Chief Nursing Officer Bishop, who have been employed in leadership roles for many years, reviewed the Appellant's appeal for reclassification. (Pike Testimony; Bishop Testimony). In her review, Ms. Bishop wrote that The RN IV positions hold "a very important role in the coverage of the shift they work… Their responsibility is for an 8 hour shift. The RN V has 24 hour accountability for the unit that they oversee. The assessment, monitoring, setting policy, implementation, responsibility for the nursing units 24/7 is the role of an RN V. (Bishop testimony) Additionally, the RN IV's role is to give input into the performance evaluation of staff, whose responsibility is to follow through with performance evaluations. Involvement in committees is not an expectation to justify reclassification to an RN V because all levels of RNs and LPNs participate in committees. (Bishop Testimony, Resp. Ex. 3; Resp. Ex. 5).

12. In her review, Ms. Bishop addressed the three duties of an RN V that distinguish that classification from the RN IV:

- **Inspect physical facilities to ensure compliance with Federal and State laws and regulations**: The RN V "follows up with Departments (i.e. Facilities, Maintenance) that the safety issues have been corrected and staff have been educated if necessary on the changes. Example: removal of mold, water pipes repaired, kitchen refrigerators cleaned, broken equipment removed from the unit… It is the RN IV's responsibility to notify the RN V of all safety issues identified for follow up and corrective action implemented."

- **Oversee and implement the quality assurance program and examine medical and other records relative to utilization review to ensure compliance with federal, state and professional standards, regulations and laws designed to ensure and control quality of care.**: RN V duties include developing Quality Assurance monitors and implementing the process of those monitors. "They collect data, evaluate and change processes accordingly… and present to Nursing Quality Committee for discussion."

- **Analyze statistical reports such as reports on patient census, personnel changes, accidents and time and attendance in order to recommend action concerning patient census deployment of personnel and effective use of available resources:** The RN V is responsible for planning the time for all staff on a 2-week rotation and works with HRD to monitor staff on FMLA. The RN V "follow up[s] with analyzing the reports and following up with ways to improve the outcomes, example: fall rates, restraint use, constant observation stats and 1:1s." (Resp. Ex. 5).

13. At the time of his appeal for reclassification, the Appellant checked for safety issues during his shift and followed up to see if issues were remedied. On every other weekend, he was the sole supervisor for 2-3 units when the RN V Evening Shift Nursing Supervisor was not present. (Appellant Testimony).

14. When the Appellant leaves his shift, others are responsible for decision-making. (Appellant Testimony at 4:12).

15. The Nurse V position is responsible for writing and signing staff members' EPRS evaluations.[4] (Pike Testimony at 2:07; 2:24-2:25). The Appellant routinely communicated via email with his supervisor and other RN IVs and Vs to share a commendation about a staff member or to let a supervisor know about improper behavior which the Appellant had addressed while working that shift. (Appellant testimony at 3:17). The Appellant began the discipline process through staff education and counselling. The Appellant did not write or sign EPRS evaluations. (Pike Testimony at 2:04-6).

4. The RN V Night Shift Nursing Supervisor at Tewksbury Hospital who was hired in 2015 prior to the administrative decision to redefine the Nurse IV position, testified that he has in the past written EPRS evaluations for staff. (Adusei Testimony at 144-145).

LEGAL STANDARD

"Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal…. Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it." G.L. c. 30, s. 49.

"The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe* v. *Department of Environmental Protection,* 15 MCSR 47 (2002). The Appellant must show that he is improperly classified and to do so, he must show that he performs the distinguishing duties of the RN V title more than 50% of the time. *See Gaffey* v. *Dept. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also Ghandari* v. *Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015) (finding that "in order to justify a reclassification, an employee must establish that he is performing duties encompassed with in the higher level position a majority of the time…."). Further, "[w]here duties are equally applicable to both the lower and higher titles, although they may be described slightly differently for each title, those types of overlapping duties are not "distinguishing" duties of the higher title." *Saunders* v. *Dep't. of Labor Standards,* 32 MSCR 413, 415 (2019).

ANALYSIS

The Appellant is a skilled and dependable nurse who cares for his patients and takes his oversight responsibilities seriously at Tewksbury Hospital. However, reclassification of a position by the Commission requires proof that the Appellant is performing the level distinguishing duties of the higher classification a majority of the time. After a careful review of all the evidence, including the relevant testimony of all witnesses and all relevant documents, the Appellant has not shown, by a preponderance of the evidence, that he performs the level distinguishing duties of an RN V a majority of the time.

At first glance, certain evidence supports the Appellant's argument in favor of reclassification. The forms describing the duties of the RN IV and the RN V share all job duties but two and the DPH classification specifications show shared responsibilities except for three duties, which are broadly worded. Shortly before the Appellant applied for and received a promotion to the RN IV Evening Shift Supervisor, other RN IVs had been administratively reclassified to RN Vs. Thus, Appellant works with RN Vs who share his responsibilities.

However, the testimony from the Chief Nursing Officer and human resources representative, both of whom have substantial experience, shows the difference between the two classifications in practice. RN Vs are responsible for their duties during a 24 hour shift and RN IVs are responsible for their duties during an 8 hour shift. As Ms. Bishop explained in her analysis and at hearing, RN Vs inspect physical facilities to ensure compliance with Federal and State laws and regulations. This inspection requires, at the RN V classification, "follow-up with Departments (i.e. Facilities, Maintenance) that the safety issues have been corrected and staff have been educated if necessary on the changes." Arguably, the Appellant performs this duty *during his shift* by routinely inspecting the physical facilities in the units he supervises and following up with repair requests. Likewise, the Appellant provided evidence that he "oversee[s] and implement[s] the quality assurance program and examine[s] medical and other records relative to utilization review to ensure compliance with federal, state and professional standards, regulations and laws designed to ensure and control quality of care," on the units *when he is supervising*. He does not "develop[] Quality Assurance monitors and implement[] the process of those monitors." The duty of an RN V, to "analyze statistical reports such as reports on patient census, personnel changes, accidents and time and attendance in order to recommend action concerning patient census deployment of personnel and effective use of available resources," were performed as part of the Appellant's job responsibilities because of deployment of staff according to the needs of the patients *during his shift*. The Appellant does not, however, perform the duty of an RN V to follow up with analyzing reports about statistics such as fall rates, restraint use, and constant observation, while also implementing ways to improve those statistics.

The most significant difference in responsibilities between these two classifications is the level of responsibility over a period of time: RV Vs have the responsibility for 24 hours of hospital activities; the Appellant, as an RN IV, is responsible for activities that originate during his eight-hour shift for the units he supervises. Additionally, the Appellant does not write evaluations for other staff. While he may begin a disciplinary process through counseling, it is the responsibility of the RN V to administer discipline, if warranted, and complete and sign staff EPRS evaluation forms.

The Appellant performs the duties of an RN IV as specified in his Form 30: he performs administrative functions of the nursing department, addresses administrative issues promptly, takes a leadership role in the guidance of personnel regarding problems of an immediate nature, implements the disciplinary process when appropriate, assists with special projects such as data collection related to attendance and incident reports, and ensures compliance with all applicable state and federal laws including HIPPA regulations. That these duties share similarities with the duties of an RN V does not indicate the Appellant has the responsibilities of an RN V for more than half the time.

In summary, a preponderance of the evidence establishes that most of the Appellant's job duties fit squarely within his current level of an RN IV. The Appellant has not met his burden to show that he performs the responsibilities of RN V more than fifty percent of the time.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. C-18-100 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso and Stein (Commissioners)—AYE; and Tivnan (Commissioner)—NO) on March 11, 2021.

Notice to:

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* * * * * *

CORY MATCHEM

v.

CITY OF BROCKTON

G1-19-234

March 11, 2021
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Brockton Firefighter-Tattoos and Body Art-First Amendment-Equal Protection Clause—Commissioner Paul M. Stein affirmed a decision of the Brockton Fire Department, rejecting the Appellant's candidacy for his noncompliance with the department's Tattoo, Body Piercing, and Mutilation Policy. The candidate's tattoos covered his face, hands, and neck and would have been clearly visible in or out of uniform. The Appellant unsuccessfully argued that his rejection violated First Amendment Free Speech protections and the Equal Protection Clause. The latter clause was invoked because there are firefighters already on the force with tattoos that violate the policy, but these firefighters were grandfathered or could not be disciplined because of collective bargaining agreement concerns.

DECISION

The Appellant, Corey Matchem, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), from his bypass by the City of Brockton (Brockton) for appointment to the position of permanent, full-time firefighter in the Brockton Fire Department (BFD).[1] A pre-hearing was held at UMass School of Law in Dartmouth on December 13, 2019 and a full hearing was via remote videoconference (Webex) on August 19, 2020, which was audio/video recorded.[2] Nineteen Exhibits (*Exhs 1-13,15-19, PHExh.20)* were received in evidence. Proposed Decisions were received from the Appellant on October 30, 2020 and from Brockton on November 13, 2020. For the reasons stated, Mr. Matchem's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Michael F. Williams, BFD Fire Chief

Called by the Appellant:

- Appellant did not testify and called no witnesses

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Cory Matchem, took and passed the written portion of the civil service examination for Firefighter on March 24, 2018 and took and passed the Entry Level Physical Abilities Test (ELPAT) portion of the examination on July 11, 2018. His name was placed on the Firefighter eligible list established by the Massachusetts Human Resources Division (HRD) on October 1, 2018. (*Exh.1; HRD Prehearing Submission 11/22/19*)

2. On August 13, 2019, HRD issued Certification 06541 authorizing Brockton to appoint ten (10) Firefighters for the BFD. Mr. Matchem's name appeared on the Certification in 15th place in a tie group with four other candidates. (*Exh.1; HRD Prehearing Submission 11/22/19*)

3. Mr. Matchem signed the Certification as willing to accept appointment and completed the required application package. A background investigation was completed and he was interviewed on or about February 22, 2019 by a panel consisting of BFD Fire Chief Williams, Deputy Chief Marchetti, Captain Michael McKenna and Firefighter Victor Soto-Perez. (*Exhs. 1 & 4 through 7; Testimony of Williams*)

4. By letter dated October 30, 2019, Brockton Mayor Rodrigues informed Mr. Matchem that he found him an unsuitable candidate who was "ineligible for employment by the Brockton Fire Department due to your non-compliance with the department's Tattoo, Body Piercing and Mutilation Policy for New Hires." (*Exh.8*)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. Copies of the recording the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

5. There were multiple candidates ranked below Mr. Matchem on the Certification who received offers of employment. (*Exhs.1, 9, 11 & 12)*

6. This appeal to the Commission duly ensued. (*Exh. 1;Claim of Appeal*)

Tattoo Policy

7. Pursuant to the authority vested in the BFD Fire Chief under Brockton Ordinances and BFD Rules and Regulations, in August 2019, the BFD promulgated a policy applicable to all future BFD hires, entitled "Department's Tattoo, Body Marking, Body Piercing, and Mutilation policy for new hires."(BFD Tattoo Police) (BFD Body Art Policy). (*Exhs.1 through 4, 12 & 14; PHExh.20; Testimony of Williams*)

8. The BFD Tattoo Policy states its purpose:

> "a. To establish a policy concerning the professional appearance of all employees and to ensure we are maintaining a professional image."
>
> "b. The Brockton Fire Department (BFD) has the responsibility of ensuring public safety, maintaining order, and attending to particularly vulnerable and sensitive persons, and to achieve these goals the public must trust and respect its firefighters. Maintaining a professional and uniform fire department is critical to advancing such public trust and respect."
>
> "c. Tattoos and body modifications, as forms of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted."
>
> "d. Misinterpretation of visible tattoos and other body modifications worn by firefighters while on duty can cause members of the public to question a firefighter's allegiance to the safety and welfare of the community, as well as the Department's. This misinterpretation can damage the public's trust and respect that is necessary for the Department to ensure public safety and maintain order."

(*Exh. 4*)

9. The BFD Tattoo Policy prohibits two categories of tattoos, brands and body art: (1) those which depict offensive subjects, such as racial, sexist or other similar hatred or intolerance, are prohibited, whether visible or not while on duty; and (2) tattoos, brands and body art (tongue splitting, disfiguring ears, nose and lips) on the face, head, neck or hands are prohibited if they are "visible to public view while wearing any department issued uniform." (*Exh. 4*)

10. An applicant who has a prohibited tattoo, brand or mutilation may remove it and be considered for appointment at a future date. The BFD also has indicated that, if a candidate removes a tattoo before the hiring cycle has been completed, reconsideration of an applicant may be possible. Several other candidates were bypassed based on non-compliance with the BFD Tattoo Policy. (*Testimony of Williams*)

11. The BFD proffered examples of similar tattoo policies adopted by the Brockton Police Department, the Lexington Fire Department, the Stoneham Fire Department; and the Massachusetts Department of State Police; Tattoo Policies of the United States Marine Corp, Navy, Army, Coast Guard and Air Force; and Article XXI, Personal Grooming and Appearance, Body Art" contained in the 2016-2019 Collective Bargaining Agreement between the Town of Duxbury and the Duxbury Permanent Firefighters Association. (*Exhs.10, 15 through 19*)

12. Chief Williams explained that the BFD Tattoo Policy prohibited tattoos on the face, neck and hands and that covering those markings would not be acceptable because, in part, that would raise safety issues. At my request, the BFD produced additional documents containing general orders, memos, bulletins and other similar communications related to BFD uniform requirements, appropriate attire and appearance, fitting and testing firefighters for face masks and the prohibition of facial hair which may impact the proper sealing of such masks. (*PHExh.20; Testimony of Williams*)

13. The Appellant pointed to the fact that three current BFD firefighters have tattoos, brands or body art of the type that the BFD Tattoo Policy prohibits and BFD has never received any complaints about them from the public. (*Testimony of Chief Williams*)

14. Chief Williams acknowledged that current BFD firefighters had non-complying tattoos but offered two explanations for the "new hires only" approach. First, he wanted to take a "proactive" approach rather than wait until he got complaints. Second, the BFD was party to a collective bargaining agreement with the local firefighters' union and he was legally prevented from applying the policy to current firefighters who are union members until Brockton engaged in "impact bargaining" with the union. Chief Williams intends to expand the application of the BFD Tattoo policy to all BFD members and will place that issue on the agenda in the next round of collective bargaining with the union. (*Exh.1; Testimony of Williams*)

15. Mr. Matchem has multiple tattoos, none of which fall into the offensive category that would be strictly prohibited. He has visible tattoos on his face, neck and hands. He also has excessive ear stretching. (*Exhs.1 & 4*)

16. Mr. Matchem's BFD application ascribed the following meanings to his tattoos:

- Front neck—candlestick represents honor and light
- Left face/neck—lit torch represents "liberty enlightening the world" representing a positive life; Woman's head is a classic style in tattoo imagery standing for good luck and the wings of her hair represent strong independence; "Torches together" is from Judges 15:4 representing the power and positive outcome of teamwork; Two upside down triangle [sic] joined together stands for a strong bond between mother and son in Celtic origins
- Right face/neck—umbrella represents Leviticus 19:11, "You shall not steal, nor deal falsely, nor lie to one another." For protection under God's protective umbrella; Cherry blossom represents the beauty

of life; Rocket ship was drawn by my son, he dreams to be an astronaut and I wanted to show my encouragement to follow your dreams; Deer represents my son's favorite animal; Water drops are a part of a tattoo of a wolf on the side of my head which is unable to be seen. The wolf represents guardianship and loyalty.

- Right hand—Bottle containing liquid represents the popular expression "glass half full or half empty" with the words "quite the ride" expressing an outlook on a positive life; VW logo

- Left hand—blue and yellow ribbon in support of the Boston marathon bombing victims; deep sea diving helmet in honor of all my family members who have served in the U.S. Navy; "Deep Trouble" the title of my favorite childhood book by R.L.Stine.

- Knuckles (right to left hand)—Top knuckles "INVA-SION"; bottom knuckles "Itsa-trap" Both are popular phrases/sayings from the Star Wars franchise.

(*Exh. 4*)

17. One of the personal references provided by Mr. Matchem and interviewed by Dep. Chief Solomon recommended Mr. Matchem as a "great kid, hardworking", but when asked about any weaknesses, stated: "Tattoos." (*Exh. 7; Testimony of Solomon*)

18. Mr. Matchem signed the BFD Tattoo Policy and complied with the requirement to disclose all tattoos, whether visible in uniform or not. He wrote a letter to Brockton indicating that he "acknowledges and respects the policy", he does not agree with it and that he signed the policy under duress. (*Exhs. 1 & 4*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban,* 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*.,423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c. 31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n,* 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton,* 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211,214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission "cannot substitute its judgment about a ***valid*** exercise of ***discretion based on merit or policy considerations*** by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) (***emphasis added***) However, the governing statute, G.L. c. 31, §2(b), also gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id.*

ANALYSIS

The parties do not dispute most of the material facts presented in this appeal. They agree, in essence, that the issue before the Commission is whether the BFD Tattoo Policy is discriminatory on its face and unlawful under civil service law. I answer that question in the negative.[3]

The Validity of the BFD Tattoo Policy As A Matter of Law

The Commission is persuaded that the BFD has established, by a preponderance of evidence, that the adoption of the BFD Tattoo Policy is rationally related to legitimate purposes of maintaining order and a uniform and professional image of the BFD that the public will trust and respect, and preserving public confidence in the ability of the BFD to maintain public safety and attend to particularly vulnerable and sensitive persons. The Commission must give appropriate deference to what a public safety department be-

3. The Appellant initially also claimed that the BFD Tattoo policy was unlawfully promulgated by the BFD Fire Chief without approval from the Mayor and City Council, but did not press that clam or argue it in the Appellant's Post-Hearing Proposed Decision. (*See Appellant's Proposed Decision, pp.7-8*) This question would be a matter of municipal law which is not within the purview or expertise of the Commission and I do not need to address it in this Decision.

lieves to be necessary to regulate its mission and achieve those goals. The Commission cannot begin to micromanage the application of this policy and substitute its judgment for that of the BFD, as the Appellant effectively as us to do, at least so long as the policy does not intrude on constitutional rights, which is not the case here.

As a general rule, police and fire safety departments, commonly referred to as "para-military" organizations, are authorized to regulate the appearance and conduct of its members. As shown by the evidence in this appeal and the weight of judicial authority, for reasons of ensuring safety as well as "good order and discipline," State and municipal police and fire service officers may be ordered, and are lawfully required, to strictly adhere (from head to toe) to dress codes that require specific uniforms and compel on-duty compliance with standards of personal hygiene and appearance, including limitations on adornment of their uniforms as well as conforming to head and facial hair protocols. *See, e.g., Kelly* v. *Johnson*, 436 U.S. 238 (1976) (hair grooming); *Daniels* v. *City of Arlington*, 246 F.3d 500, *cert.den*., 534 U.S. 951 (5th Cir. 2001) (jewelry; "no pins"); *Weaver* v. *Henderson*, 984 F.2d 11 (1st Cir. 1993) (Mass. State Police "no mustache"); *Risk* v. *Burgettstown Borough*, 2007 WL 2782315 (W.D.Pa.) (no pins); *cf*. *Cloutier* v. *Costco Wholesale Club*, 390 F.3d 126 (1st Cir. 2004), *cert.den*., 1131 (2005) (private employer restricting facial jewelry); *Willingham* v. *Macon Teleg. Pub. Co*., 507 F.2d 104 (5th Cir. 1975) (private employer hair length rule applied to job applicants); *Fagan* v. *National Cash Register Co*., 481 F.2d 1115 (D.C. Cir. 1973) (private employer grooming standards); *Morris* v. *Texas & Pac RR Co*., 387 F.Supp. 1232 (M.D.La. 1975) (railroad employee hair length rule).

Tattoos and body art long have been included as the subject of regulation by the Federal military services, the Massachusetts State Police, and numerous municipal police and fire departments for many years. Although tattoos present unique issues and are not completely immune from constitutional scrutiny, as a general rule, the authority of law enforcement agencies to appropriately regulate tattoos and body art that its members (or applicants) chose to embed and display on their bodies is well-established. *See, e.g., Scavone* v. *Pennsylvania State Police*, 501 Fed.Appx. 179 (3rd Cir. 2012) (rejecting state police applicant with tattoo); *Inturri* v. *City of Hartford*, 165 Fed.Appx. 66 (2nd Cir. 2006), *aff'g*, 365 F.Supp.2d 240 (D. Conn. 2005) (police officer tattoos); *Medici* v. *City of Chicago*, 144. F.Supp.2d 984 (N.D.Ill. 2015), *remanded*, 856 F.3d 536 (7th Cir. 2017) (police officer tattoos); *Riggs* v. *City of Forth Worth*, 229 F.Supp.2d 579 (N.D.Tex. 2002) (police officer tattoos). *See also Stephenson* v. *Davenport Comm. School Dist*., 110 F.3d 1303 (8th Cir. 1997) (student with tattoo); *Equal Employment Opportunity Comm'n* v. *Red Robin Gourmet Burgers*, 2005 WL 2090677 (private employee with tattoo)

With this background in mind, I turn to the Appellant's two Federal constitutional claims.[4]

Free Speech Under the First Amendment

As a threshold matter, the question arises whether the BFD Tattoo Policy is properly analyzed under the standards governing the limitations on freedom of speech by public employees, under the line of cases beginning with *Pickering* v. *Board of Educ*., 391 U.S. 563 (1968), or whether tattoos are more properly evaluated as adornments to law enforcement uniforms and appearance, governed by the line of cases emanating from *Kelly* v. *Johnson*, *supra*.

On the one hand, there is some authority that tattoos should be treated as "pure speech", those cases arise mainly in the context of zoning appeals which challenge the validity of restriction on the business of operating a tattoo parlor. *See Jucha* v. *City of North Chicago*, 63 F.Supp.3d 2014 (N.D.Ill. 2014) (tattoos are akin to paintings, drawing and writings created in other media that are undeniably protected"; city may regulate tattoo parlor by zoning restrictions on speech "reasonable [in] time, place and manner"; *Colman* v. *City of Mesa*, 230 Ariz. 352 (2012) (tattoos are "pure speech" and the "process of tattooing' is no less protected under the First Amendment than "the art of writing is no less protected than the book it produces, nor is painting less an act of free speech than the painting that results"); *Voight* v. *City of Medford*, 22 Mass.L.Rptr 122 (Middlesex Sup. Ct. 2007) (tattooing is protected art form under First Amendment).On the other hand, for purposes of analyzing the validity of restricting display of tattoos by on-duty law enforcement, I find the better approach is to view them, not as a "form of speech on matters of public concern" but, rather, as comparable to regulation of appearance and/or adornments on an officer's uniform. *E.g.*, *Inturri* v. *City of Hartford*, 165 Fed.Appx. 66 (2d Cir. 2006); *Stephenson* v. *Davenport Comm. School Dist*., 110 F.3d 1303 (8th Cir. 1997); *Medici* v. *City of Chicago*, 144 F.Supp.3d 984 (N.D. Ill. 2013), *remanded*, 850 F.3d 530 (7th Cir. 2017); *Riggs* v. *City of Fort Worth*, 229 F.Supp.2d 572 (N.D. Tex. 2002) This approach also makes sense considering that, a police officer or firefighter on-duty and in uniform, "speaks not as a citizen . . . but instead as an employee . . . ." and therefore, cannot get past even the first prong of the *Pickering* test. *Daniels* v. *City of Arlington*, 246 F.3d 500, 503-504 (5th Cir.), *cert.den*., 534 U.S. 951 (2001)

Under this approach, the law enforcement officer asserting a violation of constitutional rights bears the burden to establish that

4. It appears that the Massachusetts courts have not been presented with a case that requires deciding the lawful scope of public or private employer regulation of tattoos in the workplace and the Appellant does not specifically raise claims under Massachusetts law or the Massachusetts Declaration of Rights. Based on the related Massachusetts judicial precedent involving similar issues of free speech, I infer that the Massachusetts courts would closely follow Federal precedent in assessing the regulation of tattoos under Massachusetts law. *See, e.g., Antonellis* v. *Department of Elder Affairs*, 98 Mass. App. Ct. 251 (2020) (interpreting Federal constitutional law in employee free speech claim); *Atterberry* v. *Police Comm'r*, 392 Mass. 592 (1984) (validity of Boston Police regulation under Federal and Massachusetts constitutional law, applying *Kelly* and *Pickering* line of U.S. Supreme Court cases); *Perriera* v. *Commissioner of Social Services*, 432 Mass. 251 (2000) *(same*; First Amendment, Massachusetts Constitution and common law claims); *Howcroft* v. *City of Peabody*, 51 Mass. App. Ct. 573 (2000) (police officer's free speech claim; Federal constitutional and Massachusetts civil rights laws); *Rowe* v. *Civil Service Comm'n*, Suffolk C.A. 2019-3005 (Sup.Ct. 2021), *appeal pending* (free speech issues involving Boston firefighter)

the restriction serves "no rational purpose" as a legitimate means for the enforcement or exercise of the law enforcement agency's police powers. In *Kelley* v. *Johnson*, 425 U.S. 238, 247-48 (1976), the Supreme Court upheld a police department's grooming regulation, stating:

> ". . . Choice of organization, dress and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State police power . . . [T]he question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent [police officer] can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property. [Citations]"
>
> ". . . Neither this Court, the Court of Appeals, nor the District Court is in position to weigh the policy arguments in favor or against a rule regulating hairstyles as part of regulations governing a uniformed civilian service. . . .This choice may be based on a desire to make police officers readily recognizable to members of the public or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's [police officer's] claim . . . ."

See also De Philippis v. *United States*, 567 F.2d 341, 344 (7th Cir. 1977) (Pell, C.J, dissenting) (court should continue order granted pre-*Kelley* v. *Johnson* enjoining U.S. Marine Corp from prohibiting reservists to wear wigs to cover long hair, citing Justice Jackson's observation that: "judges are not given the task of running the Army" in *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953))

Indeed, because a law enforcement officer on-duty and in uniform is a symbol of the state police power, restrictions that might be improper for private employers to impose on their employees are justified, indeed even compelled because of the public image that a law enforcement officer projects. For example, in *Daniels* v. *City of Arlington*, 246 F.3d 500, 503-504 (5th Cir.), *cert.den*., 534 U.S. 951 (2001), the U.S. Court of Appeals upheld the city's "no pins" policy, that prevented police officers from displaying any form of pins on their uniforms, even a small gold cross that symbolized an officer's evangelical Christian faith:

> " '[a] police officer's uniform is not a forum for fostering public discourse or expressing one's personal beliefs . . .'
>
> . . .
>
> "The content of [the officer's] speech—conveyance of his religious beliefs—is intensely personal in nature. Its form melds with the authority symbolized by the police uniform, running the risk that the city may appear to endorse [the officer's] religious message."

Id. 246 F.3d at 502-504. *See also*, *Risk* v. *Burgettstown Borough*, 2007 WL 2782315 (W.D. Pa.) (prohibiting officer from wearing small cross pin as a sign of his strong Christian faith).

In weighing the rational interest of law enforcement agencies to promulgate a broad, preemptive policy under the police power to regulate the appearance of their officers while on-duty and in uniform, it also bears notice, as the BFD Tattoo policy expressly recited, that tattoos involve a very wide range of symbolic images that the bearer may intend to convey one idea, or no idea, but which another person might misinterpret.

> "Tattoos, as a form of personal expression, are frequently symbolic in nature. These symbols are often displayed without the use of words, which typically convey precise thought and meanings. Consequently, a tattoo's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol can be easily misinterpreted. The idea that meanings of symbols can often be confused is demonstrated by the case of *Stephanson* v. *Davenport Community School District*, where a high school student's modest hand tattoo was interpreted as a gang symbol . . . While the student maintained that the cross, tattooed between her thumb and index finger, was not a religious or a gang symbol, her high school attributed its own meaning to the symbol. . . ."

Medici v. *City of Chicago*, 144 F.Supp.3d 984, 988-89 (N.D. Ill. 2013), *remanded*, 850 F.3d 530 (7th Cir. 2017). *See also*, *Inturri* v. *City of Hartford*, 365 F.Supp.2d 240, 244-47 (D.Conn. 2005), *aff'd*, 165 Fed.Appx. 66 (2d Cir. 2006) (police officer's spider tattoos meant to be purely decorative but conveyed an unintended racist meaning to certain populations); *Jucha* v. *City of North Chicago*, 63 F.Supp.3d 820, 828 (N.D.Ill. 2014) ("regardless of a tattoo's content, merely having a tattoo can express a message to one's fellow members of society")[5]

Finally, the Appellant fairs no better under a "free speech" analysis as set forth in *Pickering* v. *Board of Educ*., 391 U.S. 563 (1968) and its progeny. As I concluded above, a law enforcement officer in uniform and on duty does not speak as a "citizen" within the meaning of the first prong of *Pickering. See,.e.g., Garcetti* v. *Ceballos*, 547 U.S. 410 (2006)[6] Similarly, since there was no actual testimony to explain the matter of "public concern" on which the Appellant's tattoos were meant to express an opinion, the Appellant fails the second *Pickering* prong as well. Indeed, by his own admission, many of the tattoos represented his private "self-expression" about his favorite children's book, his family, or his interest in Star Wars films, a far cry from what is required to establish speech on a topic of "public concern." *See, e.g., Connick* v. *Myers*, 461 U.S. 138 (1983). Moreover, even if one or more of the Appellant's body markings could arguably be considered to address matters of "public concern", most of them patently do

5. The evidence in the appeal is another example of how a particular tattoo may carry a one meaning to the person wearing the tattoo which no one else understands in the same way. For example, the Words "Deep Trouble' "INVA-SION" and Itsa-trap" may seem benign to the Appellant, but could invoke a fearful response in another person.

6. I am not persuaded by the Appellant's argument that, as an applicant for a public safety position, he is speaking as a 'citizen." The point of the BFD policy is to disclose the duties of an applicant as a uniformed fire service officer upon appointment. It is wrongheaded to evaluate the validity of the restrictions except as they apply to the ability to comply with those restrictions as an on-duty firefighter. *See Scavone* v. *Pennsylvania State Police*, 501 Fed.Appx. 179 (3d Cir. 2012)(state police applicant); *Willingham* v. *Macon Teleg. Pub.Co.*, 507 F.2d 1084 (5th Cir. 1975 (job applicant)

not, so the Appellant's case also founders on the *Mt. Healthy* 'but for" test. *See Mt. Healthy City School Dist*., 429 U.S.274 (1977) Lastly, for the reasons fully explored above, the BFD has met it burden to show a legitimate governmental interest served by the BFD Tattoo Policy, which includes, in particular, the interest in maintaining public trust while serving a vulnerable population, the importance of maintaining good order and discipline, and the public safety issues that preclude allowing a firefighter to cover his tattoos while on-duty and wearing his uniform.[7] .

Equal Protection Under the Fourteenth Amendment

The Appellant makes what amounts to a "class of one" equal protection argument, asserting that the BFD Tattoo Policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it only applies to new hires and treats similarly situated existing BFD firefighters differently. This claim can be addresses more summarily.[8] First, the "class of one" theory does not apply in the public employment context. *Engquist* v. *Oregon Dep't of Agriculture*, 553 U.S. 591 (2008). Second, a "class of one" equal protection claim requires that the Appellant must show that he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" which means that a government official acts "with no legitimate reason" for the decision. *See Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000); *Giordano* v. *City of New York*, 274 F.3d 740, 750-52 (2d Cir. 2001). Here, the BFD applied the BFD Tattoo Policy uniformly to all candidates, bypassing several other candidates in addition to Mr. Machen for non-compliance with the policy. Third, while it is true that the policy is not being applied to current BFD firefighters, and several currently employed firefighters have tattoos that do not comply with the policy, the BFD stated a legitimate reason for limiting the BFD Tattoo Policy to candidates only, namely, it is prohibited, for the time being, from enforcing such a policy against current members under the terms of the collective bargaining agreement with the firefighters' union. *See Scavone* v. *Pennsylvania State Police*, 501 Fed.Appx. 179 (3d Cir. 2012) (rejecting state police applicant's equal protection claim); *Tuskowski* v. *Griffin*, 359 F.Supp.2d 225 (D.Conn. 2005). Indeed, grandfathering a new public safety requirement is a recognized justification for distinguishing among employees under civil service law. *See, e.g*., Personnel Administration Rules, PAR.23 Smoking Prohibition Rule (effective prospectively 10/6/1988). *See also Jucha* v. *City of North Chicago*, 63 F.Supp.3d 820 (N.D. Ill. 2014) (rejecting tattoo artists equal protection claim for being treated differently than others who were grandfathered under the zoning policy)

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Cory Matchem, CSC Docket No. G1-19-234, is ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

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* * * * * *

7. I do not overlook that, in the current COVID environment, it is likely that BFD firefighters now, temporarily, may be using PPE equipment that would possibly cover some (but not all) of the areas displaying the Appellant's tattoos. That does not provide sufficient reason to impugn the justification and validity of the BFD Tattoo Policy as established by the evidence and set forth in this Decision.

8. The Appellant does not seriously argue, as there is no basis to do so, that he has a viable equal protection claim under a "protected class" or "selective enforcement" theory. (Appellant's Post-Hearing Proposed Decision, pp. 18-24)

In Re: Request by: DANIEL COONS and Nine (9) Others for the Civil Service Commission (Commission) to investigate the City of New Bedford's Decision to not participate in the upcoming promotional examinations for Deputy Fire Chief and District Fire Chief

RE: Tracking Number: I-21-039

March 11, 2021
Christopher C. Bowman, Chairman

***Commission Investigation-New Bedford Fire Department-Conflict of Interest-Provisional Fire Chief-Extension of Eligible List*—**At the request of no less than nine firefighters, the Commission voted to accept the recommendation of Chairman Christopher C. Bowman to investigate New Bedford's decision to extend a promotional list for Deputy Fire Chief and District Fire Chief. Apparently this move was designed to benefit the current provisional Fire Chief, Scott Kruger, who is first on the list but has not had time to study for the exam. Letting the list expire would allow available positions to be filled provisionally and give all firefighters the opportunity for permanent promotions on the next exam.

RESPONSE TO REQUEST FOR INVESTIGATION

BACKGROUND

On February 22, 2021, Daniel Coons and nine (9) other petitioners (Petitioners), all of whom are employed by the City of New Bedford (City)'s Fire Department (NBFD), filed a Petition with the Civil Service Commission (Commission), asking the Commission to investigate the City's decision to not participate in the upcoming statewide promotional examinations for Deputy Fire Chief and District Fire Chief.

2. At the request of the Petitioners, I expedited the scheduling of a show cause conference, which was held remotely via Webex videoconference on March 9, 2021. In attendance at the show cause conference was Mr. Coons, six (6) other Petitioners, Provisional Fire Chief Scott Kruger, counsel for the City and counsel for the state's Human Resources Division (HRD).

3. Based on statements made at the show cause conference, it appears that the following facts are undisputed, unless noted otherwise:

A. On May 18, 2019, the City participated in a statewide promotional examination for Deputy Fire Chief and District Fire Chief.

B. On July 15, 2019, HRD established eligible lists for Deputy Fire Chief and District Fire Chief for the City of New Bedford.

C. Scott Kruger is ranked first on the eligible list for Deputy Fire Chief.

D. These eligible lists are scheduled to expire on July 15, 2021, two years from the establishment of the eligible list.

E. Consistent with HRD's standard practice, these eligible lists may be extended until May 1, 2022 (three years from the first day of the month in which the promotional examinations were administered) if no new eligible lists have been established as of July 15, 2021.

F. The next statewide promotional examination for Deputy Fire Chief and District Fire Chief is scheduled to be held by HRD on May 12, 2021. The deadline for applicants to apply for this promotional examination is March 16, 2021.

G. There is currently no eligible list for New Bedford Fire Chief.

H. Scott Kruger, who holds permanency as a District Fire Chief and, as referenced above, is first on the current eligible list for Deputy Fire Chief, is currently serving as the City's Provisional Fire Chief.

I. The City recently completed an Assessment Center / Written Examination for Fire Chief, with the written portion of the examination held on October 14, 2020 and the Assessment Center portion of the examination on February 20, 2021.

J. HRD anticipates that it will be a "few months" (i.e.—June 2021) before an eligible list is established for Fire Chief. Provisional Chief Kruger is one of three applicants who sat for the Fire Chief examination.

K. For those communities who are participating in this year's promotional examinations for Deputy Fire Chief and District Fire Chief, eligible lists for these positions will most likely be established after the establishment of the eligible list for New Bedford Fire Chief.

L. For at least the past decade, the City has participated in the statewide promotional examination for District Fire Chief every two years. Participation in the Deputy Fire Chief examination (for which there is only one position), has been dictated by whether there is a vacancy in the position.

M. Provisional Fire Chief Kruger recommended to the City's Mayor, who is the appointing authority, that the City not participate in the upcoming promotional examinations for Deputy Fire Chief and District Fire Chief.

N. Several of the Petitioners submitted letters to the Commission in which they recounted being told by Provisional Chief Kruger that his recommendation to the Mayor was based, at least in part, on the fact that he (Chief Kruger) had not had time to study for the Deputy Fire Chief examination.

O. If the City participated in a promotional examination for Deputy Fire Chief in May 2021, a new list could be established as early as July 15, 2021. If Chief Kruger did not take that promotional examination, his name would be removed from that list as early as July 15, 2021. If the City does not participate in the statewide promotional examination for Deputy Fire Chief, and the eligible list is extended, Chief Kruger could remain first on that eligible list through May 1, 2022.

Alleging that Chief Kruger would benefit from having the eligible list extended, the Petitioners argue that Chief Kruger should have played no role in making a recommendation to the City's Mayor regarding whether or not the City should participate in the upcoming promotional examinations. Further, the Petitioners argue that, in anticipation that the City would be participating in the upcoming promotional examinations, they have been preparing (i.e.—reading recommended publications) to take the examinations.

While Chief Kruger acknowledges that he referenced his inability to study for a statewide Deputy Fire Chief examination as one reason for his recommendation to the City's Mayor, he argues that his statement was taken out of context. Chief Kruger, at the show cause conference, argued that the entire administrative command

staff, in part due to the strains put on the Department because of COVID-19, have been forced to focus their time on Department operations, as opposed to studying and preparing for civil service examinations.

Counsel for the City argued that Chief Kruger will not see any benefit from the City's decision not to participate in the Deputy Fire Chief examination, outlining scenarios showing that any potential vacancy and subsequent filling of the Deputy Fire Chief position would be made before July 15, 2021, the first date that the current eligible list for Deputy Fire Chief would expire if the City participated in the upcoming promotional examinations.

HRD, while taking no position, stated that it may not be feasible at this late date for the City to participate in the upcoming promotional examinations, pointing to the various requirements (i.e.—posting the examination, etc.) that must precede the applicant deadline of March 16th, which is only days away.

After the close of the show cause conference, lead Petitioner, Captain Daniel Coon, penned an email to me, copied to the City, stating:

> "Thank you for hearing our case. I know that there is a time constraint with getting New Bedford on for this test, and if it is not possible, I am asking you to consider not allowing the extension of the current district chief and deputy list. This will allow the positions that become available in that year to be filled with provisional promotions, and give everyone the opportunity for those [permanent] promotions on the next exam."

APPLICABLE CIVIL SERVICE LAW AND COMMISSION RESPONSE

G.L. c. 31, § 2(a) allows the Commission to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. *See Boston Police Patrolmen's Association et al* v. *Civ. Serv. Comm'n*, No. 2006-4617, Suffolk Superior Court (2007). *See also Erickson* v. *Civ. Serv. Comm'n & others*, No. 2013-00639-D, Suffolk Superior Court (2014). The Commission exercises this discretion, however, "sparingly", *See Richards* v. *Department of Transitional Assistance*, 24 MCSR 315 (2011).

Based on an initial review, I am troubled that Provisional Chief Kruger, who sits at the top of the current eligible list for Deputy Fire Chief, and who acknowledges making a statement referencing his inability to study for any statewide examination, played a major role in deciding whether the City should participate in the upcoming statewide promotional examinations by making a recommendation which was adopted by the Mayor.

Based solely on the undisputed facts here, there is at least an open question as to whether the City's decision to adopt the Fire Chief's recommendation provided for fair and impartial treatment of all candidates, which is the core mission of the Civil Service Commission, or whether that decision at least appeared to tilt the scales in favor of one or more potential candidates for potential promotion to these positions.

However, the window for the City to participate in the upcoming promotional examinations has effectively closed. Put another way, the relief being sought by the Petitioners is not available.

I do, however, believe sufficient evidence has been presented for the Commission to initiate an investigation to: a) determine whether the actions taken by the City here are consistent with basic merit principles; and, b) if not, issue other relief and orders deemed appropriate, including, but not limited to, relief related to whether the City should be permitted to extend the eligible lists for Deputy Fire Chief and District Fire Chief beyond July 15, 2021. Until further order of the Commission, no such extensions shall be allowed.

Under separate cover, the parties will be notified of the date and time of an investigative hearing, to be held remotely, regarding this matter, which will be preceded by a logistical status conference to prepare for the submission of documents, etc.

In the interim, I encourage the parties to make a good faith effort to resolve this matter in a manner that foregoes the need for a hearing and/or further orders by the Commission.

* * *

By a vote of 5-0 on March 11, 2021, the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) voted to adopt the recommendations of Commissioner Bowman, including the initiation of an investigation under G.L. c. 31, s. 2(a).

Notice to:

Daniel Coons and 6 Other Petitioners
[Addresses redacted]

Jane Medeiros Friedman, Esq.
City of New Bedford
Office of The City Solicitor
133 Williams Street
New Bedford, MA, 02740

* * * * * *

DEANNA SHINE

v.

DEPARTMENT OF CORRECTION

C-19-228

March 11, 2021
Paul M. Stein, Commissioner

Reclassification Appeal-Department of Correction-Office Support Specialist I to Program Coordinator II-Scope of Responsibilities—Commissioner Paul M. Stein turned down a poorly prepared reclassification appeal from an Office Support Specialist I at the Old Colony Correctional Center who was seeking classification as a Program Coordinator II. The Appellant did not prove that she was performing the level-distinguishing duties of Program Coordinator II 50% of her time nor did she ever have any direct reports or supervisory responsibilities.

DECISION

The Appellant, Deanna Shine, appealed to the Civil Service Commission (Commission) pursuant to G.L. c. 30,§49,[1] from the denial of the Massachusetts Human Resources Division (HRD) of a request to reclassify her position at the Massachusetts Department of Correction (DOC) from her current title of Office Support Specialist I (OSS-I) to the title of Program Coordinator II (PC-II). The Commission held a pre-hearing conference at the Commission's Boston office on November 26, 2019, and a full hearing at the UMass School of Law at Dartmouth on January 27, 2020, which was digitally recorded.[2] . Twenty-nine (29) exhibits (*Exhs.1 through 29*) were received in evidence. The Commission received a post-hearing Proposed Decision from DOC and a post-hearing Plaintiff's Brief from Ms. Shine. The DOC also submitted a Motion to Reopen the Record to submit three post-hearing proposed Rebuttal Exhibits which Ms. Shine opposed. The Motion to Reopen is denied. The proposed Rebuttal Exhibits are not received in evidence and are not relied upon in this Decision. For the reasons stated, the appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by DOC:

- Stephen Kennedy, DOC Superintendent
- Sara Parmenter, DOC Director of Payroll and Personnel

Called by the Appellant:

- Deanna Shine, Appellant
- Anthony J. Constantino, DOC Chaplain II
- Richard F. Heik, DOC Correctional Program Officer A/B

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Deana Shine, has been employed at the DOC's Old Colony Correctional Center (OCCC) since April 2011. She holds the title of Office Support Specialist I (OSS-I). (*Exhs. 1 & 5; Testimony of Appellant, Parmenter & Kennedy*)

2. In 2015, Ms. Shine was assigned to the OCCC Programs and Treatment Office (OCCC/DOT), the position she held at the time of the request for reclassification involved in this appeal. (*Exhs. 5 through 8 & 16: Testimony of Constantino, Heik & Kennedy*)

3. The OCCC/DOT is headed by a Director, who manages a variety of inmate services, including recreational, social, educational and religious activities, typically supported by a staff of one or more Recreation Officers (ROs) and Correction Program Officers (CPOs), other specialists, interns, volunteers and administrative staff. Ms. Shine reported to the Director. She never had any direct reports and evaluated no DOC employee's performance. (*Exhs.5, 8, 16 through 26; Testimony of Appellant, Heik & Constantino*)

4. As provided on her Form 30s and EPRS evaluations, examples of Ms. Shine's specific duties as the OCCC/DOT OSS-I included:

- Administrative support to the DOT, Volunteer Services Coordinator and Wedding Coordinator
- Liaison to the Recreation Staff, CPOs and Chaplain
- Liaison to governmental agencies to exchange information and coordinate activities
- Schedule and attend meetings
- Maintain electronic and meeting calendars for movies, recreation, library, religious, gym and other inmate activities
- Coordinate unit and department programs and activities
- Ensures office activities are operational and comply with standards or guidelines
- Responsible for organization and upkeep of files
- Conduct research
- Prepares monthly and quarterly reports and compiles data
- Creates and maintains data base and spreadsheet files

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

2. Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

- Responds to inquiries and correspondence and screen phone calls
- Handle inmate requests for leisure-time equipment (e.g., MP3 players, etc.)

(*Exh. 9 & 16*)

5. During her employment at OCCC/DOT, Ms. Shine was well-regarded as a good employee, whose performance consistently was rated as "meets" or "exceeds" requirements. (*Exhs 5 through 8 & 16: Testimony of Constantino, Heik & Kennedy*)

6. In June 2019, Ms. Shine filed a request for reclassification of her position from OSS-I to Program Coordinator II (PC-II). (*Exh.5*)

7. In the Interview Guide submitted by Ms. Shine in support of her request for reclassification, she provided a detailed list of the most important duties she regularly performed, substantially all of which were administrative in nature, such as daily handling of mail, scheduling, coffee orders, typing letters, handling volunteer calls, monthly and quarterly report preparation, program schedules, ordering supplies and meeting minutes. She also listed a variety of tasks she performed "as needed", such as assisting other staff with processing program paperwork. She did not provide any specific breakdown of the amount of time spend performing any particular task. (*Exhs. 5 & 16*)

8. The gravamen of Ms. Shine's reclassification request turned on her contention that, in addition to her core administrative duties, she performed additional management level "program coordination" duties that were delegated to her by her supervisor or that she was required to pick up due to an understaffed department, particularly, vacancies in the positions of RO and/or CPO. (*Exhs. 4 through 7; Testimony of Appellant, Heik & Constantino*)

9. Examples of the duties that Ms. Shine describes as "program coordinator" work include:

- Recreation and Leisure Activities Manual—Ms. Shine prepared a three-page summary of the programs provided by the Recreation Department and a fifteen page "Recreation Programs Operations Manual." She used a comparable manual prepared in October 2016 by another institution (MCI Framingham) as the template, with input from the DOT ROs and significant edits to conform to the programs offered at OCCC. Superintendent Kennedy described this one-time project as a "combination" of "cut and paste" and "some original work" (*Exh. 17; Testimony of Appellant) & Kennedy)*
- Inmate Run Programs—Inmate Self-Improvement Groups are structured inmate run groups, supervised by a Superintendent's designee (typically CPO), to provide offenders with a forum to develop interpersonal communications, problem solving and other basic life skills. Ms. Shine prepared forms based on the applicable DOC regulations and entered the data provided to her to track and evaluate these programs. She performed similar tasks for reporting activities under the "Good Time" program as well as other programs, preparing spreadsheets and evaluation forms for approval by the supervising staff member or program facilitator. DOC Personnel Director Parmenter found most of this work was not "evaluating" programs, but rather researching, scheduling and "maintaining the process for programs to be evaluated" by others. (*Exhs. 18, 20, 23 & 24; Tesimony of Appellant & Parmenter*)
- Supervision of Interns and Volunteers—The DOC provides opportunities for college students to intern at its facilities and utilizes volunteers to facilitate some of the recreational activities. These individuals are not DOC employees and there are no payroll records or personnel files maintained on them. Ms. Shine's responsibilities with interns and volunteers focused on providing documentation needed to process them on arrival and to evaluate them at the completion of their tours, for approval by the DOT or others, all as prescribed in the applicable DOC regulations and "Central Office" forms. (*Exhs. 21 through 23; Testimony of Appellant & Parmenter*)

10. On July 29, 2019, after an audit of Ms. Shine's request, DOC Commissioner Mici denied the request, concluding that "careful review . . . determined that you do not meet the classification specifications for the Program Coordinator II." (*Exh. 3*)

11. Ms. Shine duly appealed the DOC's decision to the Massachusetts Human Resources Division (HRD) which, by letter dated October 21, 2019, informed Ms. Shine that HRD concurred with the DOC's decision that the duties being performed by her did not warrant the reallocation of her position and, therefore, denied her appeal. (Exh. 2)

12. Ms. Shine duly appealed HRD's decision to the Commission. (*Exh.1*)

13. In February 2020, with this appeal pending, Ms. Shine was reassigned to the OCCC Office of Security, reporting to the Director of Security (DOS). She retained her title of OSS-I and pay status. She provides scheduling, tracking and other administrative support to the DOS. She no longer performs any duties for the OCCC/DOT. (*Exhs.27&28; Testimony of Kennedy*)[3]

14. If Ms. Shine were reallocated to a PC-II position, she would be the only such Program Coordinator at OCCS. PCs are not typically assigned to a DOC facility, such as OCCC. (*Exh. 8, 26 & 27; Testimony of Parmenter & Kennedy*).

15. The Classification Specification for the Office Support Specialist (OSS) Series, as reissued by HRD effective April 1, 2012, defines the basic purpose of the work of an OSS is to "perform administrative functions such as preparing and analyzing correspondence, reports and other materials as needed; arrange meetings and internal and external contacts; respond to inquiries, assist in various office programs and perform related work as required." (*Exh. 10*)

16. The OSS Series contains two levels: (1) OSS-I is a first-level administrative job, with authority to exercise direct supervision over, assign work to, and review the performance of clerical personnel and (2) OSS-II is a second-level supervisory job, with authority to exercise supervision over, assign work to and review the performance of clerical or technical personnel. (*Exh.10*)

3. Ms. Shine's replacement at the OCCC/DOT is a Clerk III. (*Testimony of Kennedy*)

17. Examples of the specific duties common to both OSS titles include: (1) provide administrative support to assigned personnel; (2) schedule and attend meetings; (3) conduct research: (4) maintain electronic meeting and event calendars; (5) use computer software or databases to prepare reports and compile data; (6) create and maintain database and spreadsheet files; (7) respond to inquiries and provide information to internal and external contacts; (8) coordinate unit or department programs and activities (e.g. trainings, seminars, teleconferences, employee recognition activities, recruitment and retention efforts); (9) ensure office activities are operational and in compliance with standard or guidelines; (10) acts as liaison with local and federal agencies to exchange information and coordinate activities; (11) screen phone calls; and (12) organize and maintain filing systems/file rooms. (*Exh.10*)

18. The Classification Specification for the Program Coordinator Series, issued July 1, 1987, defines the basic purpose of the work of a PC "to coordinate, monitor, develop and implement programs for an assigned agency." (*Exh.11*)

19. The PC series contains three levels, all of which are supervisory positions: (1) PC-I is the first-level supervisory job, providing direct supervision, work assignments and performance reviews of 1-5 professional, technical, administrative and/or other personnel; and may exercise functional supervision over some or all of the work of other such personnel; (2) PC-II is the second-level supervisory job, providing direct supervision, work assignments and performance reviews of 1-5 professional, technical, administrative personnel AND indirect supervision (through an intermediate supervisor) of an additional 1-5 such personnel; PC-II is the third-level supervisory job, providing direct supervision over 1-5 personnel AND indirect supervision (through an intermediate supervisor) of 6 - 15 personnel. (*Exh.11*)

20. Examples of the specific duties common to all PC positions include: (1) coordinate and monitor assigned programs activities in order to ensure effective operations and compliance with established standards; (2) review and analyze data concerning assigned agency programs in order to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc and to devise methods of accomplishing program objectives: (3) provide technical assistance and advice to agency personnel and others concerning assigned agency programs in order to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards; (4) respond to inquiries from agency staff and others in order to provide information concerning assigned agency programs; (5) maintain liaison with various private, local, state and federal agencies and others in order to exchange information and/or to resolve problems; (6) perform related duties such as attending meetings and conferences; maintaining record and preparing reports. (*Exh.11*)

21. A PC-II second-level supervisor also: (1) provides on-the-job training and orientation for employees; (2) develops and implements procedures and guidelines to accomplish assigned agency program objectives and goals; (3) reviews reports, memoranda, etc. for completeness, accuracy and content; (4) confers with management staff and other agency personnel in order to determine program requirements and availability of resources and to develop the criteria and standards for program evaluation; (5) evaluate program activities in order to determine progress and effectiveness and to make recommendations concerning changes as needed. (*Exh.11*)

APPLICABLE LAW

G.L. c. 30, §49 provides:

> "Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator. . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . ."

"The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe* v. *Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher level position the majority of the time. *See, e.g.*, *Pellegrino* v. *Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski* v. *Department of Revenue*, 14 MCSR 188 (2001) (more than 50%); *Madison* v. *Department of Public Health*, 12 MCSR 49 (1999) (at least 50%); *Kennedy* v. *Holyoke Community College*, 11 MCSR 302 (1998) (at least 50%). What must be shown is that Ms. Shine performs the "distinguishing duties" of PC-II a majority her time and, in making this calculation, duties which fall within both the higher and lower title do not count as "distinguishing duties." *See Lannigan* v. *Department of Developmental Services*, 30 MCSR 494 (2017)

ANALYSIS

Ms. Shine is well-regarded by her colleagues and she is, without doubt, a dedicated and hard-working public employee. However, reclassification of a position by the Commission requires proof that specified distinguishing duties of the title to which reclassification is requested are, in fact, actually being performed as the major part of her current work (i.e. more than 50 percent of her time is spent on these distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

First, after careful review of the evidence, I conclude that Ms. Shine was not performing the distinguishing duties of a PC-II a majority of the time. Ms. Shine did not expressly prove which PC-II duties she claimed to aggregate to 50% of her time. To the contrary, the preponderance of the evidence established that substantially all of the regular duties she performed while assigned to OCCC/DOT fit the job description of the administrative duties of an OSS-I. There is no dispute that the duties of the OSS Series and the PC Series do overlap (i.e., employees in each series, to some

extent, have responsibility to "coordinate" activities, analyze data, prepare reports and serve as a liaison within and outside the agency) and that some of the work Ms. Shine's performance falls into these categories that fits both job descriptions. However, as noted above, work expressly described as common to both the OSS and PC jobs are excluded from the tasks that are counted to show she performs at the PC-II level a majority of the time. *E.g., Lannigan* v. *Department of Developmental Services*, 30 MCSR 494 (2017)

Second, Ms. Shine had never had direct reports and exercised no formal supervisory responsibilities over other DOC employees as an OSS-I in the OCCC/DOT. Although she claims that she managed interns and volunteers, even if those duties were "supervisory" in nature, oversight of non-employees does not generally qualify as the required supervisory duties as defined by the PC Series Job Classification. *See,.e.g., Haque* v. *Department of Environmental Protection*, 27 MCSR 585 (2014); *Farinha* v. *UMass at Dartmouth*, 23 MCSR 21 (2010); *Dziczek* v. *Department of Conservation & Recreation*, 20 MCSR 200 (2007); *Canata* v. *Holyoke Comm. College*, 14 MCSR 91 (2001). This lack of supervisory responsibility is especially critical here where agency program supervisory duties are the essence of the PC Job Series, at all levels. *See Sutliff* v. *Executive Office of Labor & Workforce Dev.*, 32 MCSR 26 (2019)[4]

Third, Ms. Shine contends that, in effect, she became a "de facto" program coordinator, temporarily filling in "as needed" to perform duties that would have been the responsibility of other staff during periods when there were vacancies in the positions directly responsible for those duties. The evidence, however, does not support the conclusion that, at the time of the request for reclassification in June 2019, or at any other time, Ms. Shine regularly performed these level distinguishing duties more than 50% of the time. The Commission has consistently held that a reclassification requires proof that those duties comprise the majority of her current, permanently assigned work. In this respect, a reclassification is different from a promotion, which implies a prospective change in duties, rather than proof that the duties are already being performed at the higher level a majority of the time. Similarly, when an employee agrees to work overtime or temporarily works "out-of-grade", he or she may have some other claim (such as under a collective bargaining agreement) to receive a pay-differential for the time spent working in that capacity, but temporary, voluntary or overtime assignments are not, as a general rule, meant to be transformed into permanent promotions through the reclassification statute. *See, e.g., Brunelle* v. *Massachusetts Dep't of Transp.*, 33 MCSR 370 (2020); *Hartnett* v. *Department of Revenue*, 30 MCSR 398 (2017); *Baran* v. *Department of Conservation & Recreation*, 18 MCSR 355 (2005). *See generally, Boston Police Dep't* v. *Jones*, 98 Mass. App. Ct. 762 (2020) (in general, voluntary overtime and detail pay are not part of the regular compensation of a tenured civil servant)

Finally, Ms. Shine contends that her request for reclassification was denied in retaliation for animus by her superiors against her. This contention is not a matter within the purview of the Commission to determine in a reclassification appeal. I note, however, that I found no justification to reach such a conclusion of animus or bias from the evidence presented.

In sum, Ms. Shine did not meet her burden to establish that she performs the duties of a PC-II more than half of her time. Therefore, a reclassification of her position is not warranted.

Accordingly, for the reasons state above, the appeal of the Appellant, Deana Shine, under Docket No. C-19-228, is ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on March 11, 2021.

Notice to:

Deanna Shine
[Address redacted]

Joseph S. Santoro, Labor Relations Analyst
Department of Correction
50 Maple Street, 1st Floor
Milford, MA 01757

* * * * * *

4. Ms. Shine contends that no PC-IIs supervise other employees at the DOC and lack of supervisory duties should not prevent her from reclassification. The Commission has repeatedly noted, when reviewing reclassification appeals, the Commission must look "only at the duties of the Appellant" and the classification of other employees who held those positions prior to being transferred to their current job, or promoted by the Appointing Authority to the position, have no bearing on the issue before the Commission as to whether the Appellant meets the preponderance of the evidence test that the Appellant is performing a majority of the time at the higher level. *See Dell'Anno* v. *Massachusetts Dep't of Revenue*, CSC No. C-18-083, 33 MCSR 8 (2020); *McBride* v. *Dep't of Industrial Accidents*, 28 MCSR 242 (2015); *Palmieri* v. *Department of Revenue*, 26 MCSR 180 (2013).

ANA VILLAVIZAR

v.

HUMAN RESOURCES DIVISION

B2-21-009

March 11, 2021
Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Failure to Complete Component for the Examination—The appeal from a Lawrence detective from an E&E score of "0" caused by her failure to complete this portion of the sergeant's exam or provide supporting documentation was dismissed by an irritated Commissioner Christopher C. Bowman, who noted in his decision that the detective had admitted that she had not completed the component, agreed to withdraw the appeal, but never did so and never responded to reminder emails.

ORDER OF DISMISSAL

On December 29, 2020, the Appellant, Ana Villavizar (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not award her any education and experience (E&E) credit for the Police Sergeant examination.

2. On February 26, 2021, I held a pre-hearing conference via videoconference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

a. On 9/19/20, the Appellant took the Police Sergeant examination.

b. The deadline for completing the E&E component of the examination was 9/26/20.

c. Upon reflection, the Appellant now acknowledges that she did not complete the E&E portion of the examination. Rather, she provided information in response to certain requests for information, including submission of her DD-214, when she applied to take the examination.

d. The Appellant did not submit any "supporting documentation" to HRD as part of the E&E component of the examination.

e. As the Appellant did not complete the E&E portion of the examination and/or provide any supporting documentation, HRD has no record of such and the Appellant received a score of "0" on the E&E portion of the examination.

f. The E&E score of "0", combined with the written score received by the Appellant, resulted in a failing score.

g. Since the Appellant did not pass the promotional examination, her name did not appear on the eligible list for police sergeant.

h. As part of the pre-hearing conference, the Appellant indicated that she would be withdrawing her appeal with the Commission. No withdrawal was received by the Appellant, despite being sent a reminder email.

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31 § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "…[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.'"

ANALYSIS

It is undisputed that the Appellant sat for the written component of the Police Sergeant examination, but failed to complete the E&E component of the examination. Consistent with a series of appeals regarding this same issue, in which applicants have been unable to show that they followed instructions and submitted the online E&E claim, intervention by the Commission is not warranted as the Appellant cannot show that she was harmed through no fault of her own.

For this reason, the Appellant's appeal under Docket No. B2-21-009 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

Notice to:

Ana Villavizar
[Address redacted]

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

CHRISTOPHER J. DOHERTY

v.

CITY OF QUINCY

G1-17-234

March 25, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Quincy Police Officer-Restraining Order-Verbosity and Immaturity in Interview— While an eight-year-old restraining order taken out against this Quincy police candidate involving a dispute between his divorcing parents that contained no allegations of abuse against the Appellant himself was not grounds for his bypass, his verbosity and poor interview were.

DECISION

On November 3, 2017, the Appellant, Christopher J. Doherty (Appellant), pursuant to G.L. c. 31, § 2(b), timely filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Quincy (Appointing Authority or City) to bypass him for original appointment as a permanent, full-time Police Officer. A pre-hearing conference was held on December 15, 2017 at the offices of the Commission. I held a full hearing at the same location on January 12, 2018.[1] The hearing was digitally recorded and copies of the recording were sent to the parties.[2] The parties submitted proposed decisions to the Commission on February 9, 2018. As indicated herein, the appeal is denied.

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence at the hearing. Based on the exhibits, the stipulated facts, the testimony of:

Called by Quincy Police Department:

- Ms. Helen Murphy, the Director of Operations of the City of Quincy;
- Sergeant Dennis Maloney, Quincy Police Department; and
- Patricia McGowan, the Director of Human Resources of the City of Quincy

Called by the Appellant:

- Christopher J. Doherty, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant was thirty-three (33) years old at the time of the hearing before the Commission. He was born in Quincy and lived there when he applied to be a police officer with the Quincy Police Department. (Exhibits 4 and 5)

2. The Appellant has been employed since November 2014 by the Department of Correction as a correction officer. (Testimony of Appellant and Exhibit 4 p. 27)

3. The Appellant was in the U.S. Navy as a construction mechanic from July 2005 through July 2015, both on active duty and in the reserves. He was assigned to Port Hueneme, California; Gulf Port, Mississippi; Quincy, Massachusetts; Iraq; and Djibouti. (Testimony of Appellant and Exhibit 4 p. 29, 33, 196)

4. While in the Navy, the Appellant was subject to a Captain's Mast, a form of discipline under Article 15 of the Uniform Code of Military Justice. He was punished with loss of some pay for having left the area where he was supposed to stay. (Testimony of Maloney)

5. He received an honorable discharge. (Testimony of Appellant and Exhibit 4)

6. He is a disabled veteran, having been exposed to burn pits in Iraq and Djibouti. (Testimony of Doherty)

7. On May 20, 2009, West Bridgewater police officers responded to a report of a domestic disturbance at the Appellant's family's home. The Appellant's mother told police that the Appellant and her husband, the Appellant's father, had argued. The Appellant's father told police that his argument with the Appellant led the Appellant's parents to argue. Police established that no one had engaged in physical abuse. Police did not arrest anyone but asked the Appellant and his father to leave the home for the evening. (Exhibit 5)

8. The police informed the Appellant's mother of her rights under G.L. c. 209A, the state domestic abuse prevention statute. She applied for an emergency restraining order and the on-call judge issued one against the Appellant and his father. The restraining order included an order to relinquish all weapons. The Appellant's mother brought police to the Appellant's bedroom, where they found a rifle and a handgun, both unloaded, and neither of which

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with any conflicting provisions of G.L. c. 31, or 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 this transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion.

were secured in a locked container or with trigger locks. (Exhibit 5)

9. On May 21, 2009, Brockton District Court issued a restraining order under G.L. c. 209A against the Appellant. (Exhibit 9)

10. On May 26, 2009, the Appellant's mother called the West Bridgewater Police Department to report that she had found a third firearm that had been hidden in the Appellant's closet. Because the restraining order was still in effect, a police officer went to the Appellant's home and seized a pump shotgun that had one round in its chamber. It was not secured by a trigger lock and had not been secured in a locked container. (Exhibit 5)

11. On June 12, 2009, the restraining order was vacated or expired. (Exhibit 9)

12. On June 13, 2009, the Appellant's mother walked into the West Bridgewater Police Department and turned in ammunition that she had found in the Appellant's bedroom, ammunition for the rifle, handgun, and shotgun. (Exhibit 5)

13. On June 15, 2009, the West Bridgewater Police Department applied for a complaint against the Appellant for three charges of improperly storing a firearm in violation of G.L. c. 140, § 131L. (Exhibit 9)

14. On September 17, 2009, a court clerk denied the complaint against the Appellant at a clerk's hearing. (Exhibit 9) The clerk may have done so because the Appellant was returning to active service in the Navy. (Testimony of Maloney, Testimony of Doherty) A West Bridgewater police report described the disposition of charges as "Closed…Party leaving for overseas Navy." (Exhibit 5)

15. At some point, as a result of the police discovery of the Appellant's unsecured firearms, the Appellant's license to carry firearms was revoked and later reinstated. (Testimony of Maloney)

16. On September 19, 2015, the Appellant took and passed the civil service examination for police officer, receiving a score of 83 as a disabled veteran. (Stipulated Fact)

17. In October 2015, the Human Resources Division (HRD) established the eligible list for police officer. On June 13, 2017, HRD sent certification 04711 to the Appointing Authority. On July 11, 2017, HRD added names at the Appointing Authority's request. (Stipulated Fact)

18. On June 13, 2017, the Appellant's name appeared 13th on Certification No. 04711. (Exhibit 1, Stipulated Fact)

19. The Quincy Police Department was to select from six of the highest 13 candidates willing to accept the position. (Exhibits 1 and 2) The number was later increased to eight. (Testimony of Murphy 15, Stipulation of Fact)

Quincy Police Department's Review of the Appellant's Background

20. When the Appellant picked up his application and later dropped off his completed application, Ms. Murphy, the City's Human Resources Director, was present and eventually questioned his responsibility and maturity levels because he spoke excessively about matters such as his home and weaponry. On his way out of the building, he conversed with the security guard about these topics as well. (Testimony of Murphy)

21. A total of four police officer interviewed candidates, with two officers interviewing each candidate. (Testimony of Murphy 22, Testimony of Maloney)

22. After the Appellant returned his application, Sergeant Maloney and Officer William Plant interviewed him on July 18, 2017. (Testimony of Maloney)

23. During the interview, the Appellant referred to Officers Maloney or Plant as "dude" several times. (Testimony of Maloney)

24. During the interview, the Appellant's demeanor was not professional and he looked uncomfortable for most of it. (Testimony of Maloney)

25. During the interview, Sergeant Maloney asked the Appellant if he had had a way to secure his firearms in May 2009, referring to trigger locks or storage containers. The Appellant answered no. Sergeant Maloney asked the Appellant if he knew that the law required him to secure his firearms. He answered yes. (Testimony of Maloney)

26. During the interview, the Appellant explained that the context of the restraining order was the bitter divorce that his parents were going through. (Testimony of Maloney)

27. After the interview, Sergeant Maloney wrote a report. Under positive factors affecting the Appellant's application, he wrote: "Continuous work history with no issues. Served ten years with the Navy. Two years active and eight years in the reserves. Given an Honorable Discharge. Current[ly] employed as a Prison Guard for Department of Correction[]. Recently purchased a condo in Quincy. Positive references." Under negative factors, he wrote: "Had a restraining order taken against him by his Mother in 2009. Was summonsed into court for having an Unsecured Firearm in his home. The charges were dismissed prior to arraignment. Received a Captain's Mast and was docked pay for being out of the approved area while in the Navy. Questionable professionalism and maturity level." (Exhibit 7 p. 5)

28. During one of his visits to the Quincy police station as part of his application process, the Appellant interacted with a police officer who worked at the front desk area. He discussed his work at the prison, how many firearms he owned, and that he had been a firearms instructor in the navy. (Testimony of Maloney) Because most applicants do not volunteer information to people they encounter at the police station, the police officer considered the Appellant's behavior worth reporting to Sergeant Maloney. (Testimony of Maloney)

29. On the same day as his conversation with that police officer, the Appellant conversed with a police sergeant in the police station's parking lot about his work at the prison and how many fire-

arms he had. He mentioned that he had been a firearms instructor and hoped to be one at the Quincy Police Department. That police sergeant also approached Sergeant Maloney to pass on the conversation because he considered it unusual. (Testimony of Maloney)

30. In or around August 2017, approximately 12 people held a roundtable discussion of the applicants. Participants included all police officers who had interviewed applicants (including Sergeant Maloney), Ms. Murphy, the Police Chief, Quincy's Director of Policy, the Mayor, the Mayor's Chief of Staff, and Quincy's Director of Human Resources. (Testimony of Murphy)

31. At the roundtable, the Police Department made recommendations and then the roundtable participants decided whether to adopt or reject the recommendations. Ultimately, the Mayor decided which applicants to select, based on the recommendations. (Testimony of Murphy)

32. The Mayor, as Appointing Authority, selected eight candidates for appointment. Five of them ranked below the Appellant. (Stipulated Fact, Testimony of Murphy)

33. On October 27, 2017, the City of Quincy sent a bypass letter to the Appellant citing these reasons for the bypass: "You were the defendant on a Restraining Order, at the time the police department charged you with having several unsecured firearms in your home" and "[i]n your interactions with the Quincy Police Department you appeared unprofessional and pre-occupied with firearms." (Exhibit 8)

34. The bypass letter described the five candidates who had ranked below the Appellant. (Exhibit 8)

35. The first candidate who ranked below the Appellant was a veteran with a bachelor's degree in criminal justice from Northeastern University, who had the highest military security clearance, no criminal history, one moving violation on his driving history, and positive comments from his references, neighbors, and coworkers. (Exhibit 8)

36. The second candidate who ranked below the Appellant was a veteran with a bachelor's degree in criminal justice, who was a 911 dispatcher with the Hanover Police Department, with no criminal history or adverse driving history, and positive comments from references, neighbors, and coworkers. (Exhibit 8)

37. The third candidate was a veteran and current member of the National Guard with no criminal history, a "[p]ositive recommendation for Quincy Fire Background 2016," and positive comments from references, neighbors, and coworkers. (Exhibit 8)

38. The fourth candidate was a veteran with experience as a military police officer and armed security guard, no criminal history, two entries on his driving history (speeding in 2015, and being at fault for a vehicle crash in 2013), and positive comments from his references and neighbors. (Exhibit 8)

39. The fifth and last candidate who ranked below the Appellant was a corrections officer in the Norfolk County Sheriff's Office, who had received a bachelor's degree in criminal justice *magna cum laude* from the University of Massachusetts at Boston, and who had no criminal history, no adverse driving history, a very good credit rating, and positive comments from references and neighbors. (Exhibit 8)

40. None of the candidates who were offered positions had had restraining orders against them. (Testimony of Murphy, Maloney and McGowan)

41. None of the candidates who were offered positions had had a complaint of an unsecured firearm. (Testimony of McGowan)

42. None of the candidates who were offered positions had questionable professionalism or maturity. (Testimony of McGowan)

43. Three of the candidates who were offered positions were veterans, but not disabled. One candidate was a disabled veteran. (Testimony of Murphy)

44. The Appellant timely filed the instant appeal. (Administrative Notice)

45. At the Commission hearing, the Appellant's two explanations for his unsecured firearms were not entirely consistent with each other or with other facts that emerged during the hearing. The Appellant testified that he understood the law to require him to secure his firearms when he left the home and that he left the home when the police directed him to do so. He also testified that he had been cleaning his firearms in the basement and that they could not be secured while he was cleaning them. (Testimony of Doherty) However, the three firearms that almost led to charges against the Appellant were not seized in the basement.

46. At the hearing, the Appellant attributed his behavior at the interview to having been nervous and to his personality type being talkative. He testified that he had used "dude" at the end of the interview because the interviewers seemed to be getting chummy and he relaxed. (Testimony of Doherty)

47. At the hearing, the Appellant exhibited traits that had caused concern during his interview: verbosity and occasional inability to answer questions without meandering off of the topic.

48. At the hearing, the Appellant ascribed the bypass to the Mayor not wanting to hire him because he does not belong to the same political party as the Mayor. (Testimony of Doherty 199)

LEGAL STANDARD

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 administra-

tion" 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.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

In its relatively recent decision in *Boston Police* v. *Civ. Serv. Comm'n and Gannon*, 483 Mass. 461 (2019), the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant.The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly* v. *Civil Serv. Comm'n*, 78 Mass. App. Ct. 182,188 (2010) citing *Cambridge* at 305, and cases cited.

ANALYSIS

As shown through years of prior decisions, the Commission has given significant weight to whether an applicant has been the subject of a civil restraining order and has decided that evidence of prior domestic abuse, standing alone, is a valid reason for bypass. The Commission also reviews other factors related to the issuance of such an order, including, but not limited to: whether there was any allegation of abuse, how many years have transpired since the order was issued and whether or not the restraining order was extended beyond the 10-day return court hearing. The restraining order in this case was issued approximately 8 years prior to this appeal; it was not extended far beyond the 10-day court hearing; and there was no allegation that the Appellant abused any party. For these reasons, this, standing alone, is not a valid reason for bypass.

The City stands on firmer ground, however, regarding the Appellant's interview performance and other interactions with the Quincy Police Department. The purpose of an interview is not simply to ask a candidate follow-up questions about the investigation. An interview gauges the bearing and demeanor of a candidate, which is vital for a police officer, who interacts with the public and does so in stressful circumstances, sometimes crises. The Appellant testified that he had been nervous at the interview but a police officer faces more stressful circumstances than an interview and must remain calm and must display an appropriate demeanor for the sake of colleagues and the public, as well as to effectively manage situations. An interview also gauges, as in this case, the maturity and potential professionalism of a candidate, and reveals or confirms other matters of concern, such as the Appellant's apparent preoccupation with firearms, a concern that is relevant to police officers, to whom the Appointing Authority provides firearms.

The issue is not whether the Commission believes that it would have selected or rejected the Appellant in light of his interview and preoccupation with firearms. *Watertown* v. *Arria*, 16 Mass. App. Ct. at 332 (1983). The issue is whether the Appointing Authority's bypass was legitimate and reasonable. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. at 189, 190-191. An Appointing Authority is legitimately and reasonably concerned that a candidate who refers to his interviewers as "dude" might address members of the public unprofessionally and inappropriately. It is also legitimately and reasonably concerned that a candidate who cannot focus during an interview and engages in gratuitous interactions with police officers during the application process cannot focus on police work. Similarly, an Appointing Authority is legitimately and reasonably wary of selecting and arming a candidate whom it considers to be preoccupied about firearms. Interviews that do not proceed well for candidates can justify their bypass. *Dorney* v. *Wakefield Police Department*, 29 MCSR 405 (2016) and *Cardona* v. *City of Holyoke*, G1-15-61, 28 MCSR 365 (2015), and cases cited. Moreover, police officers are responsible for handling and securing their firearms. The Appellant's at least negligent failure to secure his firearms in his family home as required by law certainly supports the Appointing Authority's decision to bypass the Appellant.

Finally, the Appellant proffered no credible evidence that the City's Mayor was aware of the Appellant's political affiliation and/or that this played any factor in the decision not to appoint the Appellant.

CONCLUSION

For the foregoing reasons, the Appellant's appeal under Docket No. G1-19-198 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners on March 25, 2021.

Notice to:

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* * * * * *

In Re: HOLYOKE RESIDENCY INVESTIGATION

I-19-137

March 25, 2021
Paul M. Stein, Commissioner

Commission Practice and Procedure-Motion for Reconsideration-Holyoke Fire Department-Subsequent Appointment of Bypassed Minority Candidate-Backdating of Original Appointment Date—The Commission granted a motion for reconsideration of its final decision involving a Holyoke Fire Department bypass where it had ordered a minority candidate placed on the top of the next certification list. The City submitted information in the motion that it had appointed this candidate from a later certification and that the previous remedy was no longer relevant. Commissioner Paul M. Stein also ordered that the minority candidate's appointment date be backdated to when he would have been appointed had he not been wrongfully bypassed by a nonminority candidate who lied about his Holyoke residency.

ORDER ON MOTION FOR RECONSIDERATION OF FINDINGS AND CONCLUSION OF INVESTIGATION

On March 11, 2021, after completing an investigation and finding that a violation of the civil service law and rules had been committed relating to residency preference regarding the appointment of a certain Firefighter (Firefighter S) to a permanent, full-time position in the Holyoke Fire Department (HFD), the Civil Service Commission (Commission) voted 5-0 to order that Holyoke and HRD take certain action to remediate the violations by the City and Firefighter S, including providing relief to at least one (1) non-selected minority candidate who was harmed by the invalid appointment of Firefighter S [34 MCSR 36 (2021)].

On March 16, 2021, Holyoke filed a Motion for Reconsideration, asserting that the remedial relief ordered by the Commission was unnecessary because Holyoke had "hired every eligible minority candidate on the Certification".[1, 2] The Motion for Reconsideration provided information that, for the first time, confirms the Commission's conclusion that the invalid appointment of Firefighter S harmed at least one minority firefighter candidate who could have been appointed in that hiring cycle but for the invalid appointment of Firefighter S, and, further identified that candidate, who was tied on Certification 04132 with the last candidate hired from that certification. Holyoke also stated that this candidate was eventually appointed in a subsequent hiring cycle, and that he is currently serving as an HFD Firefighter.

Thus, it is no longer necessary, as previously ordered by the Commission, to revive Certification 04132 in order to identify which minority candidate was prejudiced by the invalid appointment of Firefighter S. The identity of that candidate is now known and (since it is also known that he was eventually hired), it is also undisputed that, but for the unlawful appointment of Firefighter S, this firefighter should have been appointed no later than March 20, 2017, the same date that the candidate with which he was tied on Certification 04312 was appointed. Thus, that firefighter's civil service seniority date should be adjusted accordingly.

The subsequent hiring of this minority candidate, however, does not alter the fact that the appointment of Firefighter S, who has not shown that he qualified for a residency preference in Holyoke, was a violation of the civil service law. For this reason, and for all the reasons stated in the Findings and Conclusions, as amended, all other orders remain in place.

Accordingly, the Motion for Reconsideration is ***allowed, in part and it is ORDERED:*** Amended Findings and Conclusions of Investigation shall issue consistent with the conclusions herein. Holyoke and HRD shall comply with the Corrected Findings and Conclusions as amended.

* * *

By a 5-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 25, 2021

Notice to:

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* * * * * *

1. In its motion, the City references a 3:1 (non-minority to minority) ratio that was in place in 2017 when the relevant Certification was active. To ensure clarity, the consent decree was modified in 2018, requiring a 1:1 hiring ratio on a going forward basis.

2. The City's motion also references a scrivener's error related to a Certification No. which has been corrected in the amended order.

ANDREW NARDONE

v.

CITY OF PEABODY

G1-18-209 and G1-19-070

March 25, 2021
Cynthia Ittleman, Commissioner

***Bypass Appeal-Original Appointment as a Reserve and Full Time Peabody Firefighter-Bias-Appointment of the Mayor's Friends-Stale Criminal Conduct-Driving Record-Restraining Order-Residency Requirement*—**Hearing Commissioner Cynthia A. Ittleman eviscerated the hiring practices of the Peabody Mayor and his Director of Human Resources for bypassing this experienced firefighter candidate for invalid reasons relating to past criminal conduct, his driving record, and residency status while appointing two friends of the Mayor who were ranked lower on the list. The Appellant's appeal was granted.

DECISION

On October 30, 2018, the Appellant, Andrew Nardone (Appellant), pursuant to G.L. c. 31, s. 2(b) filed the instant appeal, G1-18-209, at the Civil Service Commission (Commission) contesting the decision of the City of Peabody Fire Department (City) to bypass him for appointment to the position of permanent, full-time firefighter. On or about March 22, 2019, pursuant to G.L. c. 31, s 2(b), the Appellant filed a separate but timely appeal, G1-09-070, with the Commission contesting the subsequent decision of the City of Peabody Fire Department to bypass him for the appointment to the position of permanent, reserve firefighter. A prehearing conference was held in the appeal docketed G1-18-209 on November 27, 2018 and in the appeal docketed G1-19-070 on April 23, 2018. The parties agreed, on or about June 28, 2019, to consolidate the Appellant's two (2) appeals.

I held a full hearing regarding G1-18-209 on January 24, 2019.[1] The witnesses were sequestered. The hearing was digitally recorded, and the parties were given CDs from the hearing.[2] The parties submitted post-hearing briefs on March 14, 2019. The parties agreed that the second bypass appeal related to the reserve firefighter position (G1-19-070) would proceed *without* a hearing. The parties agreed to file briefs in the second bypass appeal. On September 13, 2019, the parties submitted post-hearing briefs in the form of proposed decisions for G1-19-070. As indicated herein, the appeal docketed G1-18-209 is allowed and the appeal docketed as G1-19-070 is denied as moot.

FINDINGS OF FACT

Seven (7) exhibits were entered into evidence at the hearing of G1-18-209, and one (1) additional exhibit, an Affidavit, was ordered produced by the Respondent at the hearing and was filed post-hearing, totaling eight (8) exhibits. Specifically, the Respondent entered two (2) exhibits plus one post-hearing Affidavit, while the remaining exhibits entered were five (5) joint exhibits. The Appellant sought to enter a 2008 printout of a Facebook page/picture and the comments posted online relative to that 2008 picture.[3] The Commission denied the Appellant's request to admit this printout into evidence. Based on the documents submitted, the testimony of the following witnesses:

For the City of Peabody

- Beth Brennan O'Donnell, City of Peabody Director of Human Resources
- Chief Thomas Griffin, Peabody Police Department
- Chief Steven Pasdon, Peabody Fire Department

For Andrew Nardone

- Andrew Nardone, Appellant

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

1. On or about April 16, 2016, the Appellant took and passed the civil service examination for Permanent Firefighter and received a score of 97. (Stipulated Fact, Jt. Ex. 1)

2. On or about November 4, 2016, the state's Human Resource Division (HRD) established a list of eligible candidates for Peabody Permanent Firefighter. (Stipulated Fact, Jt. Ex. 1)

3. On April 10, 2018, HRD, at the request of the Peabody Fire Department ("PFD"), sent Certification No. 05382 to the PFD. (Stipulated Fact, Jt. Ex. 1)

4. The Appellant was ranked eighth (8th) among those willing to accept employment. (Stipulated Fact, Jt. Ex. 1)

5. Of the seven (7) candidates who were selected for appointment by the PFD, two (2) were ranked below the Appellant. (Stipulated Fact, Jt. Ex. 1)

6. By letter dated December 7, 2018, the Mayor of Peabody, Edward Bettencourt, the Appointing Authority, notified the Appellant that the City was bypassing him for appointment. (Stipulated Fact, Jt. Ex. 2)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. The Commission denied the Appellant's request to admit the Facebook post into evidence on the basis that social media posts and/or photographs can be interpreted in many different ways and can be misleading if taken out of context.

7. The bypass letter regarding the Appellant stated:

> "Bypass due to lengthy history of negative driving incidents as recent as 2015, including multiple instances of speeding in the past five years. Your driving record includes a motor vehicle accident in 2017, six separate incidents of speeding in the past ten years (October 2015, May 2015, April 2014, November 2010, September 2010 July 2008) and other moving violations during that time, as well as two additional speeding violations in December 2006 and March 2007 in which you display a pattern of standards not acceptable in performance of firefighter functions which involve and require substantial regard for driving caution in public safety and emergency response. Bypass also due to results of background investigation, specifically including concerns regarding the nature of a "209A" Restraining Order issued against you in 2007 and other criminal charges brought against you that same year. While these charges were ultimately dismissed or continued without (sic) a required for a responsible public safety position in City government. Moreover, prior civil restraining order was not disclosed on current application packet materials. Questions exist regarding residency in past five years; no Rowley, MA address was listed on current application materials or Verification of Residency Form. However, letters submitted with current application packet dated 2013 and 2014 are addressed to applicant in Rowley, MA. Credit report from February 2016 application material does not indicate Peabody address, while Driver's License issued in 2015 does. (Jt. Ex. 2, December 7, 2018 Bypass Letter)

8. Beth Brennan O'Donnell has worked as the Director of Human Resources for the City of Peabody ("City") for three (3) years. As part of her official duties, she is involved in the process of hiring firefighters for the City. (Testimony of O'Donnell)

9. The process for appointing firefighters in Peabody is as follows: Candidates are chosen from the certification and, if they are willing to accept the position, the candidate reports to Peabody Human Resources and signs the Certification. The candidates are given a packet to complete by a date certain and they return the documents to the Peabody Fire Chief's Office. The Fire Chief reviews the packets for completeness. (Testimony of O'Donnell and Pasdon)

10. The Fire Chief's office sends all completed applications to the Chief of the Peabody Police to conduct a background check, which includes checking various databases to determine a candidate's criminal and driver history. This is a paper investigation. No further work is done with regards to the background investigation. The police department does not usually speak to references listed in a candidate's file. An officer usually looks at the letters of references the candidate has provided. The police department typically does not check with neighbor references, past or current employer references, or long-term acquaintances for fire department candidates. The City usually only checks these types of references for police officer candidates. (Testimony of O'Donnell)

11. The Chief of Police sends the reports generated from the records check back to the Peabody Director of Human Resources. Human Resources then flags those candidates who have a criminal history and/or a driver history within the last ten (10) years. (Testimony of O'Donnell)

12. The next step in the process is to provide the Mayor of Peabody all documents to review. Following the review, the Mayor meets with the Fire Chief and Director of Human Resources to identify those candidates whom the City would like to invite for an interview. Those candidates who do not "pass the background check" do not get an interview. (Testimony of O'Donnell)

13. Ms. O'Donnell, Chief Pasdon, and Mayor Bettencourt met sometime during the summer of 2018 to discuss the applications provided to the City as a result of Certification #05382. They reviewed the criminal history and other database printouts that have been provided to them by the police chief and, based upon these documents, they decide which candidates move forward in the process and receive interviews. (Testimony of O'Donnell)

14. There is no written policy with regards to the interview process. The interview is conducted by the Mayor, the Director of Human Resources and the Fire Chief. They do not have a list of questions, but the interviewers do go over who will ask what. Generally, all candidates are asked the same questions but some questions will be tailored towards the candidate's specific background. There is no objective rating system utilized for the interview. Answers are not ranked. The Mayor, the HR Director, and the Fire Chief discuss among themselves whether a candidate will move forward and be given a conditional offer of employment. Once a conditional offer is given, the candidates who qualify will undergo a physical, a drug screen, a psychological evaluation, and a Physical Aptitude Test (PAT), in that order. (Testimony of Beth Brennan O'Donnell)

Background of Appellant, Andrew Nardone

15. The Appellant, Andrew Nardone, was born in Salem and grew up in Lynn and Rowley, Massachusetts. (Testimony of Appellant and Jt. Ex. 3)

16. The Appellant received a high school equivalency diploma from the Commonwealth of Massachusetts in 2007. (Testimony of Appellant and Jt. Ex. 3)

17. The Appellant has earned college credit through two different associate degree programs but has not finished either program as of the time of the hearing in this appeal. (Testimony of Appellant and Jt. Ex. 3)

18. On or about December 19, 2013, the Appellant graduated from the Massachusetts Firefighting Academy. (Testimony of Appellant and Jt. Ex. 3)

19. On or about April 7, 2014, the Appellant obtained a National EMS Certification at the Emergency Medical Technician level. (Testimony of Appellant and Jt. Ex. 3)

20. The Appellant has obtained multiple certifications from the Massachusetts Fire Training Council including Firefighter I/II; Incident Safety Officer; Public Safety Responses to Bombing Incidents; High Voltage Emergency Awareness; HAZMAT/WMD/CT-Operations Level Responder; NFPA Electric Vehicle Safety; Ethanol for First Responders; Introduction to Incident Command System; Suicide Prevention and Intervention Training Program;

FEMA/An Introduction to the National Incident Management System (NIMS). (Testimony of Appellant and Jt. Ex. 3)

21. The Appellant worked as a paid on-call fire fighter for the Rowley Fire Department (RFD) for five (5) years and, at the time of the hearing in this appeal, had worked as a paid, on-call, per-diem fire fighter in Lynnfield for the past three (3) months. (Testimony of Appellant and Jt. Ex. 3)

22. Since 2012, the Appellant has also owned a demolition business. The Appellant drives a lot of vehicles for this job, including heavy trucks, such as box trucks, econovans, pickup trucks, and dump trucks. He does not have a CDL license as these are non-CDL vehicles. (Testimony of Appellant and Jt. Ex. 3)

23. Prior to 2012, the Appellant worked construction, commuting to towns such as Raynham, Middleton, Saugus and Peabody. However, he drives more for his own company than he did before. (Testimony of Appellant)

24. In an undated letter of recommendation authored by Mr. G, a Firefighter/EMT of the RFD, Mr. G has known the Appellant for almost four years, since the Appellant joined the RFD in 2012. Mr. G has worked beside the Appellant and attended the Fire Academy with him. He notes that the Appellant's "competency and strong work ethic… and his eagerness to help co-workers, including myself, and his willingness to learn from experienced superiors." Mr. G notes the Appellant seemed eager to take any opportunity to work at the station, including participating in cleaning details and public service events. Mr. G believes Peabody "would gain a dependable and enthusiastic individual who takes pride in his work. Andrew is highly motivated and …has always been committed to preserving the standard of excellence necessary for a high-stress job working for the public." (Jt. Ex. 3)

25. A second letter of recommendation was provided in the Appellant's 2018 application packet provided to the PFD. In an undated letter, Mr. D, a Firefighter/EMT with the RFD, indicates that, in his time working with the Appellant, he has been a valuable asset and a team-player who is capable of leading a team. Mr. D further opines that if a "situation at-hand requires the efforts of an individual then Andrew Nardone will be that focused and target-oriented individual that will get the job done." (Jt. Ex. 3)

26. No one from the PFD, the City's Human Resources Department, or the Mayor's Office contacted either Mr. D or Mr. G, the two firefighters who wrote the letters of recommendations. (Testimony of O'Donnell and Pasdon)

27. Included within his application packet for the PFD, the Appellant listed Mr. D of the RFD, Mr. M, Chief of the Lynn Fire Department, and Mr. F, the owner of a construction company where the Appellant had worked, as the Appellant's personal references. (Jt. Ex. 3)

28. No one from the PFD, the City of Peabody Human Resources Department, or the Peabody Mayor's Office contacted either Mr. D, Mr. M or Mr. F to check the Appellant's references. (Testimony of O'Donnell, Griffin and Pasdon)

Appellant's Driving Record

29. Peabody Police Chief Griffin testified on behalf of the City. He has been the Chief of the PPD for four and half (4.5) years and was previously in the Investigations Unit, rising to the rank of Captain, with the Salem Police Department for twenty-seven (27) years prior to working for Peabody. (Testimony of Griffin)

30. Chief Griffin assigned Officer Taryn Brotherton to conduct a background investigation of the Appellant, including the acquisition of a driving history from the Massachusetts Registry of Motor Vehicles (RMV). (Testimony of Griffin and Jt. Ex. 4)

31. Chief Griffin assigned Officer Brotherton to check a number of other databases for information regarding the Appellant's criminal offender record, his interstate criminal record, COP Link to check municipal police reports and an in-house database system to determine if the Appellant had been involved with the PPD. (Testimony of Griffin and Jt. Ex. 4)

32. Chief Griffin personally reviewed the documents obtained by Officer Brotherton and the Appellant's driving history was of concern to him. The license query returned a number of speeding violations. The Appellant was found responsible for some speeding violations and not others. (Testimony of Griffin and Jt. Ex. 4)

33. The Appellant's RMV driving record acquired by the PPD shows:

December 26, 2006	Speeding in Violation of Special Regulation, NR
March 7, 2007	Speeding in Violation of Special Regulation, R
March 2, 2007	Municipal Motor Vehicle Ordinance Violation , CW
July 14, 2008	Speeding in Violation of Special Regulation, R
September 23, 2010	Speeding, NR
	Failure to Drive in Right Lane, NA
November 26, 2010	Speeding, R
April 17, 2014	Speeding, R
May 5, 2015	Speeding, NR
October 22, 2015	Speeding, R

(Respondent Ex. 1)

34. Chief Griffin indicated that the City will look at ten (10) years or so into the candidate's driving history. He indicated that even if the candidate is found *Not Responsible*, the City is looking to see if there is a pattern of misconduct. The most relevant findings to the Chief when looking at someone's driver history are moving violations, especially speeding violations, because the City firefighters are entrusted with driving a large vehicle when responding to emergencies for the City. (Testimony of Griffin and Jt. Ex. 4)

35. There is no written policy as to how candidate's driver histories are reviewed. The police chief does not draft a report for a fire candidate relative to his findings about a driver history. The City

considers the history "stale" beyond ten (10) years. (Testimony of O'Donnell)

36. Officer Brotherton also provided Chief Griffin with a printout from the in-house system for the PPD, indicating whether or not the Appellant's name has appeared in a records check. This printout indicates that the Appellant was listed as the "Operator" in an "Accident" on August 10, 2017. (Respondent Exhibit 1)

37. The City never spoke to the Appellant about this accident referred to in his records. Ms. O'Donnell cannot tell if the Appellant was at fault in this accident or not. (Testimony of O'Donnell)

38. Ms. O'Donnell was concerned with the Appellant's driving history because there are six (6) incidents of speeding in the past ten (10) years and an additional two (2) speeding incidents on his record that fall beyond the ten (10) year lookback. The City looked at the 2006 and 2007 speeding incidents as part of a pattern of conduct. The City looks at the totality of the record. (Testimony of O'Donnell)

39. Peabody Fire Chief Pasdon has been the Chief of the PFD for eighteen (18) years. Chief Pasdon is familiar with Certification #05382 and is familiar with the hiring process undertaken to fill the positions of permanent firefighter relative to that certification. (Testimony of Pasdon)

40. Chief Pasdon also reviewed the Appellant's driver history and he was "very much concerned" with the Appellant's driving record. Chief Pasdon concurred with Ms. O'Donnell that there is no written policy for evaluating a candidate's driver history but the past practice is to look at a ten year window, and more specifically focussing on the past five (5) years. Firefighters for the City are expected to drive a 60-100,000 pound fire apparatus, which is more difficult to handle and stop than a regular vehicle. (Testimony of Pasdon)

41. Neither Chief Pasdon, Ms. O'Donnell, nor Police Chief Griffin discussed the Appellant's driving history with him at any time during his candidacy, nor did they discuss with him his criminal history or his involvement in a 2017 motor vehicle accident. They did not ascertain whether the Appellant was at-fault in the 2017 motor vehicle accident. The City officials did not write a report regarding their findings. (Testimony of Pasdon, O'Donnell and Griffin)

42. Police Chief Griffin did not speak to Mayor Edward Bettencourt, the Appointing Authority, about the reports his department generated relative to the Appellant's background nor did he give his opinion about the content of those reports to the Mayor. (Testimony of Griffin)

43. The Appellant was rear-ended on Rt. 128 in the 2017 motor vehicle accident that appears in his records. An insurance company report, produced by the Appellant and marked for Identification (Id. A), indicates that the Appellant was found not at fault in that accident. (Testimony of Appellant and Identification A)

44. The Appellant never spoke to either the Mayor, Fire Chief Pasdon, Police Chief Griffin, Officer Brotherton, or Ms. O'Donnell about his driver history.[4] (Testimony of Appellant)

Appellant's Criminal History

45. The Appellant's record indicates that a 209A civil restraining order was issued against him beginning on January 11, 2007 and expired on September 10, 2007. (Respondent Ex. 1)

46. The Appellant's criminal history indicates that he was charged with assault and battery with a dangerous weapon and procuring alcohol for a minor in September 2007. The first case was dismissal by the court and the second was disposition of the Procuring Alcohol count was continued without a finding (CWOF). (Respondent Ex. 1)

47. The Appellant did not mention in his application that he was the subject of a civil restraining order in 2007. (Jt. Ex. 3 and Testimony of Griffin)

48. A 209A restraining order is a civil matter in the Commonwealth of Massachusetts, unless the restraining order is violated, at which point it becomes a criminal violation. (Testimony of Griffin)

49. The Appellant mistakenly considered the 209A restraining order which appears in his criminal history to be a criminal matter and not a civil matter. The Appellant did not list this matter in his application because there was nowhere to specifically note it. (Testimony of Appellant)

50. On page 9 of the application, question 8A asks the Appellant if had "ever been convicted of a criminal offense?" The Appellant marked the box to indicate "no". On page 9, question 8D asks if he had "ever been a plaintiff or a defendant in a civil court action?" The Appellant did not include the 2007 restraining order in this section either because he mistakenly thought the restraining order was a criminal matter (of which he was not convicted), not a civil matter. (Jt. Ex. 3 and Testimony of Appellant)

51. There is no separate, specific question in the Appellant's PFD application packet that asks solely about prior restraining orders. (Jt. Ex. 3)

52. Neither Mayor Bettencourt, Chief Pasdon, Chief Griffin, Officer Brotherton, nor Ms. O'Donnell ever spoke with the Appellant regarding his criminal history. The City of Peabody did not obtain the police reports relative to the entries on the Appellant's criminal history or relative to the restraining order issued against the Appellant in 2007. The City did not question the Appellant about the restraining order. (Testimony of Griffin, Pasdon, O'Donnell and Appellant)

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4. The 2017 motor vehicle accident does not appear as an entry in Joint Exhibit 4, the Appellant's RMV Driver History, rather, this entry appears in Respondent's Exhibit 1, in a printout from the PPD's in-house system which identifies whether the Appellant's name, address, or vehicle appears in any reports.

Residency Preference

53. The Appellant signed a Verification of Residency Form, attesting that he maintained a residence in Peabody for one full year prior to taking the exam from which certification #05382 was created. The time frame for residency preference was from 2015-2016. (Jt. Ex. 3 and Testimony of O'Donnell)

54. The Verification of Residency Form requires candidates to "list places(s) of residence for the past 24 months." The Appellant wrote that he lives in Peabody and has been a resident in the City since 2013. (Jt. Ex. 3)

55. As part of his application, the Appellant gave the City a letter from the Mass. Fire Training Council regarding his Firefighter I/II certifications. The letter was dated December 18, 2013 and contained his address parents' address in Rowley, MA. (Jt. Ex. 3 and Testimony of Appellant)

56. As part of his application, the Appellant gave the City a letter from National Registry of Emergency Medical Technicians regarding his EMT Certification. The letter was dated April 14, 2014 and contained his parents' address in Rowley, MA. (Jt. Ex. 3 and Testimony of Appellant)

57. These letters sent to his parents' address were from agencies that he does not interact with on a daily basis so he never bothered to correct his address to reflect the Peabody address. These documents were part of the Appellant's application with the PFD to show evidence of his education/certifications, not to prove or disprove his residency in 2013 or 2014. (Testimony of Appellant)

58. The City never questioned the Appellant relative to the listing of his address as a Rowley address in 2013 and 2014. (Testimony of Donnell and Appellant)

59. The Appellant's credit report provided to the City with his application materials contains the Appellant's Peabody address at the pertinent point in time. (Jt. Ex. 3)

60. The City did not investigate the Appellant's residency. The City did not send out investigators to check on the Appellant's residence nor did they speak to the Appellant regarding any questions the City may have had about his residency. (Testimony of O'Donnell and Appellant)

61. On occasion for other past candidates, the City has investigated their residency. (Testimony of O'Donnell)

62. The Appellant gave the City the contact information of his landlords in Peabody but the City never contacted them. (Testimony of Appellant and Jt. Ex. 3)

Relationship of the Mayor and Candidate - Mr. P

63. The City bypassed the Appellant and hired Mr. P.[5] (Jt. Ex. 2)

64. Mr. P grew up in the City of Peabody and is a graduate of Peabody Veterans Memorial High School. He has been employed by the PFD as a Signal Maintainer since March 2013. (Jt. Ex. 2)

65. Mr. P is "in the process of becoming EMT certified." (Jt. Ex. 2)

66. Mr. P grew up with Mayor Bettencourt and HR Director O'Donnell. (Testimony of O'Donnell)

67. Ms. O'Donnell and Mr. P went to high school together, although they do not currently "run in the same circles." (Testimony of O'Donnell)

68. Mr. P and Mayor Bettencourt are friends and are contemporaries. They grew up in Peabody and went to high school together. (Testimony of O'Donnell)

69. The Mayor did not recuse himself from involvement in this hiring process with respect to his friend, Mr. P. (Respondent Exhibit 3, Affidavit of O'Donnell dated January 31, 2019 and email exchange between this Commissioner and the Respondent's counsel dated January 31, 2019)

70. Multiple members of the PPD and PFD with first-hand knowledge told the Appellant that they joked that there is a "P Line" on the certification and that the Mayor would do anything he needed to get down to his friend's name (Mr. P) on the certification because Mr. P had not taken the civil service examination again and would not be eligible on the next certification. (Testimony of Appellant)

71. Chief Pasdon has supervised Mr. P during his employment with the City as a Signal Maintainer. (Testimony of Pasdon)

72. Mayor Bettencourt, Ms. O'Donnell, and Chief Pasdon conducted the interviews of those applicants selected from certification #05382, including Mr. P, and made final hiring decisions, including the decision to hire Mr. P. (Testimony of O'Donnell and Pasdon)

73. Mr. P's driver history was ascertained by the Peabody Police in the course of his records check. Mr. P was cited for speeding on five (5) occasions between 1990 and 1995. He was cited in 1998 for unsafe operation of a motor vehicle and failure to stop/yield. He has had no speeding citations within the last ten (10) years and the only infraction within the past ten (10) years on his driving history is an improper turn in 2010 and an unpaid parking ticket in 2013. (Testimony of O'Donnell and Jt. Ex. 5)

74. Mr. P's criminal history report states that he had two criminal charges: one in 1994 for disorderly person and one in 2004 for compulsory insurance violation, both of which were dismissed by the court. (Jt. Ex. 5)

75. Mr. P's driver history was not of concern to Police Chief Griffin since Mr. P's speeding citations occurred well outside of

5. For purposes of confidentiality, this candidate will be referred to by the first letter of his last name. Every candidate will be referred to in this manner, hereafter.

the ten (10) year window and he was not concerned with the one 2010 citation for an improper turn. Chief Griffin never contacted Mr. P to discuss his driving record. He noted that, although Mr. P had some entries on his driver history in the 1990's, he figured that perhaps it is due to maturity, a lifestyle change, or the choice to abide by the regulations which caused Mr. P not to have any future speeding violations on his record. (Testimony of Griffin)

76. Fire Chief Pasdon testified that there was nothing of concern in Mr. P's driver history. (Testimony of Pasdon)

Relationship with the Mayor and Candidate - Mr. O

77. The City bypassed the Appellant and hired Mr. O. (Jt. Ex. 2)

78. Mr. O grew up in the City of Peabody and is a graduate of Peabody Veterans Memorial High School. (Jt. Ex. 2)

79. Mr. O lacks fire department experience. (Jt. Ex. 2)

80. Mr. O and Mayor Bettencourt are friends. (Affidavit of O'Donnell, dated January 31, 2019, Respondent Exhibit 3, and email exchange between this Commissioner and the Respondent's Counsel dated January 31, 2019)

81. The Mayor did not recuse himself from involvement in this hiring process with respect to Mr. O. (Affidavit of O'Donnell, dated January 31, 2019, Respondent Exhibit 3, and email exchange between this Commissioner and the Respondent's Counsel dated January 31, 2019)

APPLICABLE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass.1106 (1996). Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L .c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L. c.31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it had "reasonable justification" for the bypass. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal C*t., 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient").

The Commission's role, while important, is relatively narrow in scope: to review the legitimacy and reasonableness of the appointing authority's actions. *See Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly* v. *Civil Serv. Comm'n*, 78 Mass. App. Ct. 182,188 (2010). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the acts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct.331, 332 (1983). See *Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975).; *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

ANALYSIS

Of the reasons the City has given for bypassing the Appellant, the only one about which the City has raised legitimate concerns is the Appellant's driver history. However, the bias that permeated the City's hiring process violates the tenets of civil service basic merit principles, requiring the Commission to allow the bypass appeal docketed as G1-18-209. I address the City's bypass reasons below.

The Mayor of Peabody was involved in significant parts of the hiring process at issue in the appeal docketed G1-18-209. The Mayor is a longtime, personal friend of two selected candidates (Mr. P and Mr. O), whose names appeared below the Appellant's on the certification. For these reasons, the Mayor should have insulated himself from his involvement in the hiring process until he received the ultimate recommendations from those to whom he should have delegated the hiring process. The Appellant was in direct competition for the same position being sought by Mr. P and Mr. O. The Mayor should not have been involved in reviewing the purported background investigations of Mr. P or Mr. O. He should not have determined who would receive an interview. He should not have participated in the initial interviews themselves nor should he have subjectively determined, based on those who were interviewed, who was ultimately given a conditional offer of employment.

The lack of a level playing field makes it difficult, at best, to determine whether the City would have viewed the Appellant's background through a different lens if he, like other lower-ranked candidates, was a longtime, personal friend of the Mayor. Would the City have considered more fully the Appellant's candidacy learning, for example, that he was so dedicated to becoming a fulltime, permanent firefighter that he earned many certificates in the field of fire safety and firefighting on his own volition? Would the City have called and spoken to the Appellant's firefighter-references to gain insight into the Appellant's experience as a working firefighter in another community? Would the City have actually investigated the Appellant's residence? Would the City have given the Appellant the opportunity to address his dated criminal record? The Appellant deserved, but was denied, the opportunity to be evaluated as part of a process that, at a minimum, has not been compromised by patronage involving long-lasting, personal relationships between the Appointing Authority and other candidates.

Supporting the Appellant's testimony about the favoritism he heard from members of the PFD and/or the PPD, Ms. O'Donnell testified and confirmed in an Affidavit that the Mayor is a personal friend of both Mr. P and Mr. O, whose names were ranked below the Appellant on the certification, yet were chosen over the Appellant. Any decision to bypass candidates ranked above the Mayor's friends benefitted Mr. P and Mr. O. The Mayor actively participated in the decision-making process, benefitting Mr. P and Mr. O. Specifically, the Mayor reviewed all documents provided by the Chief of Police relative to the background investigations of all candidates. The Mayor was then involved in discussions about the background investigations and in the determination of who, and who would not be given the opportunity for an interview, the next step in the hiring process. The Mayor took part in the interviews of all who were given an interview. There appears to be minimal uniformity of questions the candidates were asked in their interviews. The Mayor made the determination, along with Ms. O'Donnell (who has also known Mr. P and O since high school) and Chief Pasdon, about who would be given a conditional offer of employment. The Appellant was not chosen by the Mayor for an interview yet two candidates with whom the Mayor was personal friends, and whose names were ranked below the Appellant on the certification, were given interviews.

The hiring processes used in this case were based on unduly subjective methods of assessing the candidates, in addition to processes that are inconsistent with basic merit principals of the civil service hiring process. 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. Due to the clear bias and/or favoritism of the Mayor, the City's bypass reasons are fatally flawed.

Driver History

The City's bypass letter states, in part, that it bypassed the Appellant,

> "due to the lengthy history of negative driving incidents, as recent as 2015, including multiple instances of speeding in the past five years. [His] driving record includes motor vehicle accidents in 2017, six separate incidents of speeding in the past ten years (October 2015, May 2015, April 2014, November 2010, September 2010, July 2008) and other moving violations during that time, as well as two additional speeding violations in December 2006 and March 2007 in which you display a pattern of standards not acceptable in performance of firefighter functions which involve and require substantial regard for driving caution in public safety and emergency response." Jt. Ex. 2.

When an appointing authority's hiring process comports with civil service basic merit principles, the Commission owes the appointing authority substantial deference in determining whether a firefighter candidate's driving record results in his non-selection. The appointing authority, however, "must show that the reason is valid, and reasonable, and not arbitrary and capricious." *Stylien* v. *Boston Police Dept.,* G1-17-194 (April 12, 2018). In reviewing such cases, the Commission places an emphasis on the more recent driving infractions as opposed to stale or non-moving violations that are not necessarily reflective of a candidate's ability to effectively drive a fire truck. *Stylien* v. *Boston Police Dept*., G1-17-194 (April 12, 2018). Moreover, a candidate's driving history must be evaluated in the proper context, including consideration of the number of driving hours logged by a candidate and where the driving occurred. Failure to do so runs the risk of favoring candidates who have a "good driving history simply because they drive less and/or whose driving history occurs in areas less challenging…." *Stylien* v. *Boston Police Dept*., G1-17-194 [31 MCSR 154] (June 21, 2018).

The City's witnesses all testified that they relied on the Appellant's driver history printout as their source of evidence relative to his driving history. At the hearing for the 2018 appeal, the Appellant testified that since 2012, he has owned a demolition company and that he drives five to six (5-6) hours per day for this company, using different types of heavy trucks, although he does not have a CDL license. The Appellant asserted the driving he does for his demolition company is similar to truck hauling or a delivery driver, to some extent. I did not credit the Appellant's testimony as evidence of the type of extensive driving which would warrant a closer look, or mitigation for the driving citations on the Appellant's driver history. The Appellant was involved in one motor vehicle accident in 2017 for which he was found to be not at fault. His driver history has no entries relative to speeding offenses for 2016, 2017, and 2018. *See e.g. Pacini* v. *Medford Fire Dept*, 18 MCSR 351, 353 (2005)(Commission did not consider infractions for which applicant was found not responsible). His last speeding citation was in 2015 and he was found not responsible, three years prior to this application to the PFD.

The Appellant claims his driver history is comparable to that of Mr. P, who was selected over of the Appellant. I do not find Mr. P's driver history comparable to the Appellant, mostly because of the timeframe of Mr. P's speeding infractions, which were in the 1990's, and the time frame of the Appellant's record, 2008-2015 (and 2006, 2007 to show a pattern of similar citations). Mr. P had numerous entries on his driver history, including four (4) speeding violations (May 1990, January 1991, July 1992, and July 1995—although he was found responsible for only one of them)

and failure to stop/yield in 1992 and unsafe operation (1998). Any other entry on Mr. P's driver history was not a moving violation. The City's witnesses testified that Mr. P's driver history was of no concern. I find the entries on Mr. P's driver history from 1990 to 1998 to be stale, since they occurred between 20-28 years before this 2018 bypass appeal.

The Appellant's driving infractions are much more recent than those of Mr. P. The Appellant was cited for six (6) speeding violations in the past ten (10) years and was found responsible for four (4) of them between 2008 and 2015. The City also cited to two other speeding violations on the Appellant's driver history that fall outside of the ten (10) year lookback window, one in 2006 (not responsible) and the other in 2007 (responsible) to show a pattern of behavior. On the other hand, the only entries on Mr. P's driving history that fall within the ten-year lookback window are: in 2004, unregistered motor vehicle (not responsible), uninsured motor vehicle (dismissed), and no inspection sticker (responsible); in 2010, improper turn (responsible); and in 2013, an unpaid parking ticket. I do not find these entries on Mr. P's driver history to be comparable to the Appellant's driver history during the noted ten-year period. As a result, the Appellant's driver record at the time he applied to the PFD in 2018 raised concerns.

Criminal History

The City failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his criminal record. In its December 7, 2018 bypass letter, the City wrote that the Appellant was bypassed for, among other reasons,

> "…results of a background investigation, specifically including concerns regarding the nature of a '209A' Restraining Order issued against [him] in 2007 and other criminal charges brought against [him] that same year. While these charges were ultimately dismissed or continued with a [sic][6] required for a responsible public safety position in City government. Moreover, prior civil restraining order was not disclosed in current application packet materials." Jt. Ex. 2.

The PPD was asked to obtain background information about the candidates, including the Appellant. The PPD obtained the Appellant's criminal record information and produced a computer printout of a Peabody Police Department in-house database. The record indicates that the Appellant had a 209A civil restraining order issued against him at the request of a family member on January 11, 2007 and that order was continued in effect until September 10, 2007. Additionally, the record indicates that the Appellant was charged with both assault and battery with a dangerous weapon (A&B DW) and with procuring alcohol for a minor on March 26, 2007. The Commission takes the issuance of a restraining order against a candidate very seriously and considers a variety of factors in assessing any such order, including whether an emergency restraining order has been extended to one year. In this case, the order was in effect for less than one year but the record lacks any other information. There is no indication in the record that the Appellant has been the subject of any other restraining orders since 2007. With regard to the criminal charge in the Appellant's record, the first criminal charge against was dismissed and the latter was continued without a finding and ultimately dismissed (both on September 14, 2007).

One of the City's arguments in favor of bypassing the Appellant is that he had not disclosed the restraining order on his application. However, the Appellant credibly explained in his testimony before the Commission that he was under the mistaken belief that the restraining order was a criminal matter, not civil.[7] The Appellant also testified that he did not mention the 2007 restraining order in the section of the application requesting criminal information because it only requested information pertaining to convictions. There is no indication in the record that the Appellant was charged with violating the restraining order and convicted of a crime. The Appellant further credibly testified that he did not disclose the 2007 restraining order in the section of the application that asks whether he had been involved in civil litigation because he thought it was a criminal matter. Nowhere in the application is there a separate question asking if a restraining order has been issued against the applicant. It is understandable that an applicant may be confused about whether a restraining order is a criminal or civil matter.[8]

The use of a criminal record, without the appropriate review of the circumstances behind a criminal record, particularly a stale offense that does not suggest a pattern of misconduct, is a problematic reason to bypass an otherwise qualified candidate. *Finklea* v. *Boston Police Dep't.*, G-1-01-5-070 [30 MCSR 93 (2017)], *aff'd in rel. part*, *Finklea* v. *Civil Service Comm'n,* 34 Mass.L.Rptr. 657, *6 (2018); *Stylien* v. *Boston Police Dept*, G1-17-194, 12-13 (April 12, 2018). In the present case, the City admits that it did not obtain information about the underlying facts associated with the two 2007 charges in the Appellant's record or the 2007 restraining order prior to bypassing him. Neither Officer Brotherton nor Chief Griffin, who conducted the background checks, contacted the Appellant to discuss their findings or otherwise provide the Appellant with an opportunity to explain the incidents. Nor did the Director of HR, the Fire Chief, or the Mayor speak to the Appellant about his record or otherwise offer him the opportunity to address it.

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6. In the hearing of this matter, the Director of Human Resources, Beth Brennan O'Donnell, admitted that there was a clerical error in this bypass letter. The letter did not sufficiently indicate that the Appellant's case was Continued Without a Finding, which finding led the Respondent to bypass the Appellant. The Commission found that this was a clerical error or no legal significance.

7. Indeed, it is not unusual for laypersons and others to believe that a restraining order is a criminal, not civil matter. In fact, restraining order information appears on criminal offender record information even though it is a civil matter.

8. At the hearing of this matter, the Respondent attempted to add a reason for bypass in G1-18-209, specifically "untruthfulness." There is no mention of untruthfulness in the 2018 bypass letter. The Commission barred the Respondent from adding this to its argument for bypass, pursuant to G.L. c. 31, s. 27 and HRD Personnel Administrator Rules PAR.08(4), which explicitly bars appointing authorities from adding any reasons not included in the bypass letter.

In its recent decision in *Boston Police* v. *Civ. Serv. Comm'n and Gannon*, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. The City has not proved by a preponderance of the evidence standard that the alleged criminal conduct actually occurred.

That turns to whether the Appellant's criminal conduct, if it actually occurred, is a valid reason for bypass. The City failed to establish by a preponderance of the evidence that the stale isolated events from 2007 provide a valid ground for bypass. The City acknowledges that the charges stem from an incident that occurred eleven (11) years prior to the Appellant's application to the PFD. The Appellant was not convicted of the two criminal charges. The City argues that this notation on the Appellant's criminal record alone is reason enough to bypass the Appellant yet the Commission knows nothing more than the entry on the record. The Commission does not know any of the underlying facts relative to the charges or what the Appellant, witnesses or victims recall since there is no indication in the record that the City discussed the matter with the Appellant or otherwise investigated it beyond the mere entry of the charges on the Appellant's record.

In *Stylien* v. *Boston Police Department*, the Commission concluded that a stale felony CWOF from 16 years ago, and the Appellant's driver history, when viewed in the proper context, did not provide a reasonable justification to bypass the Appellant in that case. *Stylien* v. *Boston Police Department*, G1-17-194 (2017). The Commission in *Stylien* found that the appointing authority was entitled to give some weight to an applicant's criminal record but they may not automatically disqualify a candidate because he has a felony CWOF on the record, particularly when the CWOF is stale and is not accompanied by any evidence showing a pattern of criminal behavior. As in *Stylien*, the City of Peabody has failed to articulate an argument supported by sufficient credible evidence, the reason that a stale, isolated incident provides a valid reason for bypass. Further, leaders on both sides of the political spectrum in the Commonwealth have advocated looking beyond a snapshot of who a candidate was many years ago to look at who that candidate is today, as defined by the intervening years since the misconduct occurred. The Appellant provided two positive letters of recommendation from two local fire departments with which he has been associated as an on-call firefighter. He has completed many firefighting certification courses upon his own initiative. He has successfully begun and operated his own business. Because the City failed to obtain and consider such information, it did not establish by a preponderance of the evidence that the Appellant's criminal record provided reasonable justification for his bypass.

Residency

The City also failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on his lack of residency in Peabody. Specifically, the City's bypass letter states that "[Q]uestions exist regarding residency in the past five years; no Rowley, MA address was listed on current application materials or Verification of Residency Form. However, letters submitted with current application materials does not indicate Peabody address, while Driver's License issued in 2015 does." Jt.Ex. 2. Pursuant to G.L. c. 31, s 58, the City is authorized to give preference to candidates for civil service who have maintained a Peabody residence for one year immediately prior to the date of the relevant civil service examination. The timeframe that the City of Peabody would look to in this particular instance for the Appellant's residency status would be from 2015-2016.

The Appellant provided the City with numerous documents in his application that indicate that he lived in Peabody during the required time period. This included a 2016 credit report and a driver's license. The Appellant also signed a Verification of Residency Form on page 13 of Joint Exhibit 3, where the Appellant listed two different Peabody addresses from 2013-2018. At no point during the Appellant's candidacy did the City reach out to the Appellant to inquire about his residency. The City did not undertake its own further investigation into questions it had regarding the Appellant's residency. In addition to consulting the Appellant, the City could have checked official sources such as voting records, bank records and car insurance records or check the Appellant's landlords and neighbors but the City failed to do so.

The City simply points to two letters in the Appellant's application which have a Rowley address. One letter is a 2013 letter is from the Massachusetts Fire Training Council and the 2014 letter is from the National Registry of Emergency Technicians. These letters, however, are from 2013 and 2014, not the 2015-2016 residency period at issue here. The Appellant testified that the letters were sent to his parents' address and the two institutions that sent the letters are not places that he deals with on a daily basis so he never bothered to update his address and correct them. Moreover, the Appellant gave those letters to the City with his application to bolster his educational credentials for the position of permanent firefighter, not to prove residency for the timeframe of 2015-2016. If the City had asked the Appellant about the two letters, he could have easily explained them but the City failed to do so. Therefore, the City failed to establish that the Appellant was not a Peabody resident in the year prior to the civil service exam that the Appellant took and passed.

CONCLUSION

For all of the foregoing reasons, the Appellant's appeal under Docket G1-18-209 is hereby ***allowed***.

Under the appeal G1-18-209, pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1) The state's Human Resource Division shall place the name of Andrew Nardone at the top of the current or next Certification for the position of permanent, full-time firefighter in the City of Peabody until he has been appointed or bypassed.

2) If Mr. Nardone is appointed, he shall receive the same civil service seniority date as those candidates appointed from Certification 03582.

Since the Appellant is being awarded relief through the appeal docketed under G1-18-209, his subsequent appeal under Docket No. G1-19-070, is ***dismissed*** as moot.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 25, 2021.

Notice to:

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* * * * * *

ANDREW G. PIERCE[1]

v.

HUMAN RESOURCES DIVISION[2]

B2-18-098

March 25, 2021
Cynthia A. Ittleman, Commissioner

***Examination Appeal-E&E Credits for Mass Environmental Police Promotional Exam-Service in Coast Guard as Boatswain's Mate and Boarding Officer-Full Police Powers*—**The denial by HRD of law enforcement E&E credits on the Environmental Police promotional exam for time served in the Coast Guard as a boatswain's mate and boarding officer was affirmed by the Commission in finding that the Appellant had not engaged in the functions constituting full police powers such as performing arrests.

DECISION

The Appellant, Andrew Pierce, appealed to the Civil Service Commission (Commission) pursuant to G.L. c. 31, §§2(b) and 22, seeking review of the decision by the Human Resources Division (HRD) to deny him credit for experience as a Boatswain Mate for the United States Coast Guard (Coast Guard) on the 2018 Massachusetts Environmental Police promotional examination.[3] On July 5, 2018, a pre-hearing conference was held at the offices of the Commission in Boston. A full hearing was held at the same location on December 11, 2018.[4] The hearing was digitally recorded and a CD was made of the hearing.[5] Both parties filed post-hearing briefs.

FINDINGS OF FACT

I entered nine (9) exhibits from the Respondent and seven (7) exhibits from the Appellant. Based on the documents submitted into evidence and the testimony of:

Called by the Appellant:

- Andrew Pierce (The Appellant)

Called by the Respondent:

- Gilbert LaFort, Examination Administration Supervisor, HRD

1. The Appellant represented himself at the prehearing conference and was represented at hearing by Attorney Farrell, who withdrew his representation after submission of the post-hearing brief.

2. As of the time of this decision, Attorney Downey no longer works with Human Resources Division (HRD) and Melinda Willis, Deputy General Counsel, represents HRD in this matter.

3. In his appeal to the Commission, the Appellant requested review of questions 5, 6, and 7. At the prehearing conference, the Appellant agreed that he should not give credit for questions 6 and 7.

4. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

5. 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

and after taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant has been employed as an Environmental Police Officer at the Massachusetts Environmental Police (MEP) since May 5, 2015. (Appellant Testimony; Resp. Ex. 3). Prior to being employed at MEP, the Appellant was in the Coast Guard for 21 years. (Appellant Testimony).

2. The Appellant took the promotional exam to become an MEP Officer C (Sergeant) or D (Lieutenant) on February 16, 2018. (Resp. Ex. 1).

3. The promotional exam consisted of a written examination, worth 60 percent of the overall examination, and credit given for education and experience (E&E), which accounted for 40 percent of the examination. (LaFort Testimony at 44; Resp. Ex. 1).

4. The Education and Experience Form (E&E form) is designed to be completed by the Applicant online and be submitted with documentation that supports the applicant's experience. (LaFort Testimony; Resp. Ex. 1).

4. Question 5 on the E&E form asks the number of months experience in the MEP. The Appellant answered "24-35 months" and received 4.0 points for that experience. (LaFort Testimony; Resp. Ex. 2).[6]

5. The instructions for the E&E Question 8 begin with the heading "Police Experience Outside the Department". This question asked the Appellant to specify the number of months "in a recognized federal, state, or municipal *police department* which involved full police powers." (Resp. Ex. 2). (italics added).

6. Work experience claimed on the E&E form must be supported by an employment verification form and or by letter on official letterhead with the signature of the appointing authority or designee. (Resp. Ex. 1). Supporting documentation must be submitted with the E&E form at the time of submission or emailed prior to the deadline of submission. (LaFort Testimony; Resp. Ex. 1).

7. The Applicant timely submitted his E&E form and three pieces of supporting documentation: DD214 specifying discharge from active duty (Resp. Ex. 4), a Department of Veterans Affairs form verifying a service-related disability (Resp. Ex. 5), and his Employment Verification Form verifying his work at MEP. (Resp. Ex. 3).

9. When reviewing the Appellant's application, HRD cross-referenced the questions in which the Appellant indicated law enforcement experience with the supporting documentation. Mr. LeFort, HRD Examination Administration Supervisor, first looked to the "Primary Specialty" of former employment listed in the application to make that determination but found no indication of a job title or primary specialty listed.[7] (Lefort Testimony; Resp. Ex. 4). He granted no points for questions 8. (Lefort Testimony); Resp. Ex. 2, 4).

10. While in the Coast Guard, the Appellant was a certified Maritime Law Enforcement Boarding Officer from December 1995-May 2014. Boarding Officers are customs agents that enforce maritime law and have police powers such as making an arrest. (Appellant Testimony; App. Ex. 1). Additionally, the Appellant served as a Third Class Boatswain with the rank of Chief Petty Officer. In these two roles, the Appellant's duties were often "fluid", with the majority of duties on larger vessels consisting of navigation, maintenance, weapons maintenance and personnel, and the majority of duties on smaller vessels involving boarding under maritime law enforcement. (Appellant Testimony).

11. The Appellant maintained the authority to carry a weapon, issue written warnings and violations and terminate the voyage of unsafe vessels. This authority stemmed from the Appellant's Coast Guard training. (Appellant Testimony, App. Ex. 6).

12. The Appellant's evidence at the full hearing at the Commission included detailed criteria that he successfully performed in order to be a Boarding Officer. These skills included weapons certification, conducting a search incident to an arrest, and handcuffing a subject. (App. Ex. 6). This material was not submitted as part of the Appellant's application or appeal to HRD. (Resp. Exs. 2, 7).

13. While in the Coast Guard, the Appellant performed no arrests. His law enforcement duties included searching vessels and maintaining security zones in the waters, as well as initiating civil charges of boating while intoxicated. (Appellant Testimony).

14. When determining the number of months of experience as a law enforcement officer while in the Coast Guard for Question 8 on the E&E form, the Appellant was not able to distinguish between the two primary duties as a Boatswain Mate and Boarding Officer. He provided this timeframe because he had "dual roles" in his positions in the Coast Guard and, though he always had law enforcement authority, only utilized that authority sometimes, because he had other job duties. For those reasons, he calculated that he had 36-47 months of police experience involving full police powers, a number lower than the overall number of hours spent in those positions. (Appellant Testimony; Resp. Ex. 2).

15. LeFort reviewed the Appellant's application and supporting documentation for the specific job experience which listed primary duties. In this section, HRD is looking for "time served," not qualifications. The documents provided did not demonstrate information about the Appellant's direct job experience and the Appellant received no score on question 8. (LaFort Testimony).

16. On April 13, 2018, the Appellant exercised his right under G.L. c.31, § 22 for HRD to review scoring of the E&E compo-

6. The Appellant received 4 points for Question 5, his experience in the MEP. (Appellant Testimony; LaFort Testimony). At hearing, there was no dispute that the correct points were awarded for question 5.

7. The Appellant's "Primary Specialty" is listed as "NA." (Resp. Ex. 4).

nent of his examination. The Appellant requested that he be given credit under Question 8 for his experience as "a qualified [United States Coast Guard] Boarding Officer from 1996 through 2011." (Resp. Ex. 7)

17. For his appeal at HRD, the Appellant supplied additional documentation and information applying to his Question 8 E&E claim. (Resp. Ex. 7) The supporting information was the following:

- 14 U.S.C. § 89 (titled Law Enforcement) describing the duties of Boarding Officers
- Certificates of successful completion of training, such as in marine resources
- Memoranda from 2006 and 2009 regarding being "certified as Boarding Officer" on two Coast Guard vessels, and having authority to carry and utilize weapons. (Resp. Ex. 1-3).

18. For the appeal at HRD, Lefort reviewed the supplemental documentation and determined that it did not show that the Appellant was *employed* as a Boarding Officer. Lefort concluded that the forms entitled "Boarding Officer Certification," and Memoranda showed that the Appellant was certified as a Boarding Officer but not employed as a Boarding Officer. Lefort denied the Appellant's appeal based on lack of verification. (Lefort Testimony).

19. The Appellant asked HRD for further consideration of his claim. On May 14, 2018, HRD notified the Appellant that it had denied his request. (Lefort Testimony).

20. The Appellant filed the instant appeal at the Commission. (Administrative Notice).

LEGAL STANDARD

The Commission is authorized to hear and decide appeals by a person who has been "aggrieved by a decision, action, or failure to act on the part of the administrator in violation of [G.L. c. 31] such that the person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." G.L. c. 31, § 2(b).

The law grants HRD with the responsibility to determine the passing requirements for examinations. G.L. c. 31, §22. HRD shall give credit for an applicant's "employment or experience in the position for which the examination is held." *Id*. "Each application for examination or registration pursuant to the civil service law… shall contain requests for such information as the administrator deems necessary." G.L. c. 31, §20.

An applicant may file an appeal with the Commission from a decision of HRD made "relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held." G.L. c. 31, §24. However, "the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator." *Id.*

The Commission cannot reverse the decision of HRD unless the Commission finds that HRD's decision was not based on a preponderance of evidence. G.L. c. 31, §2(b) "In general, the methodology by which HRD scores examinations is left to the sound discretion of the Personnel Administrator." *Araica* v. *Human Resources Div*., 22 MCSR 183, 186 (2009). Massachusetts General Law, Chapter 31, grants HRD "considerable discretion to make determinations regarding an applicant's claim for training and experience credit." *Peters* v. *HRD*, 23 MCSR 647, 650 (2010). Accordingly,

> "it follows that [HRD] also has a high degree of discretion to award or deny applicants credit for prior training and experience during promotional testing, as long as the decision does not violate basic merit principles." *Id*.

ANALYSIS

The Commission, which gives deference to HRD, looks to the information in the Appellant's E&E claim filed at the time designated by the administrator. The Appellant needed to provide information about time spent "in a police department" in which he had "full police powers."

HRD has established by a preponderance of the evidence that the documents provided by the Appellant in in support of his E&E claim do not show that he had "full police powers" in a police department, as was required by Question 8, and for which he needed verification.

Even if the Appellant had provided HRD with the additional information he submitted at his hearing before the Commission, the outcome here would not change. For the relevant time period prior to his application, the Appellant was employed by the Coast Guard as a Boatswain Mate and Boarding Officer. In that role, the Appellant was in charge of all operations on his assigned boat including navigation, maintenance, weapons maintenance and personnel. The position of Boatswain Mate did not require the performance of law enforcement duties, though the Appellant had the skills to conduct law enforcement duties. The position of Boarding Officer had police powers of arrest. Any actions involving police powers as a Boatswain Mate, however, were only part of the Appellant's job functions. He had not made an arrest while employed by the Coast Guard and, again, while certified to conduct law enforcement duties, he performed those duties rarely and in conjunction with other job duties. The Appellant's supporting documentation only demonstrated that he was *certified* as a Boarding Officer, not that he performed those functions.

To receive credit for Question 8, candidates must successfully demonstrate that they were employed in a police department and had full police powers. HRD's determination that the Appellant's certifications of completed training in law enforcement activities do not equate to being employed as, and performing the functions of a police officer are reasonable given the evidence presented. Further, I find no showing of any violation by HRD of basic merit

principles, such as an arbitrary or capricious determination. HRD has distinguished between having police powers as a part of one's job duties and being employed as a police officer with full police powers, with the latter as the qualification for promotion to ranks C and D. These decisions lay well within the scope of HRD's discretionary role to determine which categories of past experience indicate the Appellant's qualifications for a promotion.

For all of the above reasons, the Appellant's appeal under Docket No. C-18-100 is hereby ***denied***.

* * *

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman—Yes; Ittleman, Commissioner—Yes; Camuso, Commissioner—Yes; Stein, Commissioner—No; Tivnan, Commissioner—No.) on March 25, 2021.

Notice to:

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* * * * * *

TIGHE SPADY

v.

DEPARTMENT OF CORRECTION

G1-18-147

March 25, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Correctional Officer-Record of OUI-Driving Without Registration or Sticker-Carrying a Firearm While Intoxicated—Two charges of OUI, the most recent being only seven years before his application to the Department of Correction, along with charges for carrying a loaded gun in the glove box while driving drunk doomed this candidate's appeal to the Commission. The Appellant argued that these incidents occurred when he was "young and dumb" but Commissioner Cynthia A. Ittleman found a pattern of behavior not in conformance with the duties of a correctional officer.

DECISION

On August 21, 2018, the Appellant, Tighe Spady (Appellant), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the July 9, 2018 decision of the Massachusetts Department of Correction (DOC or Respondent) to bypass him for original appointment as a permanent, full-time Correction Officer I. A prehearing conference was held on September 18, 2018 at the Commission. I held a full hearing at the same location on November 13, 2018.[1] The hearing was digitally recorded.[2]

FINDINGS OF FACT

Thirteen (13) exhibits were entered into evidence at the hearing, twelve from the DOC (Respondent Exhibits 1-12 (Resp. Ex. 1-9) and one (1) from the Appellant (App. Ex. 1). I requested that DOC submit additional documents after the hearing which are marked as post-hearing exhibits (Resp. PH 1-5) and affidavits from Stephen Kennedy, Deputy Superintendent of Operations (Kennedy Aff.) and Patricia Snow, Personnel Analyst (Snow Aff.). Based on the documents submitted into evidence and the testimony of:

Called by DOC

- Eugene T. Jalette, Supervising Identification Agent, DOC;
- Sandra Walsh, Lieutenant, Background Investigator, DOC;

Called by the Appellant

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

- Tighe Spady, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant took and passed the Civil Service Examination for the position of Correction Officer on March 19, 2016. (Resp. Ex. 5).

2. The Appellant is currently employed as a heavy equipment operator and was enlisted in the Army National Guard in Massachusetts for six years. He was honorably discharged in 2014. He possesses a license to carry a firearm and has a Certificate of Completed Gunsmithing. (Appellant Testimony; Resp. Ex. 4).

3. The DOC hiring processes outlined in Policy 103 DOC 201 relevant to this appeal include the DOC's review of candidates' applications, candidate interviews, criminal checks; driver history checks; interviews with a hiring panel; and physical abilities testing. (Resp. PH Ex. 3, 5).

4. In all instances when a candidate's background information shows that the candidate had been arraigned, the DOC will look to the police narrative of that incident to see what occurred. DOC personnel do not "reinvestigate" the crimes, only examine the facts. (Jalette Testimony).

5. DOC policy does not include a specific "look back" period regarding prior convictions or criminal history in its hiring process. (Jalette Testimony). A bypass will occur if a candidate has any conviction but an ex-offender may be employed if the Commissioner certifies that the appointment will contribute substantially to the work of the Department. (Jalette Testimony; Resp. PH Ex. 3).

6. The Appellant applied for a position with the DOC as a Correctional Officer I on February 20, 2018. At the time of the hearing at the Commission, the Appellant was 32 years old. (Appellant Testimony, App. Ex. 1).

7. As part of the hiring process, DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). The January 26, 2018 CJIS report for the Appellant contained Massachusetts Criminal History, (BOP), Massachusetts Warrants check, a criminal history which included an NCIC [National Crime Information Center] and III [Interstate Identification Index], a Wanted or Missing Persons Check, Massachusetts Driver's License check, and a Driver history record. (Jalette Testimony; Resp. Ex. 4).

8. The Appellant's criminal background, which he does not dispute, contains many charges that were continued without a finding (CWOF) and later dismissed, or charges that were dismissed outright.[3] The Appellant was arraigned for driving negligently in June 2004; for two charges of OUI, one dated September 24, 2007 and one dated March 20, 2011; for firearms violations on March 20, 2011; and for riding an unregistered and uninspected motorcycle on June 10, 2011. The detailed charges and dispositions are as follows:

- The 2004 charge of operating negligently was continued without a finding and dismissed after a probationary period.
- The September 24, 2007 charge of OUI was continued without a finding and dismissed after probationary period, which included the loss of his driver's license for six months.
- The March 20, 2011 charge of OUI was continued without a finding and dismissed after a probationary period, including a two-year loss of license.[4]
- The Appellant had a loaded gun in his glovebox and a part of a gun underneath the passenger seat of his vehicle when he was stopped on March 20, 2011. The charge of carrying a firearm while intoxicated was continued without a finding and dismissed after a probationary period.[5]
- Other firearms charges, carrying without a license, carrying without an FID card, and carrying a loaded weapon without a license, were dismissed. (Appellant Testimony; App. Ex. 1).
- The June 2011 charge for driving an uninspected and unregistered motorcycle was dismissed. (Appellant Testimony; App. Ex. 1).

9. Lieutenant Sandra Walsh, a trained investigator who has conducted hundreds of pre-employment background investigation, was assigned to the preliminary background investigation for the Appellant. (Walsh Testimony). Mr. Jalette, who had obtained the Appellant's CORI, provided her with the paperwork for the Applicant prior to her interview with him. (Walsh Testimony, Resp. Ex. 4).

10. On March 1, 2018, at the home interview, Lieutenant Walsh spoke to the Appellant about the requirements and responsibilities of correctional officers, interviewed the Appellant's partner, and discussed his driver's history and charges against him. (Walsh Testimony; Resp. Ex. 4).

11. Lieutenant Walsh's practice during home interviews is to present the candidate's BOP to the candidates and ask them to talk about what is written there. (Walsh Testimony).

12. During Lieutenant Walsh's discussion with the Appellant, the Appellant stated that his charges had all been dismissed. When he did those things, he described himself as "young and dumb." The

3. "Under the practice known as 'continuing without a finding,' a District Court judge continues a case for a lengthy period of time without making a finding of guilty. The judge may impose certain conditions on the defendant. At the end of the designated period, if the defendant has complied with the conditions of the continuance, the case is dismissed." *Com.* v. *Duquette*, 386 Mass. 834, 837-838 (1982).

4. The probationary period imposed by the court ended earlier than scheduled because the Appellant had paid his fines and adhered to the terms of probation. (Appellant testimony).

5. Under cross examination at hearing, the Appellant provided further details about having a barrel of a gun, but not the entire gun, under the passenger side front seat during the March 20, 2011 traffic stop. (Appellant Testimony).

investigator heard the details of the charges but did not spend a great deal of time discussing them because the charges were dismissed. (Walsh Testimony).

13. Lieutenant Walsh recorded her interview with the Appellant conversation on the investigative report:

> At the home visit, I had the opportunity to speak with the Appellant about the driver history. Starting in 2004, the Appellant stated he was young. For his first DUI he stated he lost his license for six (6) months. He had a weapon with him and didn't realize that being drunk would negate the LTC [license to carry]. Then in 2011, he stated it was a nice day out and he decided to take his motorcycle out, not thinking. He was stopped without inspection/registered. Then later in 2011, his second DUI occurred. He stated it occurred while still in the military. He further stated he fought it in court for over two (2) years, and received a CWOF, and lost his license for two (2) years. He concluded by stating he seldom drinks now. (Resp. Ex. 4).[6]

14. Lieutenant Walsh spoke with the Appellant's references, checked his employment history, and discussed the Appellant's work with his current employer. (Walsh Testimony, Resp. Ex. 4). She did not speak to Mr. Jalette about the Appellant or his qualifications in any part of her process. (Walsh Testimony).

15. On the last page of the report, Lieutenant Walsh wrote that the Appellant's positive employment aspects were a "Certificate of Completion Gunsmith (260 hours)" and the Appellant's military awards, including the Massachusetts Emergency Service Ribbon and the National Defense Service Medal. She wrote that the Appellant's negative employment aspects were: "BOP includes 2 DUI's—both dismissed and carrying a firearm while intoxicated."

16. On January 9, 2018, DOC informed the Appellant via letter that his CORI report contained criminal background. This letter informed the Appellant that he could dispute the accuracy of the CORI results with the DOC. (Resp. Ex. 6).

17. On February 22, 2018, a three-member panel interviewed the Appellant. (Resp. PH Ex. 1). During the interview, the panel asked three questions that all interviewees were asked. (Resp. PH Ex. 2; Kennedy Aff; Snow Aff). The panel did not ask anything about the Applicant's criminal history. (Appellant Testimony, Kennedy Aff; Snow Aff; Resp. PH Ex. 2).

18. On April 9, 2014, DOC extended a conditional offer of employment to the Appellant, contingent on a full background check and physical pre-screening test results. (Resp. Ex. 3).

19. When he reviewed the Appellant's application file, Mr. Jalette was concerned with the Appellant's conduct of driving while intoxicated with a loaded weapon in his vehicle. He stated that "it was a very dangerous situation." (Jalette Testimony).

20. A group of senior DOC officials, including the DOC Commissioner and Mr. Jalette, met to discuss approximately sixty (60) candidates whose files needed further review to determine whether they would be bypassed for appointment. The Commissioner reviewed the Appellant's file. Of the candidates reviewed, approximately half were bypassed, including the Appellant, and half were not. (Jalette Testimony).

21. On July 9, 2018, DOC wrote to the Appellant that he was not considered for an appointment as a correctional officer because of "Failed Criminal Background based on Criminal Offender Record Information." The letter included a list of charges that had been brought against the Appellant.

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission must ensure 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. "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." (*Cambridge*, at 304).

The Commission must decide "whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). See *Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003). The Commission's charge is to review the legitimacy and reasonableness of the appointing authority's actions and ensure that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006).

The state's CORI law (G.L. c. 6, § 172) states in relevant part: " … Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties …". As a criminal justice agency, DOC may obtain and use criminal information from a CORI to determine the suitability of an applicant for the position of Correctional Officer. *Kodhimaj* v. *DOC*, 32 MCSR 377 (2019) and cases cited. However, an agency must not rely only on criminal record checks when determining whether to bypass candidates. Before the agency can consider the misconduct as a possible reason to bypass a candidate, the agency must speak with can-

6. At hearing, the Appellant cross-examined Lieutenant Walsh to correct certain facts in the report. Specifically, he noted that firearms were involved in the second OUI in 2011, not the first OUI in 2007. Lieutenant Walsh responded that she should have written the report to reflect that the second DUI offense was the offense with the firearms. (Walsh Testimony).

didates and gather any other relevant information such as police reports, regarding the accuracy and relevance of the underlying misconduct. *Golden* v. *DOC*, 33 MCSR 194 (2020). Candidates must be provided the opportunity to explain their criminal history and to justify why the criminal record is not disqualifying. *Kodhimaj*, 33 MCSR at 382.

The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown when, as in this case, misconduct is not in material dispute. *Boston Police Dep't.* v. *Civil Serv. Comm'n,* and another, 483 Mass. 461 (2019); *Cambridge* at 305. In all,

> "[n]o bright lines have been set between when an applicant's history remains an unreasonable risk of present fitness to be appointed to perform the duties of a public safety officer or other civil service job and when intervening circumstances demonstrate rehabilitation that makes such behavior too stale to be used as an indicator of present fitness consistent with basic merit principles of civil service law... Ultimately, however, absent any showing of bias, political motivation or other unlawful motives, the judgment call on rehabilitation rests within the sound discretion of the Appointing Authority." *Man* v. *City of Quincy*, 31 MCSR 37, 46-47 (2018) and cases cited.

ANALYSIS

The Appellant argues that nearly seven years with a clean record, along with his work experience and military record, shows a sufficiently long enough period of rehabilitation to be considered for a position as a correctional officer with the DOC. He also argues, in essence, that because some of his criminal cases were continued without a finding and ultimately dismissed after successful probationary periods, that the DOC could have considered those charges as dismissed, and therefore not as weighty as convictions. He stated at hearing that he is a different person than he was when he was when he was arraigned for the criminal actions appearing on his CORI.

The Commission has found that an applicant's arrests and arraignments can warrant a bypass, even where those arrests led to dismissed charges. *Lapointe* v. *Department of Correction*, 27 MCSR 110 (2014) (bypass of a candidate for CO I upheld based on an arrest for possession of marijuana, which was nol prossed, and an arraignment for driving under the influence and negligent operation); *Louis* v. *Department of Correction*, 27 MCSR 31 (2014); *Solbo* v. *Department of Correction*, 24 MCSR 519 (2011); *Thames* v. *Boston Police Department*, 17 MCSR 125 (2004).

Among the inquiries into the DOC's decision to bypass the Appellant, I first address whether the DOC properly utilized the information in the Appellant's CORI report.

Prior to issuing the non-consideration letter, the DOC thoroughly reviewed and considered the Appellant's suitability for employment as a correctional officer based on a variety of factors, not only the CORI report. The home interview by Lieutenant Walsh and her subsequent investigation and report demonstrate that the DOC looked to a variety of factors in addition to misconduct, such as education, home life, employment history, and references.

During the home interview, the Appellant discussed the entries on his BOP.[7] The Appellant acknowledged all of the charges brought against him and stated to the investigator that he was a different person then than he was when the misconduct occurred. The investigator recollected that the Appellant explained his younger self as "young and dumb." Although she did not spend much time on the charges brought against the Appellant, she gained background information from him about when and why they appeared on his BOP. Based on this information, the investigator made determinations about the positive and negative attributes of the Appellant as a suitable candidate for a position as a correctional officer with the DOC.

In addition to the interview and investigation, the DOC also gathered information about the Appellant through an interview with a three-person panel, during which the Appellant was asked no questions about prior driving or criminal history. After that stage in the hiring process, DOC officials, including the Commissioner, reviewed his file. The decision to not hire the Appellant was made after a reasonably thorough review of the Appellant's application and was based on concerns directly related to custody functions of a Correction Officer I.

Next, I turn to the question of whether the Appellant's incidents of misconduct justified DOC's decision to bypass him for appointment.

The charges of reckless driving that occurred when the Appellant was 17, and the charge of driving without a registration or inspection sticker, do not weigh as heavily as does the Appellant's multiple OUI charges and a firearms charge in 2011.[8] The Appellant's most serious misconduct for which he was charged occurred on March 20, 2011, seven years prior to his application to the DOC. On this date, he was driving while intoxicated. He was carrying a loaded gun in his glovebox and there was a barrel of a gun on the floor beside him. The charge of carrying a firearm while intoxicated charge stemmed from this single, "dangerous" incident. This was not the first time the Appellant had been stopped for operating under the influence, however. In 2007, the Appellant had been charged with OUI and lost his license for six months as a condition of his probation. Even though the two OUI's and the charge of carrying a gun while intoxicated did not result in conviction, they were serious enough to cast doubt on the Appellant's ability to follow the law regarding operating firearms and vehicles, and

7. Despite cataloguing some of the chronology of the charges imprecisely, the investigator captured all of the Appellant's criminal charges in her report.

8. *Dorn* v. *Boston Police Department*, 31 MCSR 375, 376 (2018) (Commission may weigh driving record in past 5 years more heavily than in 10 years; "less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position").

therefore conduct himself within the regulations of the DOC as a correctional officer.

Further, the two charges of OUI arguably demonstrate that there was a pattern of behavior involving driving under the influence of alcohol. That the second violation of OUI and carrying a firearm while intoxicated occurred during the same incident compounds the seriousness of these offenses and gives the DOC justifiable reason to conclude that the Appellant was not qualified to conduct the duties of a DOC correctional officer at the time of application.

The preponderance of evidence in this appeal establishes that DOC had just cause to bypass the Appellant based on a legitimate concern about the Appellant's history of operating a vehicle and carrying firearms under the influence of alcohol. No evidence of any impermissible political or personal factors is evident, and the DOC has acted within its statutory discretion to not hire the Appellant for the position of Correctional Officer I.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-18-147 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 25, 2021.

Notice to:

Tighe Spady
[Address redacted]

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* * * * * *

FRANCIS J. BILLS

v.

BROCKTON FIRE DEPARTMENT

D-18-021

March 25, 2021
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Two Day Suspension of Firefighter-Disobeying Orders-Shirking Duty at Fire-Section 42 Appeal-Hearing Delay—The Commission affirmed the two-day suspension of a Brockton fire captain who disobeyed the order of the Incident Commander to return forthwith to the scene of a fire that had been knocked down but was still active. The Appellant claimed that his ladder was rehabbing and using the bathroom after fighting the fire. Once he returned to the scene of the fire, he was abusive and insubordinate to the Incident Commander.

DECISION

On January 23, 2018, the Brockton Fire Department (BFD) suspended the Appellant for two days without pay for three reasons: "[d]isobeying orders of a superior officer; [c]onduct prejudicial to good order; [and c]owardice or shirking duty at a fire." (Exhibit 14) On February 5, 2018, the Appellant filed an appeal with the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 42 ("Section 42 appeal"), alleging that the BFD failed to follow procedural requirements in suspending him. On March 6, 2018, a pre-hearing conference was held at the offices of the Commission, at which the Appellant filed an appeal, pursuant to G.L. c. 31, § 43 ("Section 43 appeal"), alleging that the BFD had not suspended him for just cause. (Stipulations of Facts, Procedural Order)

On March 30, 2018, the Appellant moved for summary decision on his Section 42 appeal, alleging that he had been deprived of a just cause hearing within five days of requesting one. On April 2, 2018, BFD opposed the Appellant's motion for summary decision, and cross-moved for summary decision. BFD argued that the Appellant's just cause hearing had been delayed by two factors: settlement negotiations that, although ultimately unsuccessful, had been promising enough that a hearing had not been scheduled; and after a hearing was scheduled, BFD's lawyer became ill, requiring a continuance. On April 8, 2018, the Commission denied the Appellant's summary judgment motion, citing BFD's reasons, and stated that the denial would be incorporated into this decision. The Commission did not rule on BFD's cross-motion for summary judgment and need not do so now in light of this decision.

The Appellant requested subpoenas for many witnesses, some of which I allowed and some of which I denied. I allowed subpoenas to issue to Maureen Cruise, who conducted the Appellant's hearing pursuant to G.L. c. 31, § 41 ("Section 41"), and Deputy Chief Scott Albanese. BFD objected to the issuance of these two subpoenas.

A full hearing was held at the offices of the Commission on June 4, 2018. The hearing was public at the written request of the Appellant. The hearing was both transcribed by a stenographer and recorded; the stenographer's transcript is the hearing's official record, by agreement of the parties.

The witnesses were sequestered. The Appellant did not testify or call witnesses. I admitted 30 exhibits into evidence, Exhibits 1 through 27 and 29 through 31. The BFD submitted Exhibits 1 through 16. The Appellant submitted Exhibits 17 through 29. I struck Exhibit 28 and returned it to the Appellant. The BFD later submitted Exhibits 30 and 31 at my request. I agreed to the Appellant's request that these last two exhibits be redacted. The Appellant objected that BFD did not do so. I now rule that Exhibits 30 and 31need not have been redacted. I admitted de bene Exhibit 25, which are handwritten notes of an unidentified person investigating the Appellant's conduct. Because the author of Exhibit 25 was never identified (Testimony of Albanese 254), I now exclude Exhibit 25.

Among the Appellant's requests for subpoenas that I denied was one to subpoena Paul Hynes, a lawyer for the Brockton Firefighters Union. The Appellant contended that Hynes had held himself out as the Appellant's lawyer and entered into an attorney-client relationship with the Appellant. At the hearing, the Appellant proposed entering into evidence an offer of proof of what Hynes would have testified to. (Transcript 62-68) The offer of proof was the Appellant's proposed Exhibit 28 that I struck and returned to him. On June 5, 2018, the day after the hearing, the Appellant submitted the offer of proof again and asked that I reconsider my decision. The offer of proof is in the record, but I have not relied upon it in this decision.

Following the close of the hearing, the Appellant submitted a proposed decision on June 4, 2018; the BFD did so on July 19, 2018. The Appellant's proposed decision included Exhibits A through Q, which had not been admitted at the June 4, 2018 hearing. BFD objected to these exhibits and then moved to strike the Appellant's proposed decision under 810 CMR 1.01(7)(c), noting that 810 CMR 1.01(10)(j) authorizes the submission of post-hearing briefs that include "arguments on the evidence." I allow in part BFD's motion as it pertains to Exhibits A through Q, finding that their submission violates 810 CMR 1.01(10)(j) and that they are "impertinent" under 810 CMR 1.01(7)(c), and striking them. I deny that portion of BFD's motion that pertains to the body of brief, which may or may not be supported by evidence that was admitted. I deny the requests contained in the Appellant's opposition to BFD's motion to strike, including his request for attorney's fees.

FINDINGS OF FACT

Based upon the documents admitted into evidence and the testimony of:

Called by the BFD:

- Captain Jeffrey Marchetti;
- Firefighter Edward Churchill;
- Firefighter Francis Madden;
- Deputy Chief Scott Albanese;
- Chief Michael Williams,

I make the following findings of fact:

1. The Appellant has been a Brockton firefighter since 2004 and a captain since 2016. (Stipulated Facts)

2. An active fire scene begins with a telephone report of a fire to the BFD's dispatch center. When the BFD personnel arrive at the scene and discover an active fire, a person designated as the Incident Commander will establish command. An active fire scene ends when the Incident Commander terminates command. (Testimony of Marchetti 77-78)

3. An Incident Command Technician (ICT) is assigned to the Incident Commander. An ICT acts as the Incident Commander's eyes and ears—the Incident Commander's deputy. If an ICT gives an order, it is assumed that the order is from the Incident Commander. An ICT is also known as an Acting Deputy Aide. (Testimony of Marchetti 82-83, testimony of Churchill 165)

4. It is common knowledge who the ICT is at a fire. The ICT is assigned at the beginning of a shift, drives the Incident Commander, and wears a helmet indicating status as the ICT. (Testimony of Marchetti 84)

5. In the early morning of December 31, 2017, Captain Marchetti, who was the Acting Deputy Chief of the Brockton Fire Department (BFD), was the Incident Commander of an active fire scene at 12 Johnson Court, Brockton. (Exhibit 1, Testimony of Marchetti 77-78, 80)

6. Chief Williams was present at the active fire scene but did not assume command over it. (Testimony of Marchetti 80, Testimony of Williams 275)

7. Captain Marchetti communicated that he was the Incident Commander in two ways. He arrived at the fire scene in Car 56, which is for the Incident Commander and says "Shift Commander" on it. He also used the BFD radio to call in an initial report, provide the address, and establish command. (Testimony of Marchetti 81)

8. The initial response to the fire entailed certain personnel and vehicles. Captain Marchetti called for additional personnel and vehicles. (Testimony of Marchetti 86-87)

9. Engine Company 5 and Ladder 4 responded to Captain Marchetti's second call for personnel and vehicles. Captain Marchetti gave instructions to Engine Company 5 and Ladder 4 when they were en route to the fire, identifying himself as the Incident Commander. (Testimony of Marchetti 87-88)

10. The Appellant was in charge of Ladder 4. Two firefighters arrived with the Appellant, Firefighters Madden and James Miceli. (Testimony of Marchetti 87)

11. It is important that an Incident Commander knows where fire personnel and equipment are located. Fire personnel need to remain accountable to superior officers. One reason is that a building on fire is a building that has been weakened and that could collapse. If a building collapses, the Incident Commander needs to know whether to send a crew into the collapsed building to rescue trapped firefighters. An Incident Commander also needs to know which fire crews are available for work. (Testimony of Marchetti 90, 98, testimony of Albanese 233-34)

12. After firefighters had knocked down the fire, they were allowed to rehab. (Testimony of Marchetti 104, 142-45).

13. Rehabbing is a process that occurs after a fire has been knocked down and all firefighters have left the building that was burning. It includes firefighters drinking water, taking off their fire coats and Scott packs (portable air supply packs), changing air bottles, and resting. (Testimony of Marchetti 88-89, 104, 143, Testimony of Albanese 236)

14. Also after firefighters had knocked down the fire, Ladder 4 and its personnel were assigned to assist Engines 4 and 5 in a task called packup. When that task was completed, Engines 4 and 5 reported for their next assignment. Ladder 4 did not return for its next assignment. (Exhibit 1)

15. Captain Marchetti noticed that Ladder 4 was unaccounted for. He did not know where it was located. He assigned Firefighter Churchill, the ICT, to find Ladder 4. (Testimony of Marchetti 90-91)

16. The ICT found Ladder 4 and its personnel parked on North Main Street. The personnel were drinking coffee. (Exhibits 1 and 2, Testimony of Marchetti 92, 98, 148, Testimony of Churchill 169)

17. The ICT told the Appellant that Captain Marchetti was looking for him. The Appellant responded that his crew was cold and tired and that he was rehabbing them. When the ICT reported this response to Captain Marchetti, Marchetti ordered the ICT to order the Appellant to report to the front of the building that had had the fire. (Testimony of Marchetti 92, 148, Testimony of Churchill 170)

18. An Incident Commander decides when firefighters will rehab, although other supervisors, such as a Safety Officer, sometimes make decisions about additional rehab. (Testimony of Marchetti 100, 104)

19. A captain should not have a crew rehab without getting permission from or informing a superior officer. (Testimony of Albanese 233, 238)

20. For a member of the BFD to act without an order or assignment is considered "freelancing," which is dangerous and prohibited. (Testimony of Marchetti 101, Exhibit 20)

21. The ICT conveyed Captain Marchetti's order to the Appellant. The Appellant said "OK" but Ladder 4 did not appear in front of the building. (Testimony of Marchetti 93, Testimony of Churchill 171)

22. The fire had been knocked down but the BFD was still contending with hot spots and investigating the fire. (Testimony of Marchetti 92-93)

23. Captain Marchetti gave Ladder 4 a few minutes to report to the front of the building. When it did not do so, Captain Marchetti called the Appellant on the radio. (Testimony of Marchetti 93-94, 149)

24. The radio call was recorded and went as follows:

> Captain Marchetti: "Command. Call[ing] Ladder 4."
>
> Appellant: "Ladder 4."
>
> Captain Marchetti: "Front of the building with your crew."
>
> Appellant: "Repeat that message."
>
> Captain Marchetti: "Report to the front of the building with your crew."
>
> Appellant: "We'll be there in five. My crew has to use the bathroom."
>
> Captain Marchetti: "Report to the front of the building with your crew."
>
> Appellant: "Did you get that last message? We have to use the bathroom."

(Exhibit 15, Testimony of Marchetti 94-95 (summarizing radio call and identifying the voices))

25. Although the Appellant told Captain Marchetti that "[w]e" had to use the restroom, only the Appellant needed to do so. Firefighter Madden had already used the restroom and Firefighter Miceli did not use the restroom around that time. (Testimony of Madden 205)

26. The Appellant told Firefighter Madden, who was assigned to Ladder 4, of the gist of his conversation with Captain Marchetti. Firefighter Madden offered to report to Captain Marchetti and inform him that the Appellant was using the restroom but the Appellant ordered Firefighters Madden and Miceli to remain with Ladder 4 until he returned from the restroom. (Testimony of Madden 204-05)

27. The Appellant and his crew took 10 to 15 minutes to report to the front of the building. (Exhibit 1, Testimony of Marchetti 97)

28. In the meantime, other fire personnel were working, such as helping fire investigators and collecting firefighting equipment. At the time, it was still an active fire scene even though the fire had been knocked down. (Testimony of Marchetti 97-98)

29. An active fire scene can be dangerous, even fatal, to firefighters, even hours after they have knocked down the initial fire. (Testimony of Marchetti 112)

30. When the Appellant and his crew reported to the front of the building, Captain Marchetti sent the two firefighters other than the Appellant to the front of the building so that he could talk to the Appellant in private. (Testimony of Marchetti 99)

31. The Appellant approached Captain Marchetti aggressively, was angry, and leaned in with a threatening posture and clenched fists, while grinding his teeth. (Testimony of Marchetti 99)

32. During the ensuing conversation, all of the Appellant's responses were disrespectful, sinister, and condescending. (Exhibit 1)

33. Captain Marchetti asked where the Appellant had been. He answered that he had been sitting in his truck and rehabbing his crew. (Testimony of Marchetti 99)

34. Captain Marchetti asked if anyone had given permission for the Appellant and his crew to rehab. The Appellant answered no and that he had given the command order for his crew to rehab because they were cold and tired. (Exhibit 1, Testimony of Marchetti 101)

35. Captain Marchetti said that he was in command, he needed to maintain accountability of fire personnel, he had needed to know where the Appellant was, the Appellant had been unaccounted for, and he had not known where the Appellant had been. (Testimony of Marchetti 101-02)

36. Captain Marchetti asked the Appellant if he were okay. The Appellant, who was clenching his fists and grinding his teeth, asked Captain Marchetti if Marchetti were okay. (Testimony of Marchetti 102)

37. Captain Marchetti then asked the Appellant if he were cold. The Appellant asked something like, "Are you cold? Are you nice and warm in there?" Captain Marchetti was outside and did not understand what the Appellant was referring to. (Testimony of Marchetti 102)

38. Captain Marchetti said something to the Appellant, who was still clenching his fists and grinding his teeth, such as, "You seem upset. Do you want to fight?" (Testimony of Marchetti 102)

39. At one point, Captain Marchetti asked the Appellant if he had a problem. The Appellant asked Captain Marchetti the same question. Captain Marchetti said something such as, "Yes, you. You're not listening." (Testimony of Marchetti 107)

40. Firefighter Madden confirmed that the Appellant had allowed Firefighters Madden and Miceli to rehab. (Testimony of Madden 196-97)

41. All members of the BFD receive its rules and regulations and receive opportunities to become familiar with them, such as during training sessions. (Testimony of Williams 291-92)

42. The BFD expected the Appellant, as a captain, to be familiar with its rules and regulations. (Testimony of Williams 292)

43. Chief Williams determined that the Appellant had violated the BFD's rules and regulations. (Testimony of Williams 290)

44. On January 23, 2018, the BFD suspended the Appellant for two days without pay for three reasons: " Disobeying orders of a superior officer; Conduct prejudicial to good order; Cowardice or shirking duty at a fire." On the same day, the BFD informed the Appellant of his suspension. (Exhibit 14)

45. The language of the suspension letter invoked the BFD's regulations, which refer to "cowardice or shirking," but the Appellant was disciplined for shirking and not cowardice. (Testimony of Williams 291, 317, 320)

46. BFD did not discipline Firefighters Madden and Miceli. (Testimony of Williams)

47. On February 14, 2018, a Section 41 hearing to determine whether the Appellant's two-day suspension was supported by just cause. (Exhibit 16)

48. On February 22, 2018, a hearing officer found just cause for the Appellant's two-day suspension. (Exhibit 16)

Discipline of Other Personnel

49. By way of comparison, in September 2015, a firefighter was considered Absent Without Leave (AWOL) for arriving 15 minutes late for roll call. The firefighter received a verbal reprimand. (Exhibit 29)

50. In June 2015, a second firefighter was considered to have neglected duty for leaving a pump testing area without the proper equipment. The firefighter received a written warning. (Exhibit 29)

51. In January 2019, a third firefighter was considered AWOL from roll call. It was his third offense. His discipline was to forfeit a day of vacation. (Testimony of Williams 300)

52. In October 2016, a fourth firefighter was considered Absent Without Leave (AWOL) for arriving 30 minutes late for roll call. The firefighter stated that he had overslept and received a written reprimand. (Exhibit 29)

53. In April 2018, a fifth firefighter was disciplined for conduct prejudicial to good order and conduct unbecoming a member of the BFD. The record does not reveal the firefighter's conduct. The firefighter received verbal and written reprimands. (Exhibit 29)

54. The discipline referenced in Facts 49 through 53 were the only discipline cases in the three years preceding the Appellant's discipline. (Testimony of Williams 298, 299)

55. Of the three AWOL cases above, all entailed firefighters having been absent from or late to roll call. None involved their absence from an active fire scene. (Testimony of Williams 315, 320, 321)

56. In Captain Marchetti's 18 years as a firefighter, he had not observed a firefighter fail to respond to an order as the Appellant did here. (Testimony of Marchetti 111, 112)

57. In Firefighter Churchill's 23 years as a firefighter, he had not observed a firefighter fail to respond to an order as the Appellant did here. (Testimony of Churchill 172, 173).

58. Chief Williams had never heard of a firefighter needing to use a restroom as an excuse not to obey an order. (Testimony of Williams 293)

Prior Discipline of Appellant

59. In 2006, the Appellant had agreed to cover another firefighter's shift but failed to do so. His discipline was to lose his substitution privilege for six months. (Exhibit 30, Testimony of Williams 284)

60. In 2007, the Appellant contended that for working a detail at a nursing home, he deserved a higher pay rate, known as the alcohol rate, for establishments that serve alcohol, such as bars. He so contended to the nursing home and BFD because the nursing personnel allowed some residents to keep wine in their rooms to drink. To try to gather information to support his contention, the Appellant went behind a coffee bar at the nursing home and looked for alcohol. He received an oral reprimand for conduct unbecoming a member of the BFD. (Exhibit 31, Testimony of Williams 285)

61. Because of these previous disciplinary actions, the two-day suspension of the Appellant constituted progressive discipline.

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 42 states in part:

> "Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission … If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights."

G.L. c. 31, § 43 provides:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law". *Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971). *See also Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service". *School Comm.* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). *See also Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew". *Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to 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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Id.*, quoting internally from *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

ANALYSIS

As a preliminary matter, this appeal was filed under both G.L. c. 31, § 42, contesting whether the BFD properly followed the *procedural* requirements to terminate the Appellant, and G.L. c. 31, § 43, contesting whether there was *just cause* to terminate his employment. I briefly address the procedural portion of the appeal. I find that the Appellant's Section 41 hearing was not unreasonably delayed so as to give rise to a successful Section 42 appeal. If the Appellant had any other ground under Section 42, he neither identified it in pleadings, in testimony, or through counsel.

Based on the findings of fact above, the BFD has shown by a preponderance of the evidence that the Appellant's conduct on December 31, 2017 constitutes substantial misconduct that adversely affected the public interest. The preponderance of the evidence primarily comprised the testimony of witnesses and a recording (Exhibit 15) that corroborated each other, and was aided by the adverse inference of the Appellant's declining to testify at either the Section 42 hearing or the hearing before the Commission. (Exhibit 14, Transcript 10-11) The substantial misconduct violated BFD rules regarding disobeying orders of a su-

perior officer, conduct prejudicial to good order, and shirking duty at a fire.

Having determined that the Appellant did engage in misconduct, I must determine whether the level of discipline was warranted.

As stated by the SJC in *Falmouth* v. *Civ. Serv. Comm'n*, 447 Mass. 814, 823-825 (2006):

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to 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. citing Watertown* v. *Arria*,16 Mass. App. Ct. 331, 334 (1983).
>
> "Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing *Police Comm'r of Boston* v. *Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system— 'to guard against political considerations, favoritism and bias in governmental employment decisions." *Id*. (citations omitted).
>
> ….
>
> "Unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." *Id*. at 572. (citations omitted).

I find no evidence of political considerations, favoritism, or bias by the BFD. Exact comparisons of discipline are often difficult, particularly when no other firefighter, let alone a captain, has been disciplined for violating an order in an active fire scene. Nonetheless, the Appellant's two-day suspension is proportionate when compared with the other disciplinary actions that BFD took during the previous three years before the Appellant's suspension. Further, I considered that the Appellant had engaged in misconduct in the past, thus justifying a two (2)-day suspension.

For all of the above reasons, the Appellant's appeal under Docket No. D-18-021 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on March 25, 2021.

Notice to:

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* * * * * *

JOHN F. CARNES

v.

TOWN OF NORWELL

G2-18-223

April 8, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Promotion to Norwell Police Sergeant-Interview-Successful Candidates-Specialized Trainings—The Commission sustained the bypass of a former union president for promotion to sergeant based on a poor interview where the record concerning the panel interview demonstrated a thorough, uniform, and fair process. The Appellant's answers were consistently less thorough than those of other candidates and showed a lack of knowledge of current Department policies. The interview panel consisted of the Town Administrator and two police chiefs from neighboring towns. The Commission also sustained the bypass based on the greater strengths and specialized trainings of the successful candidates.

DECISION

On November 20, 2018, the Appellant, John Carnes, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Norwell (Town or Respondent) to bypass him for promotional appointment to the position of Police Sergeant in the Norwell Police Department. On December 5, 2018, a pre-hearing conference was held. I held a hearing at the Commission on January 30, 2019, February 26, 2019 and March 19, 2019.[1] The full hearing was digitally recorded and both parties received CDs of the proceedings.[2] On April 30, 2019, the parties submitted post-hearing briefs in the form of proposed decisions. For the reasons stated below, the appeal is denied.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the CDs should be used to transcribe the hearing.

FINDINGS OF FACT

The parties submitted thirty-four (34) joint exhibits (Ex. 1-34). Five of these exhibits are CD's. (Ex. 4, 14, 19, 24, 29). A recording of the Town of Norwell Board of Selectmen meeting on September 19, 2018 was also received into evidence (BOS CD). The Town submitted four (4) exhibits (AA 1-4) and the Appellant submitted three (3) exhibits (App. 1-3). Based on the documents submitted and the testimony of the following witnesses:

For the Town:

- Theodore Ross, Norwell Police Chief
- Peter Morin, Norwell Town Administrator
- Marc Duphily, Carver Police Chief
- Ellen Allen, Chairperson Norwell Board of Selectmen (BOS)

For the Appellant:

- John Carnes, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the credible evidence, I find the following:

Norwell and Candidates for Sergeant

1. Norwell, Massachusetts is a town located in Plymouth County, twenty miles south of Boston, with a population of approximately 11,000 people. https://www.townofnorwell.net/about-norwell.

2. The Appellant has lived in Norwell for over fifty years and has been employed as a patrolman by the Norwell Police Department (Department) for nineteen years. (Appellant Testimony at CD 2, 4:11). He has a Master's Degree in Criminal Justice. (*Id.*)

3. The Appellant owns his own landscaping business for which he works an average of about 20-30 hours each week. This business does not impact his work as a patrolman. (Appellant Testimony at CD 2, 4:13).

4. The Appellant volunteers in the community through sports teams that his children participate in, such as coaching and being on the Board of Directors of the Town's Little League. (Appellant Testimony at CD 2, 4:09; Ex. 12).

5. Police Department staff include the Chief, Deputy Chief, 6 Sergeants, 16 patrolmen, and special part-time police officers. (Ross Testimony at CD1, at 1:17; App. Testimony at CD 2, 4:15). In 2018, it was a "young" department, with four (4) recent new hires (Morin Testimony at CD 1, 4:43-4). There are only patrol officers and Sergeants in the police hierarchy. (Ross Testimony).

6. Norwell Police Chief Ross (Ross or Chief Ross) has been the Chief of Police at the Norwell Police Department for thirteen years. (Ross Testimony)

7. Special positions within the Department include positions such as the Police Prosecutor, School Resource Officer, and others. Some of these positions are put into the normal bid cycle and others are positions filled by the Chief. (Ross Testimony at CD, 3:20 approx).

8. Specialty training opportunities exist within the Department, such as certified sexual assault investigator and training for motorcycle or mountain bike patrols. (Ex. 1; Ross Testimony at CD 1, 2:16).

9. There are several opportunities for members of the Police Department to participate in police-sponsored community events, such as the Town Memorial Day parade, a cancer fundraiser called Pick Patches Project and Cops for Kids (Ross Testimony at CD 1, 2:14; AA Ex. 1).

10. The Appellant served as President of the Norwell Police Association (union) for eight years, Vice President for two years, and Treasurer for six years. (Appellant Testimony at CD 2, at 4:14-15). The union is comprised of both patrolmen and Sergeants. (Appellant Testimony at CD 3, 6:16).

11. As a union leader, the Appellant did not apply for departmental special positions because those positions often came with extra benefits such as pay, certain time off, or other "perks" and he did not wish his union duties to be influenced by any benefits he would receive as part of those assignments. (Appellant Testimony at CD 3 at 2:00).

12. The Appellant takes part in Departmental mandatory testing and certain community events each year. (Appellant Testimony).

13. In early 2018, two Sergeant positions became available at the Department. (Ross Testimony, CD 1 at 1:41; Appellant Testimony at CD 3, 1:55 and 2:04; CD 3, 2:04).[3]

14. In August 2018, four candidates signed the Departmental Promotional Certification, Requisition Number 04614, the Appellant, Candidate 2, Candidate 3, and Candidate 4. The Appellant was listed first on Requisition #04614 for Departmental Promotional Certification. Candidate 2 was second, Candidate 3, third, and Candidate 4, fourth. (Ex. 6; Ross Testimony at CD 1, 1:21).

15. Candidates 2, 3, and 4 have earned undergraduate degrees in criminal justice. (Ex. 17, 22, 27).

16. The candidates' resumes show that Candidates 2-4 had considerably more experience in specialty positions and more specialty training than the Appellant. For instance, Candidate 2 sought

3. Chief Ross later added one Administrative Sergeant position in the summer of 2018. (Ross Testimony, CD 1 at 1:41; Appellant Testimony at CD 3, 1:55 and 2:04; CD 3, 2:04).

specialty positions and is certified in the following: motorcycle, mountain bike, RAD Instructor and Armorer. Additionally, he has been awarded certificates of commendation from the Norwell Police Department, participated in several courses such as the Glock Advance Armorer's course, basic SWAT school, and emergency vehicle specialty course, to name a few. (Ex. 17). Candidate 3 sought specialty positions and is certified in motorcycle, mountain bike and RAD Kids Instructor (which requires specialized training). He serves as a Field Training Officer for new recruits, for which he received specialized training, and is assigned as Detective. Additionally, Candidate 3 serves as a Municipal Police Training Committee Level III Instructor for CPR/First Aid, has an EMT Paramedic certification, and teaches recruits and Norwell Police staff, among other activities. (Ex. 32) Candidate 4 has served as Detective, the Computer Systems Administrator for the Department, and as Police Prosecutor, all of which required specialized training. Additionally, to name a few of his responsibilities, Candidate 4 has served as the CJIS Representative, the Safety Net Coordinator, and Elder Affairs Officer (currently serving as back-up) which also require training. He is currently serving as a Field Training Officer for new recruits and actively seeks training opportunities not only for himself but for the Department as well. (Ex. 32).

17. At the time of the promotion process at issue in this case, Candidate 4 was the union president and Candidate 3 was union vice president. (Ross Testimony; Appellant Testimony). Chief Ross found the Appellant to be a more "aggressive" union advocate than Candidate 4, whom Ross considered to be working collaboratively with police management. (Ross Testimony at CD 1, at 3:07-3:08).

18. The Appellant's resume listed no extra certifications, experience, or commendations gained through his work as a police officer. (Ex. 12).

Departmental Hiring Processes

19. Prior to the promotional hiring at issue in this appeal, the Department had promoted police officers based on "certification and the HR list". (Ross Testimony at CD 1, 1:26). Past procedures for promotion involved an interview with the Norwell Board of Selectmen (BOS), who would take into consideration the Chief's recommendation when deciding whom to promote. (Ross, at Testimony CD 1, 1:17).

20. Not long before the promotional process at issue here, in March 2016, an officer was promoted to Sergeant based on a previous interview by the Town Board of Selectmen and because he was first on the civil service List. (Morin Testimony at CD 2, 6:00; Allen Testimony at CD 2, 3:32).

21. Prior to the bypass in this appeal, only two candidates have been bypassed for promotion since Chief Ross became Chief. The first bypass occurred because the candidate had a record of discipline and the second occurred because of a lack of experience. Specifically, the second bypass involved the Appellant, who was bypassed years earlier when he only had four years' experience. (Ross Testimony; Appellant Testimony)

22. In January 2018, Chief Ross spoke to Peter Morin, the town administrator, about using an assessment center to fill the upcoming available sergeant positions. (Ross Testimony at CD1, 1:29; Morin Testimony at CD 2, 9:26). Mr. Morin and Chief Ross discussed using an assessment center, which meant an outside entity would administer examinations to candidates. (Ross Testimony at CD 1, 1:24). At a regularly scheduled meeting with union officials, Chief Ross and the Deputy Chief brought up this possibility. The union officials expressed concerns with the proposed assessment center. Another regularly scheduled meeting with the union president and vice president took place on May 10, 2018. At that meeting, Chief Ross further discussed the possibility of using an assessment for the promotional positions. The candidates complained that they had already paid money for exam preparation and the civil service exam itself. (Appellant Testimony at CD 3:4:26; Ross Testimony).

23. A union meeting was held on May 11, 2018 with Candidates 3 and 4 (in their union positions) and Sergeant A (who was not a candidate for promotion). On direct examination at the Commission hearing, Chief Ross testified at the Commission hearing that he did not tell those present at the May meetings that he would "kill the list", meaning that he would end the promotion process because, he asserted, there were not enough candidates on the list. However, on cross-examination Chief Ross admitted that he did threaten to "kill the list" at the May 2018 meeting. Specifically, Chief Ross told those at the meeting that under civil service law (the "2 [N] plus 1 Rule"), he did not have 5 candidates for the open two positions.[4] (Ross Testimony at CD 1, AA Ex. 1). Chief Ross next proposed that the promotional process includes an interview panel instead of an assessment center. In considering the Chief's amended proposal, the union asked the Chief to ensure that certain named individuals not be allowed to participate on the proposed interview panel. The Chief agreed not to include the named individuals to which the union objected. (Ross Testimony at CD 1; AA Ex 1).

24. In mid-June, 2018, after the Appellant and others requested an informational meeting with Chief Ross to explain what the proposed promotional process would involve, Chief Ross and Mr. Morin met with the four candidates and informed them that an interview panel, not an assessment center, would be utilized. (Ross

4. "In general, positions must be filled by selecting one of the three most highly ranked candidates willing to accept the appointment, known as the "2n+1" formula. G.L. c. 31, §27; PAR.09. In order to deviate from that formula, an appointing authority must provide written reasons—positive or negative, or both—consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L. c.31, §1, §27; PAR.08. The statement of reasons must 'indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely . . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission.' PAR.08(4)." *Pilling* v. *City of Taunton*, 32 MCSR 69, 71 (2019).

Testimony). The Appellant asked that the process be provided to the candidates in writing so that the union could bring that proposal to the union lawyer for review. (Appellant Testimony, CD 2, 4:11). After that mid-June meeting, Chief Ross believed that the promotional process had been finalized. (Ross Testimony, Morin Testimony).[5]

25. On July 30, 2018, Chief Ross emailed the union president, Candidate 4, about the hiring process. The email stated that a three-member panel would receive the candidates' cover letters and resumes and would be informed about the candidates' civil service exam rankings. The interviews would be conducted in the order of standing on the civil service certification and would be audio- and/or video-taped. The questions to be asked by the interview panel would relate to a Sergeant's responsibilities, such as policy, management and supervision of personnel, scenarios and "other questions as deemed appropriate." The interviews would be scored to produce a ranking of the candidates but the panel's recommendation would not be binding because the BOS has the final hiring authority. (Ex. 4).

26. On August 21, 2018, Chief Ross informed the candidates via email of the time and place of their interviews. (Stipulated Facts).

27. Chief Ross did not tell the candidates the weight that the interview would be given in relation to the civil service exam score and any other criteria used to evaluate the candidates' suitability for the position of Sergeant. (Appellant Testimony).

Candidate Interviews with the Three-Person Panel and Scoring

28. The three members of the panel were professional colleagues of Chief Ross, the Police Chiefs of Hull and Carver, and Mr. Morin. (Ross Testimony, CD 1 at 3:00). Two of the three panelists testified at hearing: Mr. Morin, Norwell Town Administrator, and Carter Chief of Police Duphily.[6] (Hearing at CD 3 at end).

29. Chief Ross provided the panel with a list of twenty questions to be asked of all candidates, instructions to be read to each candidate at the start of each interview, scoring ranks of 1 (poor) to 5 (excellent), a grading sheet for each candidate, and other instructions about the candidates' poise and communication scores being separate scores. Chief Ross also provided the panel with information about question #20 regarding the use of reasonable force and information about the Active Shooter Street Guide scenario and the responsibilities of a Patrol Supervisor to help the interviewers assess the candidates' responses to related questions. However, he did not provide model answers. (Ross Testimony, Morin Testimony, Ex. 9).

30. The panelists took notes during the interview and scored each candidate separately, without input from others on the panel. (Morin Testimony; Duphily Testimony). Chief Duphily scored the candidates on his notes and then placed his scores on the scoresheet. There were differences in these scores for the Appellant only.[7] Morin changed some of his initial scores for the Appellant and one other candidate on his scoresheet. (Duphily testimony; Morin Testimony; Ex. 10, 15, 20, 25).

31. The scores were totaled and averaged at the end of the interview process. The Appellant scored 65.08, Candidate 2 scored 90.08, Candidate 3 scored 90.75, and Candidate 4 scored 84.66. (Ex. 13, 18, 23, 28). The three panelists indicated on their score sheets that they would not recommend the Appellant to be promoted to Sergeant. (Ex. 10, Ross Testimony, Morin Testimony).

32. Chief Ross and the Deputy Chief were present in the interview room for all four interviews. Chief Ross testified that he did not speak to the panelists during the interviews. However, Mr. Morin testified that Chief Ross said something once during the interviews. Specifically, Mr. Morin testified that Chief Ross informed panel members that one of the Appellant's answer was incorrect. To wit, after the Appellant had answered Question 5 (about what two new policies he would suggest), Chief Ross told the panelists that one of the policies suggested was an existing policy. (Morin Testimony). Chief Ross did not comment about any other candidate's answers to the interview questions. (Ross Testimony). In view of Chief Ross's prior conflicting testimony about whether he had told the union he would "kill the list" and Mr. Morin's straightforward testimony about what the Chief said at the interviews, I find Mr. Morin's testimony in this regard credible and Chief Ross' testimony in this regard not credible.

33. There were discrepancies in scoring the candidate's answers. (Ex. 14, 19, 25, 29). Morin awarded different scores to the Appellant for similar or less accurate answers from other candidates. For instance, on Question 5, which asked the candidate to tell the panel two policies that currently do not exist that should be instituted (Ex. 9), Morin gave the Appellant a 3.5, Candidate 2, who provided only one policy, a 4.5, Candidate 3, who could not name any new policy, a 2.5, and Candidate 4, who named no new policies but described the policies as complete because they were up-to-date on the law, a 4. (Ex. 14, 19, 25, 29; Morin Testimony). On Question 15, which asked, "If you were not promoted to Sergeant name one candidate and why," Morin gave the Appellant 4.5 and Candidate 3 a 5 for virtually the same answer. (Ex. 9, 13, 14, 23, 25, 29; Morin Testimony). On Question 20, which asked about the standard for use of force, the Appellant listed the correct standard of reasonableness and factors he would consider in evaluating whether the force used was excessive. (Ex. 9, Ex. 14, 19, 25, 29). Candidate 3 referred to the correct standard but did not name any factors, instead referring to the policies and procedures manual. (Ex. 14, 19, 25, 29). Morin gave the Appellant a 4 and Candidate 3 a 4, despite Candidate 3 not fully answer-

5. The Appellant requested that the union leadership (Candidates 3 and 4) recuse themselves from participating in decisions about changing the promotions process. They did not. (Appellant Testimony at CD 3, 1:19).

6. The third member of the panel, Chief Dunn of the Hull Police Department, was available to testify but the Town did not call him.

7. For candidates 2, 3 and 4, Duphily's contemporaneous scores match up exactly with his final scores entered into his rating sheet. For the Appellant's scores, however, several of Chief Duphily's contemporaneous scores were significantly lower than those on his scoresheet. There is no evidence that Duphily was influenced in any way nor that there was a bias towards the Appellant despite the modification of scores.

ing the question and the Appellant providing a full answer. (Ex. 13, 23). Morin stated that he may have given the Appellant lower scores because he was the first to be interviewed but had no reasons for the difference in scoring of many other questions. (Morin Testimony).

34. At times, the Appellant's answers were similar to answers given by the other candidates. (Ex. 14, 19, 25, 29). However, in some of those answers, such as Question 6, 13, 14, and 15, the other candidates provided more information or a more thorough answer than did the Appellant, or the Appellant assessed the question in a slightly different way that did not fully comport with policy. For example, Candidate 4 had long and thorough answers for Question 13, which asked about what steps a shift supervisor would take to ensure a domestic incident is handled thoroughly and in accordance with department policy. (Ex. 9). The Appellant answered the question fully based on his assumption that the initial officers would have already called EMS for medical treatment; the policy states that the shift supervisor must call EMS and was scored lower than other candidates for not including the step of calling EMS. (Ex. 14, 19, 25, 29; Appellant Testimony).

35. At least one question resulted in a discussion of proper police procedure amongst the panelists. Question 6 asked,

> "You are the day shift Sergeant. There are confirmed reports of an active shooter at the High School. You must assume command as both the Chief and the Deputy are out of town. Please explain what steps you would take to effectively handle this incident. Please be as thorough as you can." (Ex. 9).

Morin scored the Appellant by comparing his answer to the policy in place. Chief Duphily, however, understood the Appellant's answer to reflect current police response to an active shooter, which had changed on a national level after a recent school shooting. The panelists discussed the answer to that question and scored according to their own opinions, with Morin scoring the Appellant very low because he did not follow policy and Chief Duphily scoring higher because the Appellant's answered in accordance with current police practice. (Morin Testimony, Duphily Testimony). Chief Dunn scored the Appellant's answer as "2," or "fair." Regardless of the difference in opinion about the correct answer to this question, other candidates responded in a more thorough way, incorporating other steps such as which agencies to communicate with and where to set up particular stations near the school. (Exs. 10, 13, 18, 23 and 28)

36. Each panelist's scores varied; in other words, no scoresheet looked exactly like another one. This was true for all candidates. (Ex. 10). Morin and Captain Duphily testified that they scored each candidate independently, without input from the others, and that changes made to their scoresheets were made contemporaneously. (Morin Testimony; Duphily Testimony).

37. The Appellant stated at the hearing that his answers to the questions at hearing were different than the answers he gave during the panel interview. (Appellant Testimony).

BOS Process of Promotional Appointment.

38. As the Appointing Authority for the Town, the BOS received the candidates' resumes and cover letters. (Allen Testimony)

39. The Chairperson for the BOS (Allen or Chair) has chaired the BOS for eight years. (Allen Testimony). It is her practice to seek out the Chief of Police or the Town Administrator prior to interviewing candidates to learn what she can in advance of the meeting. (Allen Testimony).

40. At some point prior to the BOS meeting on September 19, 2018, Morin told the Chair about the candidates' interviews with the three-person panel. Morin stated the panel did not recommend the Appellant because in a question about active shooter, the Appellant had answered in a way that did not follow policy. Morin also stated that the Appellant, when asked to suggest a new policy, provided an answer that was already in policy. The Chair did not know any questions asked of the candidates except these two. Morin did not tell the Chair that the Appellant's answer was considered to be the correct answer by one of the panelists or that the panel had differing opinions about the answer to that question. (Allen Testimony). The Chair was "convinced" by this information and made up her mind about the Appellant before interviewing the candidates at the September 12, 2018 meeting. At hearing, she did not remember if she told this information to any other board member. (Allen Testimony at CD 2 at 3:07, 3:38).

41. The BOS members interviewed the four candidates by asking five questions of each candidate. Each candidate was asked the same five questions in the same order. Among the questions were questions about community policing efforts and community involvement and a question about supervisory experience. (BOS CD; Allen Testimony)

42. At the BOS meeting, several members stated that the BOS has in the past always taken the recommendation of the Chief of Police and that they hold the entire police department in high regard. The members expressed gratitude to the Department for being a part of the community. They stated that all candidates were qualified and thanked them for their service to the Town. (BOS CD; Allen Testimony).

43. At the end of the interviews, Chief Ross explained to the BOS members the factors he used to make his recommendation. He stated that he considered the candidates' scores from the interview panel, a review of specialized training, the jobs they did within the Department, and the amount of community interaction the candidates had signed up for. (BOS meeting at 1:46; Ross Testimony at CD 1, 2:01).

44. The BOS voted to bypass the Appellant for Candidate 2, bypass the Appellant for Candidate 3, and bypass the Appellant for Candidate 4. (BOS CD: Allen Testimony)

Appointing Authority's Determination

45. On September 24, 2018, the Appellant received the Town's decision to bypass him for promotional appointment to Sergeant in a letter from the Town. (Ex. 1). The letter included another

lengthy letter signed by the Chief Ross that stated the reasons for the bypass and listed the qualifications of the other three candidates that led to their promotions. Chief Ross's letter stated that the Appellant was not promoted for the following reasons:

> 1. "The Appellant's interview did not compare favorably to other applicants, he did not demonstrate forethought regarding situations that a Police Sergeant might reasonably be able to handle, and displayed undesirable Sergeant qualities. Specifically, the Appellant
>
> a. Displayed average communication skills.
>
> b. Displayed lack of knowledge of Departmental Policies and procedures, specifically the procedures for juveniles (interview question 5) and the Department of HR, Essential Functions of a Police Sergeant in the Rules and Regulations.
>
> c. Was not familiar with the Active Shooter Plans or Incident Command and did not answer interview question 6 thoroughly as requested. In the answer, the Appellant stated that he "would ignore the Active Shooter Plans and enter the school."
>
> d. Did not state that he would contact EMS to provide medical attention in question 13 regarding a domestic disturbance.
>
> Additionally, the Interview Panel did not recommend the Appellant for promotion and rated him the lowest of the four candidates."
>
> 2. "The Appellant's training history consisted of predominantly mandatory training, whereas the other candidates demonstrated 'far superior initiative in seeking specialized training.'
>
> 3. The Appellant demonstrated less initiative than the other candidates to engage in Community Policing efforts or participate in Department sponsored events.
>
> 4. The Appellant has taken significantly less initiative to contribute to the Department by serving in or expressing an interest in the Specialty positions." (Ex. 32).

This letter also contained detailed information about the other candidates' positive attributes and experiences in specialty training, police-sponsored community events, and special positions, with specific references to those types of activities, as well as other supervisory experience.

LEGAL STANDARD

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 (2001), 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, § 1.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *Cambridge* at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. *Selectmen of Wakefield* v. *Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928). *Commissioners of Civil Service* v. *Municipal Ct. of the City of Boston*, 359 Mass. 214 (1971).

A person who is bypassed may appeal that decision under G.L. c. 31, §2(b) for *de novo* review by the Commission. When a candidate appeals from a bypass, the Commission's role is not to determine if the candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of evidence, the bypass decision was made after an "impartial and reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and that there was "reasonable justification" for the decision. *Police Dep't. of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012) citing *Massachusetts Ass'n. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259 (2001); *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 241 (2006) and cases cited; *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (appointing authority must prove, by a preponderance of evidence, that the reasons assigned to justify the bypass were "more probably than not sound and sufficient"); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) (same).

The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly* citing *Cambridge* at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

The preponderance of the evidence established that the Town's decision to bypass the Appellant was made utilizing an impartial and reasonably thorough review and is reasonably justified. As part of my assessment regarding whether political considerations, favoritism, or bias played a role in this promotional appointment, I listened carefully to all of the witnesses, including the two witnesses who served on the initial interview panel. Additionally, I paid close attention to the video recordings of the panel's interviews with the candidates and compared the candidates' answers and assigned scores, and the candidates' interviews with the Board of Selectmen.

Bypass Reason 1—The Panel Interview

In this case, the promotional process of forming recommendations using the information gained by an interview panel, *once the process was decided upon,* was transparent and thorough.

"Public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one." *See*, e.g., *Dorney* v. *Wakefield Police Dep't*, 29 MCSR 405 (2016); *Cardona* v. *City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principles of civil service law. *See e.g.*, *Malloch* v. *Town of Hanover*, 472 Mass. 783, 796-800 (2015); *Flynn* v. *Civil Service Comm'n*, 15 Mass. App. Ct. 206, 208, *rev. den*., 388 Mass. 1105 (1983)." *Pilling* v. *City of Taunton*, 32 MCSR 69, 72 (2019).

Further, performance during candidate interviews, especially for interviews for promotion to a senior level position in the department's command staff, "is a relevant factor an appointing authority can use to judge an applicant." *Sheehan* v. *City of Somerville*, G2-19-178 [33 MCSR 364] (2020). *See Frost* v. *Town of Amesbury*, 7 MCSR 137 (1994)(Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); *LaRoche* v. *Department of Correction*, 13 MCSR 159 (2000)(Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead); *McMahon* v. *Town of Brookline*, 20 MCSR 24 (2007)(poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations on the part of the Appointing Authority).

There is little information about if or how the change in promotional hiring in September 2018 was decided in conjunction with the union's decision-making process. Chief Ross's decision to impose a new type of promotional process marked a significant change from past policy, where the previously hired sergeant was promoted without an interview and based on the Chief's recommendation. Both Candidates 2 and 3 benefitted from the change in procedure, as they were ranked third and fourth on the Civil Service list. At a meeting on May 11, 2018 with Candidate 3 and Candidate 4 and Sergeant A (who was not a candidate for promotion), the Police Chief stated that he would "kill the list, " meaning he would not fill the two open Sergeant positions; however, the record does not reflect that this statement was intended to prejudice the Appellant. The union had asked for a written description of the change in process so that the union could bring that information to its attorney. Ultimately, if the change in interview process did not adhere to the requirements negotiated as part of the collective bargaining agreement, a potential violation of the collective bargaining agreement should be pursued through the grievance process, not the Commission.

There is a flaw in the promotional hiring process of September 2018. Town Administrator Morin, in his informal conversation with the BOS Chair prior to the BOS interviews, supplied information about the Appellant's participation in the interview panel that was not fully accurate. Specifically, Mr. Morin stated that the panel agreed on not promoting the Appellant because in a question about an active shooter scenario, the Appellant had answered in a way that did not follow policy and that the Appellant, when asked to suggest a new policy on another matter, provided an answer that was already established policy. Because of this information, the Chair "was convinced" and made up her mind about the Appellant prior to his interview with the BOS, in effect tainting her participation in the BOS interview process.

However, this aspect of the Town's promotional hiring process in September 2018, while important, is just one aspect of the Town's decision to bypass the Appellant. In all, that process was fair and impartial. When compiling the panel, Chief Ross included two other Chiefs of Police whom he knew professionally. The panelists treated the candidates equally and all questions were asked of all candidates. The twenty questions asked involved the exact types of questions Chief Ross indicated would be asked in his email to union leadership: policy, management and supervision of personnel, and scenarios. While some of the scores reflected differences in opinion, the scores of all panelists were not wholly arbitrary, even though a model answer or method of scoring would have helped to eliminate some subjectivity in scoring.

One of the Appellant's responses, specifically to Question 5, was overtly scored lower and more subjectively by Mr. Morin, in all likelihood because Chief Ross told the panel that the Appellant's answer about a policy was incorrect.[8] That single question, on which the Appellant scored differently than candidates 2, 3, and 4 in Mr. Morin's scoresheet, did not impact his overall score given the number of other questions, the slight variations in scores from all panelists, and the inherent subjective nature of an interview. In other questions, the difference in scores do not justify the differences in answers; however, in Mr. Morin's case, the differences were primarily in scoring a half point. This was the single occurrence of Chief Ross's intervention in the scoring process for any candidate.

In other scoring, the Appellant's answer was not the most thorough answer of all the candidates' responses, and the scores accordingly reflect that difference. For instance, the Appellant generally had shorter and less thorough answers to Question 6, 13, 14, and 15 when compared to the other candidates. Moreover, the scoring of the candidates' answers during the three-person interview, though inherently subjective, demonstrated a difference in each candidate's skills and knowledge to function in the role of a police sergeant. To give an example, Candidate 4 answered Question 6 in a more thorough way, incorporating taking other steps in an active shooter situation, such as contacting sister agencies and setting up particular stations for specific priorities near the school.

The evaluation of the Appellant under Bypass Reason 1 was reasonable and justifiable based on the record of the interviews,

8. Mr. Morin's scoring of the Appellant compared with other candidates could have been the result of the Appellant having interviewed first, as he credibly testified.

testimony of two panelists, and policies the panelists had when scoring. In its entirety, the record concerning the panel interview demonstrates a thorough process and justification to bypass the Appellant.

Bypass Reasons 2 Through 4

Even if the first reason for bypassing the Appellant was not justified, the other bypass reasons detailed in the Town's letter to the Appellant indicate that the Appellant did not possess the qualifications possessed by the successful candidates, which qualifications the Town deemed necessary for the promotion. The successful candidates engaged in specialized training, community policing efforts and Department-sponsored events and they applied for specialty positions, which were emphasized in this hiring process. The Appellant certainly possesses supervisory skills gained while being a union leader in positions of president, vice, president, and treasurer, as well as during the many years he has employed others at his own business. Unlike the other candidates, however, the Appellant lacked the breadth of specialized police training and specialty police position experiences that the Town wanted and which it had the discretion to pursue in filling the sergeant positions. In addition to bypassing a candidate for appropriate negative reasons, an appointing authority may bypass a candidate for positive reasons, as when one police candidate obtains specialty training and assumes specialty responsibilities that another candidate has not. Here, the Town identified the specific skills and diversity of police work that it sought in the sergeant candidates. The Town promoted the two candidates it found had the training and work experience and bypassed the Appellant for not having the training and experience it sought. The Appellant's lack of training and experience that the Town sought provided the Town with reasonable justification for bypassing the Appellant for the Sergeant promotion.

As a final matter, the Appellant requests that I draw a negative inference from the fact that Chief Dunn, the third panelist on the interview panel, was available and was not called to testify at hearing. I decline to do so as the record provides adequate evidence on which to render a decision and the Appellant has not established a legal basis for requiring the appointing authority to call a particular witness.

CONCLUSION

For these reasons, the City's decision to bypass the Appellant for promotion to Sergeant is affirmed and the Appellants appeal under Docket No. G2-18-223 is ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on April 8, 2021.

Notice to:

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* * * * * *

ROGER J. CORMIER

v.

CITY OF GARDNER

G2-19-049

April 8, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Promotion to Sergeant in the Gardner Police Department-Insubordination-Incivility to Superiors-Interview-Advanced Trainings of Successful Candidates-Disciplinary History— The Commission had no problem affirming the bypass of a candidate for promotion to sergeant in the Gardner Police Department where he had a record of incivility and insubordination toward his superiors, a disciplinary history, and a lack of voluntary specialized trainings that contrasted poorly with those of the successful candidates. While not a team player and unpopular with the command staff, this Appellant was highly regarded in the community with many commendations from civilians he had helped.

DECISION

On March 5, 2019, the Appellant, Roger J. Cormier ("Appellant"), pursuant to G.L. c. 31, s. 2(b), filed the instant appeal at the Civil Service Commission ("Commission") contesting the decision by the City of Gardner ("City") to bypass him for promotion to the position of sergeant in the City's Police Department. I held a full hearing at the Armand P. Mercier Community Center in Lowell, MA, on May 13, 2019.[1] The hearing was digitally recorded and both parties received a CD of the proceedings.[2]

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal is obligated to supply the court with a transcript of this hearing to the extent that he wishes to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

The Parties together submitted twenty-one (21) Exhibits without objection. The Appellant submitted three (3) Exhibits to which the City objected, and the City submitted one (1) Exhibit to which the Appellant objected. One additional Exhibit was ordered produced by the Respondent and was filed post-hearing with the Commission. Specifically, the Respondent was ordered to produce transcribed notes of Police Chief Neil Erickson's interview notes, as his original, handwritten notes were illegible. Based on the documents submitted, the testimony of the following witnesses:

For the City of Gardner:

- Mayor Mark Hawke
- Deputy Chief James Trifiro
- Chief Neil Erickson (Retired)
- Chief Richard Braks

For the Appellant:

- Deputy Chief John Bernard (Retired)
- Patrol Officer John Smith
- Patrol Officer Roger Cormier, Appellant

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

1. The Gardner Police Department ("Department") has approximately forty-one (41) employees including: one (1) Police Chief; two (2) Deputy Chiefs; two (2) Lieutenants; (5) Sergeants; four (4) Detectives; and nineteen (19) police officers. (City of Gardner website www.gardner-ma.gov)

2. The Mayor of Gardner serves as the Appointing Authority for all appointments and promotions in the Police Department and the City Council confirms the appointment. Mayor Mark Hawke ("Mayor Hawke") testified at the hearing of this appeal that he relies very heavily on the recommendation of the Police Chief regarding which candidate to appoint or promote. (Testimony of Mayor Mark Hawke).

Fall 2015 Civil Service Sergeant's Promotional Exam

3. In the Fall of 2015, the Appellant took the Civil Service Sergeant Promotional Examination. The Appellant received a score of 80. (Testimony of Appellant).

4. The state's Human Resource Division created a list of eligible candidates for promotion to Sergeant for the Gardner Police Department. The Appellant was ranked first on this list of two and Officer L was second on the list. (Ex. 5 and Testimony of Appellant).

5. No certifications were generated from this eligible list because there were no promotions to fill, according to an Affidavit of Debra A. Pond, Director of Human Resources for the City of Gardner. (Ex. 5A and 6).

Fall 2016 Civil Service Sergeant's Promotional Exam

6. Chief Neil Erickson called for another promotional examination for the ranks of Sergeant and Lieutenant during the month of August 2016. The Appellant spoke to Chief Erickson on August 24, 2016, questioning his decision to call for another examination. The Appellant recalled the Chief explaining that he did so because he wants the officers to get better at taking the exams so they can pass.[3] They discussed the list and the Chief told him that he does not have to take the exam again because he is on an active list. (Testimony of Appellant).

7. On or about October 5, 2016, the Appellant took the Civil Service Sergeant Promotional Examination again and received a score of 81.[4] Another eligible list was created by HRD. The Appellant was ranked first on the list of two candidates. (Ex. 5B & 6 and Testimony of Appellant).

8. No certifications were generated from this eligible list either because there were no promotions to fill, according to the Affidavit of Affidavit of Debra A. Pond, Director of Human Resources for the City of Gardner. (Ex. 5B and 6).

Fall 2017 Civil Service Sergeant Promotional Examination

9. During the summer of 2017, Chief Erickson called for another promotional examination for the rank of sergeant and lieutenant. In a July 10, 2017 email, the Chief also announced to the Department that "we [are] going to start having Oral Boards for part of the selection process for advancement starting this series of exams. That will allow for a better process in selection." (Testimony of Appellant and Ex. 8).

10. This civil service promotional examination was administered during the Fall of 2017. The Appellant took the Lieutenant's Exam[5] but did not elect to take the Fall 2017 Sergeant Exam since he had already scored an 81 on the 2016 examination and he knew that his score was good through February 1, 2019. (Testimony of Appellant).

11. The Fall 2017 Exam resulted in a new eligible list for Sergeant. On the Sergeant's list, the Appellant was tied for first with then-De-

3. The Appellant testified that back in 2014, the Chief called for a promotional exams for Sergeant and Lieutenant on the basis that he may retire in 2015. The Appellant and two (2) sergeants took the Lieutenant's Exam. The Appellant and four (4) other patrol officers took the Sergeant Exam. Every single person failed both examinations. The Chief did not retire in 2015, as initially anticipated. He retired in December 2018. The Appellant noted that the test costs $250 every time he takes it and that he does believe people get better at the exam by taking it multiple times, they get better by studying. (Testimony of Appellant).

4. The Appellant also took the Lieutenant's Promotional Exam in the Fall of 2016, along with two sergeants. Everyone failed the lieutenant's exam.

5. The Appellant tied for first on the Fall 2017 Lieutenant's Examination. Sgt. M., who also took the exam, was ultimately promoted to Lieutenant. The Appellant did not file a bypass appeal because he was not bypassed, as he was tied on the list with the chosen candidate.

tective A (both with a score of 81). Officer L was second on the list. Officer W was ranked third on the list. (Ex. 5C).

12. By letter dated January 15, 2019, Gardner Mayor Mark Hawke, the Appointing Authority, notified the Appellant that he was bypassing him for promotion to the rank of sergeant. The bypass letter details that Officer L, who was ranked second, was chosen for the promotion. This bypass letter indicated that the Appellant was not selected for the following negative reasons:

- As noted above, after the panel interviews Officer Cormier was identified as the fourth candidate for promotion selection.
- Over the course of Officer Cormier's employment with the Gardner Police Department, he has been verbally critical of superior officers and Department administration.
- Officer Cormier has been insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. (Ex. 2)

13. The January 15, 2019 bypass letter also indicated that Officer L was chosen for the position of Sergeant for the following positive reasons:

- He has a Bachelor's Degree in Criminal Justice.
- He has worked as a police officer with the City of Gardner Police Department for more than eight (8) years.
- Over the course of his employment with the City, he has exhibited strong communication skills, as well as flexibility to deal with the public in a positive manner.
- There are no disciplinary actions in Officer L's disciplinary file
- After completing the interview process and reviewing each candidate's responses, the candidates were ranked in order of hire preference as follows:

  1. Then-Detective A
  2. **Officer L**
  3. Officer W
  4. Appellant (Ex. 2)

14. By letter dated January 20, 2019, Mayor Hawke, the Appointing Authority, notified the Appellant that the Mayor was bypassing him for another vacancy for the position of Sergeant.[6] The bypass letter details that Officer W, who was third on the list, was chosen for the promotion. This bypass letter indicated that the Appellant was "the first candidate on the certification…." The Appellant was not selected for the following reasons:

- As noted above, after the panel interviews Officer Cormier was identified as the fourth candidate for promotion selection.
- Over the course of Officer Cormier's employment with the Gardner Police Department, he has been verbally critical of superior officers and Department administration.
- Officer Cormier has been insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. The most recent disciplinary incident occurred on or about December 13, 2018, resulting in a verbal warning. (Ex. 3)

15. The January 25, 2019 bypass letter indicated that Officer W was chosen for the position of Sergeant for the following positive reasons:

- He has taken several classes towards an Associate's degree in criminal justice.
- He has worked as a police officer with the City of Gardner Police Department for more than six (6) years.
- Over the course of his employment with the City, he has exhibited strong communication skills, as well as flexibility to deal with the public in a positive manner.
- There are no disciplinary actions in Officer W's disciplinary file.
- After completing the interview process and reviewing each candidate's responses, the candidates were ranked in order of hire preference as follows:

  1. Then-Detective A
  2. Officer L
  3. **Officer W**
  4. Appellant(Ex. 3)

Background of the Appellant

16. Richard J. Cormier ("Appellant") was born and raised in Gardner, MA, graduating from Gardner High School in 1987. He attended Mt. Wachusett Community College from 1988-1992 and obtained an Associate degree in Electronic Engineering Technology. (Testimony of Appellant and Ex. 7).

17. The Appellant was appointed a Patrol Officer for the Gardner Police Department ("Department") on February 20, 1995 and has been so employed for twenty-four (24 years). During his tenure at the Department, he has served in two (2) specialty assignments—Community Policing for a year and a half (1.5) and Foot Patrol for two (2) years. He has also served as Officer in Charge ("OIC") on eight (8) occasions. (Testimony of Appellant). The Appellant has not undergone or sought any additional training as a Gardner Police Officer, other than mandatory in-service training. (Testimony of Chief Erickson and Dep. Chief Braks).

18. Within the Appellant's Personnel File at the Department, there are numerous letters sent to the Chief of Police commending the Appellant and his fellow officers for their police work throughout his time at the Department. Some of the quotes from the letters are as follows:

- In 2001, a woman and her husband noted "what a kind, considerate, helpful officer." The Appellant was "just so wonderful to him." Further, she stated, "He's certainly a credit to the uniform he wears." (Ex. 23)

6. There were two vacancies within a short time of each other. The Appellant was bypassed for both sergeant vacancies by lower ranked candidates.

- In 2008, the branch manager of a bank that had been robbed, who was also a City Councilor at the time, commended the officers for their expedited reaction to the situation and how they interacted with the staff and. He extended his gratitude to the officers and noted that he is proud to have the Gardner police protect his own family. Chief Erickson handwrote on the note, "Great work everyone. Thanks." (Ex. 23).

- In another letter sent in 2012, a mother wrote of her adult son who was found by the Appellant and his fellow officers after an overdose, who survived. The mother wrote to the Appellant and the other officers, "[T]hank you for giving our son back." Chief Neil Erickson noted on the letter, "I hope everyone reads this. I think this is the moment everyone strives to accomplish... Great job. Great teamwork." (Ex. 23).

19. Also included in the Appellant's personnel file are four (4) official Commendations (1997-1998) by then-Chief Cronin, each of which commended the Appellant for his hard work, professionalism, and the pride he brings upon the Department. (Ex. 23)

20. As for the Appellant's disciplinary history at the Gardner Police Department:

- On June 8, 2011, the Appellant was suspended for two (2) days for insubordination (argumentative with Sergeant Czasnowski with regards to writing a report) and for arriving late to three (3) police details and becoming argumentative and demeaning towards Sergeant Trifiro when confronted about his tardiness. When confronted, the Appellant told Sergeant Trifiro that he was on a "power trip" and that he was "only an acting sergeant." The Appellant said that "if this was going to be the type of working relationship they were going to have, he wasn't going to be a happy camper." He was ordered to send an email to the Deputy Chief and Sergeant Trifiro, about the reason for being tardy. The Appellant remained defiant and said that he would only send it to the Deputy Chief and not the Sergeant and that he would only write the email because he had to, not because he wanted to. The disciplinary notice, written by Chief Erickson acknowledges that the Appellant admitted to his behavior and that he appreciated his honesty. The Chief indicated that the original discipline was for five (5) days, but he only imposed two (2) days because of his honesty. The January 15, 2018 bypass letter refers to this instance of discipline in 2011 as a "written warning" when indeed, it was a suspension.[7] (Exs. 2 and 17).

- A written internal affairs report filed by Deputy Chief Braks indicates that, on December 13, 2018, the Appellant violated *Rule 6.3 - Courtesy* and violation of *General Order on Dispatcher Access*. The Appellant entered the dispatch area to discuss an issue he had with the dispatch team, in violation of the General Order established in April 2018. The Appellant admits he got "a little heated" during the conversation. He was directed from the dispatch area by his supervisor. The Appellant was supposed to go to his supervisor, Sergeant Trifiro, with any complaints. He was immediately spoken to by Sergeant Trifiro regarding his conduct and by Deputy Chief Braks, both of whom witnessed the incident. Deputy Chief Braks warned the Appellant that he could not go into the dispatch area and noted that he was brash and unreasonable in his interaction with dispatch employees. His strong demeanor and elevated tone were unacceptable. A note of this incident was placed in the Appellant's internal affairs file.[8]

Dep. Chief Braks notes that, in addition to the contents of the dispatch complaint, Dep. Chief Braks reminded the Appellant on December 13, 20018 of their November 28, 2018 conversation, less than one month prior, wherein he warned the Appellant that he must stop making demeaning and degrading comments about other employees. He notes that they specifically spoke about how he was making comments to officers and civilian employees in the department while working, focused upon how the department has been run and the poor decisions made by supervisors. He reminded him that they discussed how he has frequently spoke negatively about certain supervisors and administrative officers over a number of years and that cannot continue. He told him that his comments have not gone unnoticed, and he was not being selected for an administrative team as a result of this behavior. The Appellant expressed that he had a basis for those beliefs and those complaints should have been addressed with him before he became disgruntled. He stated that someone should have told him or stopped his behavior when it began. Dep. Chief Braks told him that he was addressing it now. The Appellant agreed to restrain himself but that his opinions would not change.[9] (Ex. 25)

21. The Appellant has a reputation in the Department of speaking ill of his superiors. Sergeant James Trifiro ("Trifiro"), with twenty-five (25) years on the force and twenty years (20) in the United States Coast Guard, retiring as a Lieutenant Commander, has known the Appellant his entire career. They were friends when they worked together. Their relationship changed when Trifiro became a supervisor and reprimanded the Appellant for his tardiness to three (3) police details back in 2011. Since then, the Appellant barely speaks to him. If he asks the Appellant for something, he responds but otherwise they do not speak. Sergeant Trifiro has been told by many Department officers that the Appellant has called him a "piece of shit," that he is "not a leader," and that "others should have his position." (Testimony of Sergeant James Trifiro).

22. Deputy Chief Richard Braks has twenty (20) years on the force. He wishes that the Appellant had a better rapport within the Department, as he does with the community. He noted that the Appellant is a great patrol officer, but that he has problems with superiors—which has been a consistent theme all along the way. He is willing to speak out against top administrators and he has personally heard the Appellant speak in derogatory terms about the command staff. (Testimony of Dep. Chief Braks).

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7. Although Exhibit 17 references a two (2) day suspension, Chief Neil Erickson testified that he believed that the suspension was reduced from two (2) days to one (1) day.

8. The Appellant argues that he was never officially disciplined by the Department for this matter. He does not contest that this incident occurred, however. (Testimony of Appellant). Dep. Chief Braks testified that, when he spoke to the Appellant that day following the incident, he was giving him a warning verbally but then the Chief told him to put it in writing. The incident is memorialized in the Appellant's Internal Affairs File, following a further investigation by Dep. Chief Braks, which involved getting a statement from all witnesses of the event. (Testimony of Dep. Chief Braks and Ex. 25).

9. The Appellant argues that this December 18, 2018 incident should not be considered a *formal* disciplinary matter in his record. He claimed that he was never given a copy of the internal affairs finding that he violated any rules of the department. He was spoken to at the time of the incident and acknowledged the facts of the case, yet he thought that was the end of the matter.

23. As his supervisor through the years, Dep. Chief Braks often heard the Appellant speaking ill of a certain Deputy Chief who has since retired, calling him a "piece of shit" and calling Sergeant Trifiro the same derogatory term. Deputy Chief Braks said that is his default nickname for supervisors the Appellant has a problem with. He has also heard the Appellant scrutinize Chief Erickson, essentially keeping a "tally of the Chief and certain officers." He never spoke of the Chief in a favorable manner and has told Dep. Chief Braks that he has no respect for the Chief or Sergeant Trifiro. Braks noted that Sergeant Trifiro appeared to be the co-worker the Appellant did not like the most. The Appellant told Dep. Chief Braks that he did not like or trust Sergeant Trifiro. (Testimony of Dep. Chief Braks).

24. I found Deputy Chief Braks to speak carefully, softly, and considerately during his testimony. He was willing to give the Appellant credit for his strengths and to also speak candidly of the Appellant's weaknesses. I credit his testimony.

25. Chief Neil Erickson, has been with the Department for forty-one (41) years and seventeen (17) as the Chief. The Appellant stopped communicating with him, except for essential communication, dating back to the 2011 discipline. He had heard from retired- Deputy Chief B that the Appellant said that "they were all screwed up" on the command staff. The Chief had not taken the initiative to speak to the Appellant to clear the air between them. (Testimony of Chief Erickson).

Promotion of then-Detective A—Not a Bypass of Appellant

26. By 2018, promotions for supervisory positions in the Department were forthcoming due to multiple anticipated retirements throughout the year, which would generate open lieutenant and sergeant positions. Deputy Chief Bernard gave his notice in April 2018 and both Chief Erickson and a sergeant (Sergeant Brow) were slated to retire in December 2018, as well. (Testimony of Appellant).

27. The Appellant was tied on the eligible list with a detective who worked in the Narcotics Division, then-Detective A. In April 2018, Chief Erickson announced he would accept "Letters of Interest" for the Narcotics Detective position that then-Detective A held. (Testimony of Appellant).

28. Deputy Chief John Bernard (Dep. Chief Bernard) retired from the Gardner Police Department after thirty-one (31) years of service in 2018. He recalled that Chief Erickson was seeking "supervisor training school" for then-Detective A prior to conducting interviews for the sergeant position. (Testimony of Deputy Chief Bernard).

29. Deputy Chief Bernard had a conversation with Chief Neil Erickson about the Appellant and his chances for promotion. Dep. Chief Bernard recalled that the Chief stated that "he would never promote Richard Cormier." When he asked why, the Chief indicated that the Appellant had been suspended years ago, that he was not a team player, and that he was not fit to command. Dep. Chief Bernard told the Appellant what Chief Erickson had said about him. (Testimony of Dep. Chief Bernard).

Oral Board Interviews, May 30, 2018

30. On April 24, 2018, Chief Neil Erickson sent an email to Mayor Hawke and the Director of Human Resources, Debra A. Pond, forwarding a copy of his previous July 10, 2017- email to the members of the Department concerning the Oral Board Interviews. The Chief reminded the relevant officers of the upcoming promotional interviews in a May 26, 2018 email, wherein he notified the officers of the order in which they would take place. (Ex. 8, 9 & 10).

31. Chief Erickson told the Appellant that he was not required to participate in the interview because he was on a previous eligible list, and he had not provided notice of an interview prior to his 2016 promotional examination. The Appellant opted to do the interview anyways. (Testimony of Chief Erickson and Appellant).

32. The Oral Board consisted of Chief Erickson, Acting Deputy Chief Braks of the GPD, Chief Albert of the Westminster Police Department, and Chief Barrett of the Ashburnham Police Department. (Testimony of Appellant, Chief Erickson, and Dep. Chief Braks).

33. The interviews took place on May 30, 2018, and did not proceed in the order initially listed in the Chief's May 26, 2018 email. Then-Detective A was not interviewed second, as indicated in Exhibit 10, rather, he was interviewed last. Additionally, Deputy Chief Braks was present for only three (3) full interviews and had to step out during the fourth interview[10], which was with then-Detective A. Dep. Chief Braks does not have any notes relative to the final interview.[11] (Testimony of Dep. Chief Braks Exhibit 13).

34. Chief Erickson developed the questions for the sergeant's Oral Board interviews and may have utilized suggestions from other members of the board. At the hearing of this matter, the City was unable to produce any notes from Chief Albert or Chief Barrett. Additionally, Chief Erickson's notes were illegible and had to be transcribed post-hearing. Dep. Chief Braks took notes during the interviews he was in attendance for. (Exhibit 12A-12D, 13A-13C and post-hearing Transcription).

35. The Oral Board did not utilize a scoring system to rank the respective candidates. The candidates' answers were not scored or ranked individually, not all interviewers knew of the respective rankings of the candidates on the certified list before the interview, nor were the interviews audio or video recorded. The only ranking of the candidates was pursuant to a discussion that was held by the Oral Board after all interviews were conducted. (Testimony of Chief Erickson).

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10. Dep. Chief Braks testified that he did not leave the interview because of any type of conflict of interest with then-Detective A. He simply left the room unexpectedly to tend to Department business. He cannot recall what the matter was about. (Testimony of Dep. Chief Braks).

11. The Appellant testified that he was interviewed first in the Sergeant interview. This interview took place immediately after the Appellant interviewed for the Lieutenant promotion (of which he was not promoted). The Appellant was given the opportunity to not partake in the Sergeant interview since he had just interviewed for Lieutenant, but the Appellant opted to partake in both.

36. The final rankings of the candidates occurred at the end of the interviews. Once they determined the overall ranking of the four candidates, they may have discussed the specifics of each candidate. Deputy Chief Braks would personally "key in" on the interviewee's answer to Question 9 in particular—"Please tell us how you are preparing yourself for promotion to Sergeant." Dep. Chief Braks wanted to know what each candidate had done to further his career. (Testimony of Dep. Chief Braks).

37. The Board unanimously agreed on the order of the ranking, with then-Detective A ranked first, Officer L ranked second, Officer W ranked third, and the Appellant ranked fourth. They minimally disagreed on the ranking of the second and third place candidate and vice versa, but ultimately agreed on the final order. (Testimony of Dep. Chief Braks).

38. Dep. Chief Braks found then-Detective A to be a strong candidate who had made Detective. He had a lot of schooling, had a bachelor's degree, he requested further schooling through the Department and had taken "a personal stance progressing himself." He was ranked first in the interview. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).

39. Dep. Chief Braks found Officer L to be an officer he could rely on to get something done—he would "get involved." Braks noted that he had personal knowledge of his ability to communicate with the community at large. He noted that he has a BA from Fitchburg State and also sought additional educational opportunities through the Department. Officer L was ranked second in the interview. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).

40. Dep. Chief Braks found that Officer W had gone through eighty (80) hours of training to become a Massachusetts Criminal Justice Training Academy teacher at that level. He sought this opportunity for advancement on his own and even offered to go without getting paid. The Dep. Chief notes that Officer W had taken several other classes to prepare for advancement in his career. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).

41. When the Oral Board discussed the Appellant, they spoke of how the Appellant always wanted to advance himself, but he did not have any non-mandatory training nor did he request any advanced training with the Department through the years. As a Lieutenant, Braks was responsible for these advanced training requests by officers. He does not know of any request made by the Appellant for further schooling when he was Lieutenant. Prior to the hearing, Dep. Chief Braks noted that he asked the current-Lieutenant in charge of educational opportunities of any requests by the Appellant that Braks simply did not know about—and there were none. He also noted that the Appellant was the only candidate, of the four, with a history of disciplinary action. (Testimony of Dep. Chief Braks).

42. To Chief Erickson, a candidate's position on the certification carries weight but other factors are important as well. He noted that "the interview carried a lot of weight." The interview was used in combination with the rapport he had with the officers, he stated. Chief Erickson testified that "…my knowledge of Officer Cormier over the years—he had been non-communicative with me—he wouldn't even acknowledge a 'hello.' He struggled but acknowledged it the past two years." The Chief also indicated that the Appellant's 2011 discipline "added to his thoughts last year relative to Officer Cormier becoming a sergeant." He concluded that his decision was cumulative and that the Appellant's "non-communication with me was a big issue and his discipline history" and that the new sergeant would have to be able to work with him. His issues with the Appellant were not personal, just professional. (Testimony of Chief Erickson).

43. Chief Erickson had never called for an Oral Board before during any hiring process during his time as police chief and he had only ever bypassed a candidate on one (1), possibly two (2) occasions. He noted that then-Detective A's father had been a Lieutenant with the Department and Officer L's grandfather had been on the force as well. He stated that none of that was a factor in choosing those candidates for the position of Sergeant. (Testimony of Chief Erickson).

44. On July 22, 2018, then-Detective A was promoted to Police Sergeant based on the certification generated following the 2017 promotional exam. Since the Appellant was tied on the certification with then-Detective A, the Appellant could not file a bypass appeal since he was not bypassed. (Ex. 6 and Testimony of Appellant).

Promotion of Officer L, Bypass #1 of Appellant

45. Following the October retirement of Sergeant Brow ("Brow"), Chief Erickson recommended to Mayor Hawke that he appoint Officer L (2nd on the list) for the position Sergeant, bypassing the Appellant. On December 17, 2018, Officer L was sworn in as a permanent Sergeant. Officer L had been acting Sergeant since Brow's October 2018 retirement. (Testimony of Appellant and Chief Erickson).

46. At the time of his swearing in, Officer L had been on the force for eight (8) years. He had a Bachelor's degree in Criminal Justice. (Ex. 2). Chief Erickson noted that Officer L was promoted due to his interview in May 2018, his background, and schooling. (Testimony of Chief Erickson). He was ranked second in the interview ranking. (Testimony of Chief Erickson and Dep. Chief Braks). Regarding his interview performance, Deputy Chief Braks found that he was a strong candidate with a lot of schooling, who had requested more schooling through the Department and had focused on progressing himself. (Testimony of Dep. Chief Braks).

47. In the City's January 15, 2019 bypass letter, it noted that the Appellant was not chosen for the position due to his fourth place ranking in the Oral Board, he has been verbally critical of his superior officers and the Department administration, and he had been insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. (Ex. Promotion of Officer W, bypass #2 of Appellant

48. On December 26, 2018, Chief Erickson officially retired from the Department and Deputy Chief Braks took over as Chief, creating another series of promotions. On January 9, 2019, now-Chief Braks announced that Sergeant Trifiro would be promoted to Deputy Chief, thereby creating a vacancy for another Sergeant promotion. (Testimony of Appellant)

49. Now-Chief Braks recommended to the Mayor that Officer W be chosen for the position of Sergeant, bypassing the Appellant. (Ex. 3).[12] When asked at the hearing of this matter why he recommended Officer W over the Appellant, now-Chief Braks indicated that Officer W had "better answers (in the Oral Board) and had been working in leadership and taking courses for training." At the time of his swearing-in, Officer W had six (6) years of experience as a patrol officer. He did not have a college degree, was third on the certification list, and was ranked third in the Oral Board process. (Ex. 3)

50. Officer W has no official disciplinary history in his file, yet Chief Erickson recalled an incident that Officer W was involved at the Department golf tournament and he drove off the road into a swamp. According to Chief Erickson, Officer W said that his cell phone fell and when he went to pick it up, he drove off the road. When asked if Officer W had been drinking, the Chief initially hedged his answer finally noting that "he was pretty sure he had something to drink." When asked by Appellant's counsel if the fact that he had been drinking, did that factor in the Chief's decision to give an oral reprimand, the Chief said, "No." (Exs. 3 and 6)

51. The January 25, 2019 bypass letter to the Appellant noted that Officer W had been selected because he had taken several classes towards an Associate degree in Criminal Justice, he has worked as a police officer for six (6) years, over the course of his employment, he has exhibited strong communication skills and has shown flexibility to deal with the public in a positive manner. The bypass letter notes no disciplinary history for Officer W and also notes that Officer W took the initiative to enroll in an eighty (80) hour emergency vehicle operation instructor course and became a certified instruction with the Massachusetts Police Training Council. Officer W took this course on his own time to further his experience and knowledge. (Ex. 3).

52. Now-Chief Braks does not believe that the Appellant would be able to work with this current command staff, based on his history of insubordination with the Department. Following the retirement of Chief Erickson, Deputy Chief Braks became the Chief and then-Sergeant Trifiro became Deputy Chief. (Testimony of Dep. Chief Braks).

APPLICABLE LAW

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *Cambridge* at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. *Selectmen of Wakefield* v. *Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928). *Commissioners of Civil Service* v. *Municipal Ct. of the City of Boston*, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." *Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Such deference is especially appropriate with respect to the hiring of police officers. Considering the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. *Beverly* citing *Cambridge* at 305, and cases cited. The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189 190-191 (2010) citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006).

ANALYSIS

The question before the Commission is whether the Appointing Authority has shown, by a preponderance of the evidence, that the Appellant's history of insubordination and poor working relationship with the command staff, his disciplinary history, his lack of continuing police training and education, taken in conjunction with his fourth place ranking in the interview provided "reasonable justification" to bypass the Appellant for promotion to the rank of Sergeant. Whereas the Commission is to conduct a fresh review of the facts, the Commission must consider its factual findings within the restricted context of the legitimacy and reasonableness of the appointing authority's actions. *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 186 (2010). In doing so, the Commission "may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations by the

12. The Appointing Authority relied on the candidate rankings from the immediately prior sergeant promotional process because it took place so close in time to it.

appointing authority." *Cambridge*, at 304, *citing School Comm. of Salem* v. *Civil Service Comm'n.,* 348 Mass. 696, 698-99 (1965).

Appellant's History of Insubordination, Use of Demeaning Language, and Disciplinary History

The City has proven by a preponderance of the evidence that the Appellant has a proven history of insubordination and use of demeaning language directed towards superior officers and the command staff at the Gardner Police Department. The Appellant has been employed as a patrol officer for twenty-four (24) years. He has worked with Chief Neil Erickson, Sergeant Trifiro, and Deputy Chief Braks for decades. Testimony revealed little to no issues in the way the Appellant interacted with other officers early in his career, with the Appellant being friendly with Sergeant Trifiro when they started out together as patrol officers. Sergeant Trifiro considered the Appellant a friend back then. As Sergeant Trifiro and Chief Erickson moved up in the ranks, the Appellant's attitude and demeanor towards these men began to devolve. At the hearing of this matter, Sergeant Trifiro, a Coast Guard veteran and now-Deputy Chief of the Gardner Police, willingly testified to both positive and negative attributes of the Appellant in a calm and deliberate manner and I credited his testimony.

The Appellant first became insubordinate with Sergeant Trifiro the very first time the Sergeant disciplined him. The Appellant was also disciplined for a separate instance in 2011, wherein he was argumentative and insubordinate with Sergeant Czasnowski relative to writing a report. With regards to the incident involving Sergeant Trifiro, the Appellant was late for three (3) police details, ranging from a couple minutes to an hour late in 2011. The Appellant does not dispute that he was late; he took issue with, as he claimed, other officers doing worse. The Appellant became argumentative when confronted with a reasonable inquiry into his consistent tardiness for reporting for details. He told the Sergeant that "he was on a power trip," and that he was only "an acting sergeant." The Appellant warned Sergeant Trifiro that, "if this was going to be the type of working relationship they were going to have, he wasn't going to be a happy camper." Sergeant Trifiro ordered the Appellant to write an email to the Deputy Chief indicating his reasons for being tardy, and to also forward it to the Sergeant. The Appellant refused to send the email to the Sergeant, saying that he would write the email to the Deputy because he had to, not because he wanted to. The Appellant was suspended for two (2) days total for both the Czasnowski and Trifiro incidents, of which was reduced to one (1) day, thereafter. Because the Appellant admitted to this incident, the Appellant did not receive a five (5) suspension for his behavior, as Chief Erickson originally intended.[13]

Following this discipline, the Appellant's behavior toward Sergeant Trifiro and Chief Erickson, who ultimately handed down the 2011 discipline, did not improve. It has been seven (7) years since the 2011 discipline and the Appellant continues to barely speak to Sergeant Trifiro. Sergeant Trifiro testified to having been told by many Department officers that the Appellant has called him a "piece of shit," that he is "not a leader," and that "others should have his position."

Deputy Chief Braks, who has moved up the ranks in the Department over his twenty (20) year career, and who is now the current-Chief of the Department, testified to the Appellant's foul language directed towards Sergeant Trifiro. I credit Deputy Chief Braks' testimony. He has heard the Appellant call Sergeant Trifiro a "piece of shit" and that he neither likes nor trusts Sergeant Trifiro. He has personally heard the Appellant call a former-Deputy Chief a "piece of shit," as well. Deputy Chief Braks stated that the Appellant is a great patrol officer and that he wished he had as good a rapport within the Department as he does in the community. He has had problems with superiors, which "has been a consistent theme all along the way." He is willing to speak out against top administrators and Deputy Chief Braks has personally heard the Appellant speak in derogatory terms about the command staff.

The Appellant, since the 2011 discipline, would barely speak a word to Chief Erickson, not even able to respond to the Chief's "hello." The Chief noted that the Appellant begrudgingly says hello in response to him the past two (2) years. Deputy Chief Braks saw the Appellant essentially keep a "tally of the Chief and certain other officers." He never spoke of the Chief in a favorable manner, according to Deputy Chief Braks, having told Braks that he has "no respect for the Chief." At the hearing of this matter, the Chief was unable to reconcile how he could possibly promote the Appellant to a supervisory role within the Department that he runs, if the Appellant was simply unable to even speak to the Chief, going on almost a decade. The Chief noted in his testimony that the Appellant's "non-communication with me was a big issue" and that a new sergeant would have to be able to work with him.

The Appellant argues that Chief Neil Erickson simply bypassed him from promotion due to a bias he has against the Appellant. The Appellant makes this claim without acknowledging the obvious issues with his behavior over the years which has clearly led to the Chief's opinion of the Appellant. It is unreasonable for the Chief of any Department not to evaluate and utilize twenty-four (24) years of an officer's behavior when the Chief is deciding whether that employee is a good candidate for promotion to a supervisory role. The Chief is not biased so much as the Chief has formed a well-reasoned opinion of the Appellant. The Chief cannot simply wipe the slate clean and evaluate the Appellant as if he has never met him. This is not a bypass for original appointment to the position of police officer; this is for appointment to a role with even more responsibility and the new sergeant must be able to communicate and work with the existing command staff. At the time the decision was made to bypass the Appellant twice, Chief Erickson was the chief; however, following his retirement, Deputy Chief Braks was promoted to Chief and Sergeant Trifiro was promoted to Deputy Chief. It would be irrational to believe that the Appellant would suddenly be able to work constructively

13. The January 15, 2019 bypass letter refers to the punishment for this incident as a written warning. The Appellant, Chief Erickson, and Sergeant Trifiro all testified to a one (1) day suspension.

alongside Deputy Chief Trifiro, let alone even bring himself to speak to him. Deputy Chief Braks testified that, in his opinion, the Appellant would not be able to work alongside the new command staff, even with the retirement of Chief Erickson. This is not a large Department in terms of the number of supervisors. There are two (2) lieutenants and (5) five sergeants. The Appellant's anticipated poor behavior, due to the pattern he has exhibited for years, could certainly have a major impact on the Department and its morale and this is not a risk the Department was willing to take. It is not the Commission's role to substitute its judgment for that of the Appointing Authority in this regard.

In addition to his 2011 discipline for insubordination and tardiness, the Appellant was disciplined in December 2018 for violation of a Courtesy Rule and a General Order on Dispatch Access. This incident was not listed in the first bypass letter, and therefore, the Commission did not take this one incident into consideration for that bypass. The Commission did take this incident into consideration for the second bypass, however. This incident took place during the pendency of the Appellant's candidacy for promotion to sergeant. Both Deputy Chief Braks and Sergeant Trifiro witnessed the December 2018 incident, wherein the Appellant barged into the dispatch area in the Department. The General Order, established in April 2018, prohibited patrol officers from entering the dispatch area. In addition to entering the area, the Appellant spoke in a brash manner to a dispatcher, which he admits "got a little heated." Sergeant Trifiro asked him to step outside to speak with him, in an effort not to embarrass the Appellant. Deputy Chief Braks testified that the Appellant's demeanor and elevated tone were unacceptable. The dispatch employee the Appellant confronted that day felt disrespected. A note of this incident was placed in the Appellant's internal affairs file. The Appellant was under the impression that he was not disciplined for this incident and felt he was only "spoken to" about the incident and did not even receive a "verbal warning." Both Sergeant Trifiro and Deputy Chief Braks testified that they were not looking to formally discipline the Appellant, that they just wanted him to listen, to be respectful, and to know that his behavior was unacceptable. The Commission finds, by a preponderance of the evidence standard, that this incident of misconduct occurred, regardless of what the formal discipline the Department imposed was labelled.

Worthy of note is a conversation Deputy Chief Braks had with the Appellant just two weeks prior, on November 28, 2018, wherein he warned the Appellant that he must stop making demeaning and degrading comments about other employees. Deputy Chief Braks noted that he specifically spoke to the Appellant about how he was making comments to other officers and civilian employees in the department while they worked, focused upon how the department was being run and poor decision being made by supervisors. He told the Appellant that these comments have not gone unnoticed. The Appellant, even in light of this stark warning in late- November, could not control himself and still barged into the dispatch area that day, confronting the dispatch employee, right in front of his supervisors. The purpose of the General Order was to prevent this type of confrontation because the dispatch area needed to be free of distractions. The Appellant was on notice that he was only supposed to go to his own supervisor, Sergeant Trifiro, with any issues he had with dispatch. It is was not lost on the Department, or the Commission, that the Appellant was right in the middle of his candidacy for promotion, yet he chose to conduct himself in this manner at such an inopportune time.

Preparation for Promotion; Educational Advancement and Initiative

In addition to his history of a pattern of insubordination, derogatory language, and his disciplinary history for similar misconduct, the Appellant was also bypassed due to his lack of continuing police education, as compared to those officers chosen for promotion. As noted in both bypass letters, the Department took a keen interest in those officers when took the initiative to further their standing in the Department by taking advantage of additional educational opportunities made available by the Department, other than those which are mandatory in-service training, over the years. Deputy Chief Braks, during his time as lieutenant in charge of making arrangements for officers in their pursuit for continuing education courses, never once recalls a time when the Appellant asked to be enrolled in a course. He also checked with the current lieutenant in charge of that now and he was told that the Appellant sought no such courses over his twenty-four (24) year career. Braks testified that this was an issue the Department considered when it came to whether to promote the Appellant over other candidates.

Officer L, who was the first officer to bypass the Appellant for promotion to Sergeant, has a Bachelor degree in Criminal Justice from Fitchburg State and is currently enrolled in a Master's degree program in Criminal Justice. Officer L has a certification as a field training officer, among other similar certifications. which was of interest to the Department. In comparison, the Appellant has an Associate degree in Electronic Engineering dating back to 1992 along with some courses in criminal justice, although the Appellant had not communicated the criminal justice course to the Department prior to the hearing of this matter, nor was it mentioned on his resume. Deputy Chief Braks noted that Officer L is someone "he knew could get something done—he would get involved." Braks said he had personal knowledge of his ability to communicate with the community." The January 15, 2021 letter notes that Officer L has no history of discipline in the Department and has shown, over the course of his employment, strong communication skills, as well as flexibility to deal with the public in a positive manner." The Department considers Office L to "be a self-starter who has excelled in both drug and criminal investigations." He was ranked second after the interview process, as opposed to the Appellant fourth ranking.

Additionally, Officer W, who bypassed the Appellant for a promotion to Sergeant, had taken the initiative to advance his career opportunities by taking an eighty (80) hour course at the Massachusetts Criminal Justice Training Academy to become a teacher at that academy. He sought this on his own, willing to pay for it by himself, which the Department did not have him do. He has also taken several other classes through the Department to prepare for advancement, Deputy Chief Braks testified. He does not have a college degree but has taken college courses in criminal justice. The bypass letter indicates that Officer W has a strong his-

tory communication and flexibility with the community at large. Officer W does not have a record of disciplinary action in his file, although the Chief testified to an incident for which he was verbally warned about driving off the road after a Department golf tournament, which the Chief believes he may have been drinking at. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983).

Oral Board Interviews

Lastly, the City points to the Appellant's ranking in the interview process, as compared to Officers L and W, as yet another reason for bypass, in conjunction with the Appellant's history of insubordination, his poor working relationship with superiors, his prior disciplinary history, and lack of educational initiative. Police departments and other public safety agencies are properly entitled to, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one. *Connor* v. *Andover Police Department*, Case Number G2-16-159 [30 MCSR 439] (2017), citing, *Dorney* v. *Wakefield Police Dep't.*, 29 MCSR 405 (2016); *Cardona* v. *City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent and permissible in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers." *Flynn* v. *Civil Service Comm'n.*, 15 Mass. App. Ct. 206, rev. den., 388 Mass.1105 (1983).

There were deficiencies in the Department's Oral Board interviewing process.[14] This was the first time the City had utilized the interview process and it showed. For instance, the interviews were not audio or video recorded nor were the candidate's answers to individual questions scored numerically, which would lead to some objectivity in an inherently subjective exercise. No such scoring system was used. The Oral Board's only ranking of candidates was made following a discussion after all interviews were conducted. Each interviewer put the candidates in their own ranking order and then the interviewers compared their rankings.

Chief Erickson, Deputy Chief Braks, and two local chiefs from other towns conducted the interviews. To the City's credit, the out-of-town interviewers, the Chief of Ashburnham, and the Chief of Westminster, added a level of objectivity to the process since these Chiefs did not know candidates. Their status as current-chiefs added a depth of experience to the ranking process. All four interviewers took notes. The City provided the Chief and the Deputy Chief's notes to the Commission; however, the Chief was unable to locate any notes the other two interviewers took during the interviews. The Chief believes he may have inadvertently thrown them away when he was cleaning his officer out prior to his retirement. Unfortunately, the Chief's notes were illegible and had to be transcribed post-hearing. Further, Deputy Chief Braks unexpectedly was called from the fourth interview, of then-Detective A, so he did not take any notes of that interview.

A copy of the questions asked during the interview to each candidate was provided to the Commission for review, along with the available notes. Deputy Chief Braks noted that Question Nine (9) on the list of questions was especially important to him, since the answers to that question was indicative of how each candidate had prepared himself through the years to become a sergeant. Deputy Chief Braks testified to the advanced training that candidates ranking first through third (then-Detective A, Officer L, and Officer W) had undertaken to prepare for advancement in their career as a major distinguisher among those candidates and the Appellant. Once the interviewers ranked each candidate one through four, the group at-large discussed each candidate. The group itself ultimately agreed unanimously on the ranking of the four candidates, with the Appellant ranking fourth. The group may have disagreed slightly, and momentarily, about the ranking of the second and third place candidates (Officer L and Officer W), but they ultimately agreed that Officer L would be second and Officer W would be third. None of the interviewers disagreed with one another about then-Detective A ranking first and the Appellant's rank of fourth.

In light of the objective deficiencies in the actual interview process, I do not find the interview *itself* to be a sufficient reason for bypass of the Appellant; however, the interview taken in *conjunction* with all of the aforementioned reasons for bypass is a different matter entirely. The impact this interview process had on the City's decision to bypass the Appellant is overshadowed by the weight of the evidence establishing the City's reasonable justification in bypassing the Appellant based on his work history, his demonstrated distain for members of the current command staff, his disciplinary record, and his lack of initiative to further prepare for any promotion in rank educationally. If the merits for bypassing a candidate for promotion are justifiable, procedural matters need not be considered.

> A bypass may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates… in such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with the fundamental purpose of the civil service system, to ensure decision-making in accordance with basic merit principles.

Henderson v. *Civil Service Comm'n*, 54 N.E.3d 607 (2016) *citing Sherman* v. *Randolph*, 472 Mass. 802, 813 (2015). So long as the basis upon which the City bypassed the Appellant for promotion, which includes his history of insubordination, his pattern of demeaning language against superior officers, his disciplinary history, and his lack of additional training as compared to other candidates, is adequately supported by substantial evidence

14. Chief Erickson gave the Appellant the choice to forego the interview altogether, since he was on a prior certification list and was not given notice of the interviews prior to his 2016 exam. The other candidates took a 2017 exam and were given the proper notice. The Appellant elected to take part in the interview.

(with or without consideration of the Appellant's interview), the Commission shall not substitute its judgment for the City. *Cambridge*, at 305.

For all the above reasons, the Appellant's appeal under G2-19-049 is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 8, 2021.

Notice to:

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* * * * * *

ANTHONY CUNHA

v.

MASSACHUSETTS ENVIRONMENTAL POLICE

G1-19-021
G1-19-232
G1-20-071

April 8, 2021
Cynthia A. Ittleman, Commissioner

***Bypass Appeal-Original Appointment as an Environmental Police Officer-Driving Record-Taxidermy Violations-Hunting Out of Season-Successful Candidates*—**The Commission affirmed the bypass by the Massachusetts Environmental Police of a candidate for original appointment based on his ruinous driving history and extensive record of misconduct found in the MEP's own in-house database relative to taxidermy and hunting violations.

DECISION

On January 24, 2019, November 3, 2019 and April 19, 2020, the Appellant, Anthony Cunha (Appellant), pursuant to G.L. c. 31, s, 2(b) filed the instant appeals, , at the Civil Service Commission (Commission) contesting the decision of the Massachusetts Environmental Police (MEP) to bypass him for appointment to the position of Environmental Police Officer A/B (EPO A/B).

I held a full hearing regarding the first appeal on April 5, 2019.[1] The hearing was digitally recorded, and the parties were given CDs from the hearing.[2] The parties submitted post-hearing briefs on or about April 23, 2019. The parties agreed that the second and third bypass appeals, which involved the same bypass reasons, , would proceed without a hearing. The appeals were consolidated.

FINDINGS OF FACT

Twenty-one (21) exhibits, thirteen (13) from MEP and eight (8) from the Appellant, were entered into evidence at the hearing and two (2) additional exhibits produced by MEP at my request. Based on the documents submitted, the testimony of the following witnesses:

For the Massachusetts Environmental Police

- Lieutenant Michael Lees, Massachusetts Environmental Police

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

- Lieutenant Colonel Anthony Abdal-Khabir, Massachusetts Environmental Police

For the Appellant

- Anthony Cunha

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

1. On or about September 17, 2016, the Appellant took the civil service examination for Environmental Police Officer and received a score of 87. (Stipulated Fact)

2. In or about January 2017, the state's Human Resource Division (HRD) established a list of eligible candidates for Environmental Police Officer (EPO A/B). (Stipulated Fact)

3. On or about September 20, 2018, HRD, at the request of the Massachusetts Environmental Police, sent Certification No. 05821 to the Massachusetts Environmental Police. (Stipulated Fact)

4. The Appellant was ranked tied for seventh (7th) among those willing to accept employment. (Stipulated Fact)

5. Of the eleven (11) candidates selected for employment by the Massachusetts Environmental Police, three (3) were ranked below the Appellant. An additional three (3) candidates bypassed the Appellant on the second bypass and two (2) candidates bypassed him as part of the third bypass. (Stipulated Fact)

6. By letter dated December 19, 2018, Lieutenant Colonel Anthony Abdal-Khabir of the Massachusetts Environmental Police, the Appointing Authority, notified the Appellant that the MEP was bypassing him for appointment. (Respondent Ex. 13)

7. HRD accepted the following reasons for bypass:

> ...Specifically, as an Environmental Police Officer you must be able to safely operate motor vehicles in stressful situations. Further, Environmental Police Officers must not only abide by the laws of the Commonwealth they must enforce them. Given your driving history, the Department has concerns relative to your ability to do this. You have a record of multiple driving violations dating back to 2007 and two (2) license suspensions, one in 2007 and one (1) criminal violation in 2010. Violations include a marked lane violation and failure to stop/yield in 2007, as well as license suspension for failure to pay a fine and costs. In 2008, you were not issued an inspection sticker due to failure to pay fines and costs. You also received a speeding ticket and you were cited for operating a motor vehicle with modified height. In 2009, you had a surchargeable accident. In 2010, you had an accumulation of convictions or points, which resulted in your license being suspended. On February 23, 2010, you were criminally charged for operating your vehicle despite your suspension. In 2012, you had a driving incident for failure to keep/right lane. Lastly, you had a work related accident in 2016, while driving a state vehicle. Although you reported this to the police, you did not report it to your supervisor.
>
> You have a history with the Massachusetts Environmental Police (MEP) of hunting waterfowl out of season and multiple taxidermist violations. In 2013, you were charged twice for deer/waterfowl hunting without a stamp. MEP seized two (2) wild wood ducks. In 2014, you were charged with failure to sign a migratory bird stamp. In 2015, you received a civil taxidermist violation, a civil hunting/fishing duplicate license violation, and a civil fish/wildlife hunting/fishing violation. In addition, in 2015, the environmental police seized three (3) carcasses from you and you received two (2) non-criminal citations and a written warning. In 2016, you received a citation for possession of beaver without salvage tags.
>
> Your taxidermist violations include an admitted lack of record keeping. An environmental police officer inspects your taxidermy business, and you stated that you do not keep records for your taxidermy business. You could not explain or remember where several species originated, which resulted in the seizure of some of your products. A return inspection produced another instance where you had no permit for a beaver in your possession.... (Respondent Ex. 13)

8. The Massachusetts Environmental Police are sworn to uphold all of the laws of the Commonwealth of Massachusetts, with a focus on the environmental laws. (Testimony of Abdal-Khabir). MEP officers are tasked with conservation law enforcement, fish and game laws, hunting, trapping, fishing, ATV and boating laws, taxidermy checks, and market inspections. MEP officers are uniformed, carry a weapon, and drive marked vehicles with lights and sirens. (Testimony of Lees)

9. Lieutenant Colonel Anthony Abdal-Khabir became Acting Colonel of the MEP in September 2018. He was named Lieutenant Colonel in August 2018. He began as an Officer with the MEP twenty-four (24) years ago and moved up the ranks as a sergeant and a captain during his tenure. (Testimony of Abdal-Khabir)

10. The MEP has an internal hiring board which undertakes an initial pre-screening of a candidate after the candidate has taken the civil service examination. This involves the Lieutenant Colonel and the Human Resources-civilian component. This prescreening is undertaken before a background investigator is assigned to investigate each candidate. A bypass could occur at this step. The next step in the process is the background investigation by a field officer. That field officer makes a recommendation to management as to whether the officer recommends a candidate or not. The next layer of the process are the interviews with higher level management, a board of four people. Lt. Colonel Abdal-Khabir indicated that "it is a very self-filtering process." (Testimony of Abdal-Khabir)

11. The Appellant completed a written application to become a member of the MEP on or about November 1, 2018.[3] (Appellant's Written Application, provided to Commission post-hearing by MEP)

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3. The Appellant's written application was submitted post-hearing on April 11, 2019, pursuant to the Commission's order of April 5, 2019. In addition to the Appellant's written application, the MEP submitted the driving history and the MEP in-house history and/or contact of the eleven (11) candidates who the MEP appointment, pursuant to the Commission's order.

12. Lieutenant Michael Lees (Lt. Lees) has been employed by the MEP for fourteen (14) years. He began as an officer and moved up the ranks to sergeant and ultimately to his current rank as lieutenant. Lt. Lees was assigned to investigate the Appellant's background in October/November 2018 by Captain Forsyth. Lt. Lees was trained by the MA State Police to conduct a background investigation. (Respondent Ex. 1)

13. Lt. Lees initially ran the Appellant's information through numerous databases to ascertain his criminal and driver histories. Specifically, Lt. Lees did a CORI check, a Board of Probation Check, and an in-house MEP database check for a criminal history and a Registry of Motor Vehicle check, to ascertain any driver history. (Respondent Ex. 2 and Testimony of Lt. Lees). MEP officers drive a marked vehicle with lights and sirens and are able to pursue motor vehicles and make motor vehicle stops. Lt. Lees indicated that it is important to be a safe driver because the goal is to protect the public. (Testimony of Lees)

14. After an initial phone call, Lt. Lees met with the Appellant on two (2) separate occasions relative to his candidacy. The first such meeting was a pre-investigation meeting at the Athol Police Department, wherein Lt. Lees took the Appellant's fingerprints and the two sat down and discussed, among other things, the stressors of the job, the stress the job puts on the entire family, the requirements of the job, and the various locations of the police academy. The second meeting, which lasted approximately two (2) hours, between the Appellant and Lt. Lees took place at the Appellant's residence, along with the Appellant's significant other. (Testimony of Lees and Respondent Ex. 12).

BACKGROUND OF APPELLANT

15. Anthony Cunha has lived in Massachusetts his entire life and has been an avid hunter and fisherman since he was eighteen (18) years old. He joined the United States Air Force in 2009, having been deployed several times. He rose to the rank of Non-Commissioned Staff Sergeant in 2014. (Appellant Ex. 3 and Testimony of Appellant). He won the *Department of the Air Force Achievement Medal* for his meritorious service from 2009 to 2015 and the *Iraq Campaign Medal* from September 2011 to November 2011 for outstanding service in support of Operation NEW DAWN. (Appellant Ex. 5 & 6). He was an honor grad at boot camp, graduating in the top ten (10) percent of his class. He feels that he excelled in the military and always went above and beyond what was expected of him. (Testimony of Appellant)

16. The Appellant received an Associate Degree in Science having completed the requirements of the course of study in National Resources Technology Curriculum at Mount Wachusett Community College in 2017. (Appellant Ex. 2). He has been employed seasonally at the MA Department of Conservation and Recreation in the past, as well having been employed in construction. He volunteers as a "hunter education" teacher at a local fish and game club, where he teaches children the basics of hunting. The Appellant provided the MEP with positive personal references to include former employers, Air Force supervisors, friends, and two police officers. (Testimony of Appellant and Respondent Ex. 12)

Driver History

17. The Appellant's driver history reveals the following citations:

Marked Lane Violation (R)	July 26, 2007
Failure to Stop/Yield (R)	August 17, 2007
Sus., Failed to Pay Fines/Costs	August 31, 2007
Sus., Failure to Pay Fines/Costs	September 24, 2007
Speeding (R)	March 5, 2008
No Inspection Sticker (R)	March 5, 2008
Operating MV with Modified Height (R)	March 10, 2008
No Inspection Sticker (R)	March 10, 2008
Surchargeable Accident	November 13, 2009
Rein. -Accum of Convictions or Points	December 31, 2009
Rein. - Accum of Convictions or Points	February 19, 2010
Operating MV with License Suspended	February 14, 2010
Failure to Keep in Right Lane (NR)	April 24, 2012

(Respondent Ex. 3)

18. Lt. Lees spoke to the Appellant at length about the Appellant's driver history at their first meeting. Relative to the February 14, 2010-Operating an MV with Suspended License, the Appellant indicated that he, indeed, knew the license was suspended but he had to get his wife something for Valentine's Day, so he drove anyways. (Respondent Ex. 12). This was of concern to Lt. Lees because the Appellant knew it was suspended, yet chose to break the law anyways. The Lt. saw a pattern of driving issues on the Appellant's driver history, such as a prior suspension for failure to pay fines/costs and then a subsequent arrest for driving with a suspended license. The history revealed repeat violations and Lt. Lees was concerned about whether this pattern would continue with the Appellant. (Testimony of Lees)

19. Additionally, Lt. Lees was also troubled with the facts surrounding a motor vehicle accident the Appellant was involved in on July 21, 2016. The Appellant stated that there was no damage to his vehicle, but he did break a telephone pole. The Appellant was on-duty at work at the time of the accident, yet he never told his supervisor about the incident. He alerted the police, however. Lt. Lees was unsettled by this incident because the Appellant was on-duty at work at the time of the accident and did not alert his supervisor. Lt. Lees felt it was "a matter of being honest and trying to avoid being accused of wrongdoing." (Testimony of Lees and Respondent Exs. 4 and 12)

20. As part of his background investigation, Lt. Lees spoke with the Appellant's former work supervisor on or about November 14, 2018 about the July 21, 2016 motor vehicle accident. She confirmed that the Appellant was involved in the accident in Leominster, MA, and never reported it to her. She confirmed that he did report it to the police, who then reported it to the supervisor. Lt. Lees obtained an accident report from the Leominster Police

Department, confirming that the Appellant was in an accident on July 21, 2016. (Respondent Exs. 4 and 12)

Encounters with Massachusetts Environmental Police

21. In addition to the driver history, Lt. Lees reviewed what he believed was a concerning pattern of misconduct with the Massachusetts Environmental Police itself. After checking the MEP's in-house database, which would confirm any instance the Appellant was listed in any reports, citations, arrest reports, written or verbal warnings, or encounters with officers in the field, it revealed that the Appellant was involved in multiple enforcement actions by the MEP. The history revealed the Appellant received non-criminal, civil citations from the MEP in the autumn of 2013, 2014, 2015, and 2016. (Respondent Exs. 5-10)

22. On October 14, 2013, the Appellant was found to be hunting waterfowl in a closed waterfowl zone without a valid federal waterfowl stamp. A MEP officer cited the Appellant civilly for hunting waterfowl in a closed season and for having an invalid federal waterfowl stamp. (Respondent Ex. 6.) The Appellant admitted to this violation during the bypass appeal hearing, and stated that he was unaware that he was in a closed hunting zone. (Testimony of Appellant)

23. The following year, on November 4, 2014, a MEP officer issued a written warning to the Appellant for failing to sign his federal migratory bird stamp. (Respondent Ex. 7 and Testimony of Lees). It is essential that hunters sign the stamp across the face of the stamp in order to prevent transfer of the stamp to other parties for their own use. (Testimony of Lees). The Appellant admitted to not knowing where on the stamp he was supposed to sign. He had signed on the back of the stamp. (Testimony of Appellant)

24. The following year, on October 14, 2015, the MEP conducted a taxidermy inspection of the Appellant's residence. During the inspection, the sergeant on scene found an unused and unsigned Massachusetts Bear Permit. The Appellant admitted to the sergeant that he had already harvested (hunted and killed) a bear that season. His permit, however, did not reveal that he had already hunted and killed one bear.[4] The Appellant further admitted to the sergeant that he does not keep records for his taxidermy business. The MEP sergeant found other animals that were not properly tagged—a second bear, a migratory bird species (wood duck), and a fisher cat. The Appellant could not identify who gave him those animals. The sergeant gave the Appellant two (2) non-criminal citations: one for a taxidermist violation and another for a duplicate license violation. The sergeant also issued a warning for possession of the migratory bird species carcass. (Respondent Exs. 8 and 9 and Testimony of Lees)

25. The Appellant had taken a taxidermy course in New York and he assumed the laws were the same in Massachusetts. He does not recall telling the sergeant that he did not keep records. He did not keep the records required by law, but he did keep handwritten receipts. (Testimony of Appellant)

26. The lack of documentation kept in the course of the Appellant's taxidermy business was a concern to Lt. Lees because, as a police officer, one is required to document everything going on. For the Appellant to say that "he doesn't keep records as a taxidermist," was quite concerning to Lt. Lees. Additionally, the duplicate license and not tagging a bear were also concerning to Lt. Lees because the Appellant was required to adhere to the law. (Testimony of Lees and Respondent Ex. 12)

27. The following year, on October 20, 2016, a MEP officer conducted a taxidermy inspection at the Appellant's home. The MEP officer found several unlabeled animals in the freezer, among them, a "road-kill" beaver. The MEP officer issued a non-criminal citation for not having a salvage tag on the beaver. The MEP officer further noted that the Appellant had been warned for a similar violation during the *last* inspection. (Respondent's Ex. 10 and Testimony of Lees). It is important to know where an animal came from and the need to report the animal, even if it is roadkill, since it prevents the sale and trade of a species so the species doesn't dwindle away. It prevents the sale of the animal as a commodity. The MEP has the discretion to issue either a civil violation or a criminal violation when on-scene. All of the Appellant's violations were civil violations since the responding officers chose to issue that type of violation. The MEP takes an educational approach in order to prevent further incidents. (Respondent's Ex. 10 and Testimony of Lees)

28. Following his investigation of the Appellant's candidacy for the MEP, Lt. Lees concluded that he had concerns "at every level" to include his "driver history, in-house history, and employment history." Lt. Lees noted a pattern of someone having trouble correcting issues he's had in the past. Lt. Lees concluded that the Appellant "didn't quite fit the bill" and many red flags arose in many portions of the investigation. He did not recommend the Appellant for the position of MEP. (Respondent Ex. 11 and Testimony of Lees)

29. On or about November 28, 2018, Lt. Lees signed an internal document, I-2, in which he did not recommend the Appellant for hire by the MEP. In his explanation, Lt. Lees cited the Appellant's multiple hunting and taxidermy violations, as well as his driving history. (Respondent Ex. 11 and 12)

Other Candidates' Driver History and/or Encounters with the MEP

30. The Respondent provided the Commission with evidence relative to the eleven (11) candidates chosen for appointment to the position. The candidates were numbered one through eleven (1-11). (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

4. Lt. Lees testified that a hunter is only allowed to harvest one bear per season. The tag was still on the Appellant's permit so there was a concern that an extra bear could have been taken due to the improper documentation. (Testimony of Lt. Lees)

31. Candidates 1, 2 and 9 had no negative driving history and no history with the MEP. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

32. Candidate 3 had no negative driving history. His involvement with the MEP involved receiving a verbal warning for motor vehicle trespass in a state forest. Additionally, a passenger in his vehicle had an outstanding warrant. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

33. Candidate 4 had the following motor vehicle citations: Possession of Alcohol Under the Age of 21 and Failure to Wear Seatbelt, both in June 2007; Equipment Violation and Unregistered MV in September 2008; and Speeding in April 2016. As for involvement with the MEP, Candidate 4 was cited in August 2006 for Possession of an Undersized Lobster and Possession of a V Notch Lobster; and for Failing to Have a Throwable Portable Flotation Device and Visual Distress Signal in May 2009. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

34. Candidate 5's driver history revealed a Speeding citation in 1999; Speeding in April 2000, a Warrant in May 2008, and a Surchargeable Accident in March 2018. Candidate 5 had no history with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

35. Candidate 6 had a surchargeable accident in November 2014 and another in June 2015. Candidate 6 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

36. Candidate 7's driver history revealed: Speeding and Failure to Stop/Yield in April 2000; Speeding in November 2000; Violation of State Highway Signal in December 2000; and Unlicensed Operation, Operating with a Suspended Registration, and Uninsured Motor Vehicle in June 2006. Candidate 7 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

37. Candidate 8's driver history revealed: Speeding in March 1999; Speeding and Failure to Pay Costs in May 1999; Failure to Stop/Yield and Failure to Pay Fine in July 1999; Unregistered Motor Vehicle in November 2000; Speeding, Failure to Wear Seatbelt, and Failure to Pay Fines in May 2002; and a Surchargeable Accident in October 2013. Candidate 8 had no history of involvement with the MEP. (Respondent's Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

38. Candidate 10 had the following motor vehicle citations: Speeding in April 1993, Failure to Stop/Yield in November 1997, Speeding in January 1998, Failure to Drive Right Lane and Speeding in February 2000, Surchargeable Accident in January 2006, and Failure to Drive Right Lane in March 2018. Candidate 10 had no history of involvement with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

39. Candidate 11's driver history reveals a Surchargeable Accident in April 2008 and no history with the MEP. (Respondent Reports of Eleven (11) Candidates' Driver Histories and/or Contact with the MEP, submitted post-hearing pursuant to order of the Commission)

40. The three (3) candidates who bypassed the Appellant during the second bypass were were all investigated by the MEP, just as the Appellant's background was. Counsel for the MEP has provided the Commission with redacted background summaries relative to each candidate, pursuant to a Procedural Order by the Commission. (November 26, 2019 Procedural Order of Commission). Candidate 1 is a veteran of the US Coast Guard. He had numerous positive personal and employment references and had no criminal history, no history with the MEP noted, and one verbal warning for speeding out of New Hampshire. Candidate 2 is a veteran of the US Army and the National Guard. He had positive personal and employment references and had no criminal history, no MEP history noted, and only a 2004 infraction on his driver history. Candidate #3 is a veteran of the US Marines. He also had positive personal and employment references. There was no mention of any criminal, MEP, or driver history in the investigator's summary. All three investigators each recommended their particular candidate for appointment. (Investigative Summaries of Three (3) Candidates provided to Commission by Respondent)

APPLICABLE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See, e.g.*, *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996). Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, §27; PAR.08(4).

A person may appeal a bypass decision under G.L. c.31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law'". *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal C*t., 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient").

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 428 Mass. 1102 (1997)(emphasis added). The governing statute, G.L. c.31, § 2(b), gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id*.

The Commission's role, while important, is relatively narrow in scope: to review the legitimacy and reasonableness of the appointing authority's actions. *See Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly* v. *Civil Serv. Comm'n*, 78 Mass. App. Ct. 182,188 (2010). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the acts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id*., 483 Mass. at 333-36. The SJC reaffirmed that, once the burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the Commission, to determine whether the appointing authority is willing to risk hiring the applicant. *Id.*

ANALYSIS

The Appellant was bypassed for identical reasons for three (3) separate hiring rounds with the Massachusetts Environmental Police and received an identical bypass letter for each instance of bypass. In all three letters, the MEP contends that the Appellant's driving history, as well as his hunting and taxidermist violations "do not reflect an ability to enforce laws which represent the core mission of the department." Based on those reasons, the MEP bypassed the Appellant for appointment.

Lieutenant Michael Lees of the Massachusetts Environmental Police undertook a thorough investigation of the Appellant's relevant background history. Lt. Lees noted that the Appellant is a disabled veteran who served honorably in the United States Air Force and reported multiple positive references made by neighbors, friends, colleagues, employers, military supervisors, and two local police officers. Lt. Lees met with the Appellant on two (2) occasions to educate the Appellant on what would be expected of an MEP officer and to interview the Appellant relative to what his background investigation revealed. Lt. Lees has provided the Commission with his background investigative notes, his summaries, all relevant police incident reports, and his final report not to recommend the Appellant for appointment.

Through the course of the two (2) interviews, Lt. Lees afforded the Appellant the opportunity to dispute any findings in his background investigation, most especially the civil violations noted in his history with the MEP and his driver history. Lt. Lees procured the MEP incident reports relative to his civil violations with the MEP, the Appellant's driver history, and the accident report for the July 21, 2016 accident in Leominster, MA. The Lieutenant also contacted the Appellant's former work supervisor to discuss the 2016 motor vehicle accident. The Lieutenant took the commendable step of allowing the Appellant to address allegations of prior misconduct, as found in his investigative notes provided to the Commission. I find that Lt. Lees conducted a "reasonably thorough" review of the Appellant's background and allegations of misconduct found therein.

Misconduct Cited by Massachusetts Environmental Police

In its three (3) bypass letters, the MEP indicated that the Appellant's history of misconduct found in the MEP's in-house database relative to taxidermy and hunting violations, *in conjunction* with the Appellant's driver history, is justification for all three of the MEP's decision to bypass the Appellant for appointment. Any "misconduct" referred to regarding the Appellant's history with the MEP is for the numerous civil citations[5] he received from

5. [See next page.]

2013-2016.[6] The background investigation by the MEP revealed that Appellant was non-criminally cited by the MEP four (4) years in a row, almost to the day, for violations of law, in 2013, 2014, 2015, and 2016. The Appellant was given the opportunity to address negative findings about him as part of two interviews the Appellant had with Lieutenant Lees, the second of which lasted approximately two (2) hours in his own home.

Regarding the October 2013 incident where he was civilly cited by the MEP for hunting waterfowl in a closed waterfowl zone without a valid Federal Waterfowl Stamp, the Appellant admitted at the hearing of this matter to this violation and stated that he was unaware that he was in a closed hunting zone. Regarding the November 2014 written warning that was issued to him for failing to sign his federal migratory bird stamp, the Appellant admitted that the stamp was not signed across the front, as required.

In 2015, the Appellant was issued two non-criminal citations, one for a taxidermist violation and the other for a duplicate license violation. He was also issued a warning for possession of a migratory bird carcass. The police incident report states that the Appellant admitted to the sergeant on-scene that he did not keep records for his business. At the hearing of this matter, the Appellant indicated that he only kept handwritten receipts, disputing that he ever said that "he didn't keep any records." In his bypass appeal testimony, he stated that he had taken a course in taxidermy in New York and mistakenly thought the laws in Massachusetts were the same. In 2016, a second inspection of the taxidermy business took place by the MEP. Again, similar issues were found—i.e. unlabeled animals in the freezer. He was issued a non-criminal citation for not having a salvage tag on a beaver he possessed.

At the hearing of this appeal, the Appellant stated that, since he left the military, the only laws he has broken are those that he was not aware of or those that he misunderstood. In his testimony, I found that the Appellant attributed his driving record and the MEP citations to either not knowing the law, stating that he does not repeat the same mistakes twice, adding that "they" don't give you the information about the requirements of the MEP-related licenses, and that "you have to learn them as you go." The Appellant did not appear to willingly take responsibility for his actions.

Lt. Lees, who was clearly knowledgeable about the MEP's jurisdiction and applying the law, explained the civil versus criminal aspects of a MEP officer's duties and the use of officer discretion. He was also familiar with the Appellant's specific MEP citations and carefully explained the nature of the Appellant's violations. Lt. Lees testified that the lack of documentation kept in the course of the Appellant's taxidermy business was of concern to him, since police officers are required to document most everything they do. He was also concerned about the violations of law relative to the civil citations the Appellant received from the MEP because of his concern for the animals the Appellant continued to fail to document, to include beaver, wood ducks, a bear, and a fisher cat. He told the Commission that it is imperative to document these instances where someone takes control of an animal for the protection of the species itself—to prevent the species from dwindling away. He also felt that the repetitive nature of the violations was a red flag for him. The Commission finds that the Massachusetts Environmental Police, the Appointing Authority, has proved by a preponderance of the evidence, that the Appellant, engaged in aforesaid misconduct.

Driver History

A candidate for the position of police officer should "demonstrate the ability to uphold the laws and requirements regarding the operation of a motor vehicle." *Modig* v. *Worcester Police Department*, 21 MSCR 78 (2008). "The position of police officer requires the operation of a motor vehicle and a need to show adherence to the laws of operating a motor vehicle." *Mazzola* v. *City of Worcester*, 22 MSCR 428 (2009). In its three (3) bypass letters, the MEP indicated that the driver history, *in conjunction* with the history of misconduct found in the MEP's in-house database relative to taxidermy and hunting violations, is justification for all three of the MEP's decisions to bypass the Appellant for appointment. Relative to the Appellant's driver history, the MEP notes the following in each bypass letter:

> "… as an Environmental Police Officer you must be able to safely operate motor vehicles in stressful situations. Further, Environmental Police Officers must not only abide by the laws of the Commonwealth they must enforce them. Given your driving history, the Department has concerns relative to your ability to do this. You have a record of multiple driving violations dating back to 2007 and two (2) license suspensions, one in 2007 and one (1) criminal violation in 2010. Violations include a marked lane violation and failure to stop/yield in 2007, as well as license suspension for failure to pay a fine and costs. In 2008, you were not issued an inspection sticker due to failure to pay fines and costs. You also received a speeding ticket and you were cited for operating a motor vehicle with modified height. In 2009, you had a surchargeable accident. In 2010, you had an accumulation of convictions or points, which resulted in your license being suspended. On February 23, 2010, you were criminally charged for operating your vehicle despite your suspension. In 2012, you had a driving incident for failure to keep/right lane. Lastly, you had a work related accident in 2016, while driving a state vehicle. Although you reported this to the police, you did not report it to your supervisor."

The Commission owes the appointing authority substantial deference in determining whether a candidate's driving record is problematic enough to justify his non-selection. The appointing authority, however, "must show that the reason is valid, and reasonable, and not arbitrary and capricious." *Stylien* v. *Boston Police Dept.*, G1-17-194 [31 MCSR 154] (April 12, 2018). In reviewing such cases, the Commission places an emphasis on the

5. Lt. Lees testified as to the discretion a MEP officer is given to either issue a civil violation or a criminal citation in most instances of misconduct relative to the environmental laws. The goal is education so that offenders do not repeat the same violations.

6. The only criminal charge referenced in the Appellant's history was for Operating a Motor Vehicle with a Suspended License in 2010. That charge was Dismissed by the court. I find that Lt. Lees gave the Appellant the opportunity to address this alleged criminal misconduct in their two interviews and made a reasonably thorough review of the allegations.

more recent driving infractions as opposed to stale or non-moving violations that are not necessarily reflective of a candidate's ability to effectively drive a motor vehicle. *Stylien* v. *Boston Police Dept*., G1-17-194 (April 12, 2018). In recent years, the Commission has limited its review of a driver history for the ten (10) years prior to the Appellant's name appearing on the certification list, with greater weight to those entries in the most recent five (5) years. *Akim Dorn,* G1-17-77 [31 MCSR 375 (2018)]. The Commission has given more weight to at-fault accidents and other moving violations where the Appellant was found "responsible" and less weight to those which may be attributable to socio-economic factors, such as an expired registration or no inspection sticker violation. *Id.*

Lieutenant Lees produced a printout of the Appellant's driver history as evidence of the reason for bypass of the Appellant in all three (3) bypass appeals. The Appellant's driver history reveals three (3) incidents in 2007 which fall just outside of the typical ten-year lookback by the Commission (although one of those 2007 entries shows a pattern of behavior with regards to Suspending License, which occurred again in 2010), a March 5, 2008 Speeding and No Inspection Sticker violation—both found Responsible; five days later, on March 10, 2008, a repeat citation for No Inspection Sticker and Operating a Vehicle with Modified Height—both found Responsible. In 2009, the Appellant was involved in a Surchargeable Accident and had his License Suspended for accumulation of points. In 2010, the Appellant was criminally charged with Operating a Vehicle with a Suspended License (Dismissed by the Court), which also appeared on his driver history as a License Suspension. In 2012, the Appellant was cited for Failure to Keep in Right Lane—found Not Responsible. The Appellant was found Responsible for every citation on his driver history except the final entry in 2012.

Lt. Lees discussed the Appellant's driver history at length with him during his interviews. The Lieutenant saw a pattern of driving issues on the Appellant's driver history, such as a prior suspension for failure to pay fines/costs in 2007 and then a subsequent criminal arraignment for driving with a suspended license in 2010. Lt. Lees testified that the pattern on the Appellant's history revealed repeat violations and he was concerned about whether this pattern would continue with the Appellant. The Appellant confirmed that there were many *responsible findings* on his driver history and that, if he was a little more aware of the process, he would have challenged those violations that he received. The Appellant admitted to Lt. Lees that he knew his driver's license was suspended on the day he was charged with Driving with a Suspended Licensed (February 14, 2010) but he drove anyway since, as he put it, he needed to get his wife a Valentine gift. Lt. Lees spoke with the Appellant and his former work supervisor regarding his 2016 motor vehicle accident, of which he failed to inform his supervisor. Lt. Lees also procured the incident report of the accident from the Leominster Police Department, confirming the facts of the case.

Lt. Lees testified that an MEP officer drives a police pickup truck,marked with lights and sirens and has the authority to make motor vehicle stops. He was concerned with the pattern he saw on the Appellant's history of license suspensions, coupled with the decision to drive with a suspended license. He was also concerned with the fact that the Appellant received a citation multiple years in a row. I find that Lt. Lees conducted an appropriate review of the Appellant's driver history and gave the Appellant ample opportunity to dispute everything alleged.

Comparison to Other Candidates

The Respondent provided the background investigation of the eleven (11) candidates hired by the MEP, with notes regarding each of their driver histories and any instances of misconduct noted in the MEP's database. For instance, Candidates 1, 2 and 9 have no driver history and no negative history of involvement with the MEP. Candidate 3 has no driver history and only one MEP warning for trespass in a state forest. Candidate 4 has three (3) entries on his driver history—2007 (Possession of Alcohol Under 21/Failure to Wear Seatbelt)—which is stale; 2008 (Equipment Violation and Unregistered MV); and 2016 (Speeding), along with two negative involvements with the MEP—the first in 2006 for possession of an undersized, v-notch lobster and the second in 2009 for failing to have a portable personal flotation device (PFD) and a visual distress signal.

Candidate 5 has only two (2) instances on his driver history since 2008 (with two others from 1999 and 2000 -18 and 19 years ago) and no involvement with the MEP in his history. Candidate 6 only has two (2) entries on his driver history and no negative involvement with the MEP. Candidate 7 has stale entries on his driver history from 2000 (18 years ago), and no negative history with the MEP. Candidate 8 has stale entries (16-21 years ago) on his driver history from 1999, 2000, and 2002. He has one current entry from 2013 on his driver history and no negative involvement with the MEP. Candidate 10 has stale entries on his driver history from 1993-2006 (12-25 years ago) and one current entry from 2018, but no negative history with the MEP. Candidate 11 has one entry on his driver history from 2008 and no negative history with the MEP.[7]

After careful review of the other eleven (11) candidates chosen for the position, the MEP has sufficiently distinguished the other candidates' background histories relative to misconduct with the MEP, evaluated in conjunction with their driver histories, from that of the Appellant's. Three (3) of the aforementioned candidates have no driver history and no MEP history. Many candidates have stale negative driver histories, with citations dating back from twelve (12) to over twenty-five (25) years ago. Any other candi-

7. The Commission reviewed documents produced by the Respondent relative to the three (3) candidates chosen for appointment over the Appellant in Docket G1-19-232. After carefully reviewing those documents, I note that none of the three (3) candidates' histories compare to the history of the Appellant's driver history and history of negative involvement with the MEP. Candidate 1 had no driver history and no negative involvement with the MEP. Candidate 2 had one (1) citation in his driver history from 2004 and no negative MEP history. Lastly, Candidate 3 had no negative driver history or negative history with the MEP noted in the summary provided to the Commission.

date with both a recent negative driver history and an MEP misconduct-history does not quite compare to the repetitive nature of the Appellant's histories or with regards to the number of incidents of misconduct evidenced. None of the other candidates had any taxidermy violations,either.

I carefully considered whether a fair, thorough, and impartial review process has been undertaken by the MEP, and whether the MEP has shown, by a preponderance of the evidence, that there was reasonable justification to bypass. The Commission owes the Appointing Authority substantial deference in determining whether a candidate's driver history is problematic enough to justify non-selection. *Stylien* v. *Boston Police Department*, G1-17-194.

Standing alone, the Appointing Authority has not shown that the driver history provides a reasonable and valid reason for bypass, since the most recent entry was six (6) years ago, in 2012, and the three-2007 entries on the history are arguably stale—although the MEP did use one of the 2007 entries (Suspended License) to show a pattern of behavior that continued in 2010. The Appointing Authority, however, did not bypass the Appellant on his driver history alone. On the basis of the driver history, taken *in conjunction* with the Appellant's concerning, repetitive taxidermist and hunting violations, the Appointing Authority has proven that it had reasonable justification to bypass the Appellant in G1-19-021, G1-19-232, and G1-20-071. The MEP has "shown that the reason is valid, and reasonable, and not arbitrary and capricious." *Stylien* v. *Boston Poilce Department*, G1-17-194 (2017).

For all of the above reasons, Anthony Cunha's three (3) bypass appeals docketed under G1-19-021, G1-19-232, and G1-20-071 are hereby ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 8, 2021.

Notice to:

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[Address redacted]

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* * * * * *

MARK DOWD and STUART MOLK[1]

v.

DEPARTMENT OF CONSERVATION AND RECREATION

C- 18-053 (Dowd)
C- 18-054 (Molk)

April 8, 2021
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Conservation and Recreation-Ranger II to III-Scope of Responsibilities—Two Appellants serving as Ranger IIs at the State House failed to win reclassification to Ranger III where they performed some of the level-distinguishing duties of the sought-after classification but not 50% of the time. Some of the duties they did perform included reviewing parking citations, acting as incident commanders, and responding to medical emergencies. Ranger III duties they did not perform included participating in the formal disciplinary process and being on call 24 hours a day.

DECISION

On March 7, 2018, Mark Dowd (Appellant Dowd or Lt. Dowd)[2] and Stuart Molk (Appellant Molk or Lt. Molk) (Appellants), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to affirm the decision of the Department of Conservation and Recreation (DCR) to deny their requests to be reclassified from Ranger II to Ranger III. The Commission consolidated the two cases and a prehearing was held on May 15, 2018. After the prehearings but prior to the hearing, both Appellants indicated that a promotional opportunity for the Ranger III position arose, that they applied for the promotion and that Appellant Dowd was promoted while Appellant Molk was not. Nonetheless, Appellant Dowd indicated that he wanted to continue with his reclassification appeal because he requested reclassification in 2015 and he seeks "backpay" for the intervening time period, alleging that he was performing the duties of a Ranger III since 2015. A two-day hearing was held at the Commission on September 18, 2018 and October 3, 2018.[3] The parties in both appeals submitted post-hearing briefs, the Appellants on November 21, 2018 and the Respondent on December 4, 2018. A transcript was made of the hearing.

1. Attorney Ventrella represented the Appellants until April 22, 2019.

2. Because his rank was Lieutenant when he requested an appeal of his classification to DCR, Appellant Dowd will be referred to as Lt. Dowd for the purposes of this decision.

3. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

FINDINGS OF FACT

Appellant Molk submitted 15 exhibits (Molk Ex. 1-15) and Appellant Dowd submitted 15 exhibits (Dowd Ex. 1-15). The Appellants submitted one post-hearing exhibit which consisted of two affidavits (App. PH 1, Dowd; App. PH 1 Molk). The Respondent did not offer exhibits at the hearing. I ordered the Respondent to produce post-hearing exhibits. (DCR PH 1-4). These include an affidavit from EOEA Classification Specialist Danielle Daddabbo; an affidavit from EOEA Classification Specialist Kimberlee Costanza; Overtime Procedures for the State House and a memorandum regarding time off dated May 2015; and the DCR State House Ranger Unit Post Orders, Directives, and Guidelines. Based on these documents, the testimony of:

Called by the Appellants:

- Mark Dowd, Appellant
- Stuart Molk, Appellant

Called by Respondent:

- Danielle Daddabbo, Classification and Compensation Specialist, EOEA[4]
- Michael Nelson, Acting Chief Ranger, DCR
- Adam Parr, Deputy Chief Ranger, DCR[5]

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence, I make the following findings of facts:

BACKGROUND

1. Lt. Molk applied for a reclassification from Ranger II (Lieutenant) to Ranger III (Captain) on September 12, 2015. (Molk Testimony; Molk Ex. 4). At the time of his request for reclassification, Lt. Molk had worked for DCR since 1995 as a Ranger I at the State House for six months and as a Ranger II thereafter. (Molk Testimony). Lt. Molk's previous employment includes 12 years as a licensed investigator and 14 years as Loss Prevention Manager. (Molk Ex. 4).

2. Lt. Dowd applied for reclassification from Ranger II to Ranger III on September 28, 2015. (Dowd Testimony; Dowd Resp. PH Ex. 1). At the time of his request for reclassification, Lt. Dowd had been a DCR employee for ten years as a DCR Ranger II at the State House. (Dowd Testimony; Dowd Ex. 4). Prior to working at the State House, he was assigned to the DCR Marine Unit as a Ranger I and Acting Ranger II. (Dowd Ex. 5).

3. The Ranger Classification Specification Series (Spec) is comprised of three (3) levels, Ranger I, Ranger II, and Ranger III. (Molk Ex. 1; Dowd Ex. 1). Rangers "patrol parks, reservations, historic sites, watershed conservation areas, and/or recreation areas in order to promote compliance with rules and regulations; protect natural and cultural resources; enhance visitor experiences through visibility, interpretive programming and visitor information; and perform related work as required." (Molk Ex. 1; Dowd Ex. 1).

4. The Rangers assigned to the State House are responsible for the safety and security of people in and around the State House. (Molk Testimony, Dowd Testimony).

5. Depending upon staffing needs, approximately 14-17 Ranger Is and two lieutenants (Ranger IIs) are assigned to the State House during the day shift. (Molk Testimony, Dowd Testimony). Including the two Appellants, a total of 4 Ranger IIs were assigned to the State House and reported directly to the Captain (Captain A) who was a Ranger III. (Dowd Testimony).

6. Captain A reports directly to the DCR Deputy Chief Ranger. Deputy Chief Ranger Adam Parr is responsible for establishing work schedules and approving overtime and reports to the DCR Acting Chief Ranger Michael Nelson. (Parr Testimony).

7. DCR Policies and Directives (Directives) for Rangers assigned to the State House govern Ranger conduct and employee protocols. Issuing Directives to the staff is the responsibility of the Deputy Director. (Parr Testimony; Resp. PH Ex. 4). For instance, a 2015 DCR policy states that overtime is to be scheduled according to a specific protocol involving a rotating list of Rangers and seniority to ensure fairness. (Resp. PH Ex. 3). Overtime should only be authorized by a manager. (Parr Testimony).

8. As co-workers, the Appellants often share supervisory duties that include personnel assignments. For instance, the Appellants created daily assignments for the Ranger Is at the State House, filling shifts when a Ranger was out sick and organized Rangers to ensure all areas were covered. They ensured that all shift assignments were covered with the appropriate number of staff when there was a large event at the State House. (Molk Testimony; Dowd Testimony; Dowd Ex. 1; Molk Ex. 1). However, actual work schedules are made by Dep. Chief Parr. Overtime authorizations are approved by a manager, not Ranger IIs and IIIs. (Testimony of Parr; Molk/Dowd Exs. 14 and 15).

9. The Appellants trained Rangers newly assigned to the State House by explaining the duties of the position and explaining procedures and policy as needed. (Molk Testimony; Dowd Testimony).

4. The two Appellants supervised Ms. Daddabbo from 2002 to 2015 prior to her change in position from Ranger I at the State House to Classification and Compensation Specialist at EOEA. Although Ms. Daddabbo's report denied the Appellants' request for reclassification, the better course would have been to refer her former longtime supervisors' reclassification requests to someone else at the EOEA Human Resource office.

5. DCR Deputy Chief Parr's title has changed to Chief Ranger. (Parr Testimony). In this decision, Parr will be referred to as Deputy Chief, the title he had in 2015.

10. The Appellants coordinated and attended meetings with State House personnel regarding events at the State House. Such events included diplomatic visits, large protests, and professional events. The Appellants became the point personnel for the Boston Police during an event and had daily contact with outside agencies such as the Boston Police and the Governor's Office. They would decide between them who would attend meetings with the Bureau of State House (BSH) and other entities, splitting the responsibility "50/50". (Molk Testimony; Dowd Testimony; Molk Ex. 4; Dowd Ex. 4). When there was an emergency, both Appellants were in charge. (Molk Testimony).

11. When on duty before a snowstorm, the Appellants would be responsible for organizing the Rangers to post no-parking signs in consultation with the "Snow Desk." However, this only occurred a few times each year. (Molk Testimony).

12. Lt. Dowd, in conjunction with Lt. Molk, drafted a document for Boston EMS during times of medical emergency so that EMS would utilize a particular door and elevators that accommodated stretchers in order to access the whole building. After they wrote the document, it became policy that was later issued by DCR. Further, Lt. Dowd ensured that the Rangers at the State House had functioning equipment, including 3 X-Ray machines and 3 Magnetometers to screen visitors at the State House. (Dowd Testimony; Dowd Ex. 1). The Appellants also gave input about making revisions to policy. Their recommendations "went up to the Deputy Chief." (Molk Testimony).

13. When a new hire had a question involving human resource matters, the Appellants would try to answer the question, and if they could not, they would provide a phone number or the name of a person who could answer the question. (Molk Testimony; Dowd Testimony).

14. In discipline matters, the Appellants would correct a Ranger's behavior if it violated policy or procedure. (Molk Testimony; Dowd Testimony). The Ranger III position (Captain A) was responsible for issuing a verbal warning and a written warning would be issued by the Deputy Chief. (Parr Testimony). Lt. Dowd was not authorized to discipline a Ranger. (Testimony of Dowd)

15. The Appellants' duties did not involve creating the budget. The Appellants would, however, requisition office items or equipment such as radios from DCR Headquarters. (Molk Testimony; Parr Testimony).

16. Ranger Is at the State House issue parking tickets, after which the Appellants and other lieutenants collect the citations, review them, and give them to the Parking Clerk. (Molk Testimony).

17. In June 2017, after filing his reclassification appeal with the Commission, Lt. Dowd was named the Acting Captain (Ranger III) at the State House effective August 2017. He was working at the State House in that classification at the time of the hearing at the Commission. (Dowd Testimony).

18. As a Ranger III, Appellant Dowd is involved "to a greater extent" in the discipline process than he was as a Ranger II. (Dowd Testimony). Additionally, as Captain, Appellant Dowd addresses State House Rangers' requests for vacation, which he did not do as a Ranger II. (Dowd Testimony).

19. The Captain (Ranger III) at the State House has oversight of the Ranger Is and Ranger IIs for twenty-four hours (all three shifts). When Appellant Dowd was promoted to Captain prior to the Commission hearing, he approved personnel changes and went to the State House once in the middle of the night after a report of an ill Ranger and an alarm. (Dowd Testimony).

Appellants' Requesst for Reclassification

20. The process of an audit for reclassification requires the applicant to complete an Appeal Audit Interview Guide (Interview Guide), for the applicant to be interviewed by EOEA Human Resources personnel, and for EOEA's review of the pertinent classification specification and the applicant's current job duties. (Daddabbo Testimony; Resp. PH Ex. 1).

21. The Appellants each completed an Interview Guides and submitted supporting documentation and the document that Lt. Dowd, in consultation with Lt. Molk, created that was later added to the DCR Directives. (Molk Testimony; Dowd Testimony; Molk Ex. 4; Dowd Ex. 4).

22. In his Interview Guide, Lt. Molk asserted that many other Ranger IIs who were not at the State House had less responsibility than he had and fewer duties but nonetheless had been moved to Ranger III positions. He wrote that his "current day-to-day job duties exceed the responsibilities listed in the job description and that there should be a specific job description for Rangers at the State House. (Molk Ex. 4).

23. Lt. Molk listed in his Interview Guide the primary purpose of his position is, "to directly supervise a staff of 14-17 Rangers who cover the day shift in the State House." He listed his interactions within DCR and with other entities, such as the ones listed in Lt. Dowd's Interview Guide, as "daily" or "as requested/required." (Molk Testimony; Molk Ex. 4).

24. Under the heading "Job Changes" in the Interview Guide, Lt. Molk wrote,

> The State House program was started in December 1995, twenty years ago. I was fortunate enough to be one of the 16 rangers who started in this program… With the events surrounding 9/11 in 2001, our responsibilities changed drastically. State House rangers now utilize sophisticated equipment (x-ray machines, metal detectors) in an effort to provide and promote a safe environment… We also respond to all medical emergencies which were initially handled by a licensed doctor/nurse… Over the years we have been trained to deal with the threat of "terrorist" and "active shooter" situations to the point of bullet proof vests being issued as part of our standard uniform/equipment.

(Molk Ex. 4)

25. Lt. Dowd's Interview Guide stated that the "Ranger II's job at the State House had changed over the years and the Ranger

Series grade system had not changed to compensate for the extra duties." (Dowd Ex. 4).[6] Lt. Dowd also wrote that he was doing the work of Captain A, who is a Ranger III at the State House and supervised all the DCR Rangers working in the State House. (*Id*.) However, Lt. Dowd copied Captain A on certain documents, like reports and email messages. Lt. Dowd believed that Captain A, who was in charge 24 hours a day, was not a good supervisor, he would not let Lt. Dowd do what he (Lt. Dowd) wanted to do and he (Captain A) could not make decisions and always deferred to his (Captain A's) boss. Lt. Dowd complained to one of his superiors a couple of times a year that Captain A was not getting his work done. (Dowd Testimony).[7] Lt. Molk concurred with Lt. Dowd that Captain A was not a good supervisor, asserting that one of the State House Lt. Rangers would attend meetings for scheduled events and Captain A would rarely attend such meetings, that Captain A would forward emails to the Lieutenants, and he complained to a superior about Captain A. Lt. Molk had little to do with disciplinary and budgetary matters. (Testimony of Molk)

26. On his Interview Guide, Lt. Dowd wrote that the primary purpose of the Ranger III position as overseeing the daily operations of the Rangers at the State House who provide round-the-clock security for the building, the people in the building, and visitors to the building. (Dowd Ex. 4).

27. Neither Appellant listed the percentages of time duties were performed but wrote how often he performed those duties using descriptors such as "daily" or "as needed". (Molk Testimony, Molk Ex. 4; Dowd Testimony; Dowd Ex. 4).

28. In their Interview Guides, the Appellants wrote that they had near-daily interactions with internal staff such as DCR Deputy Chief Parr and with other entities, including the Massachusetts State Police Protective Services, the Boston Police, the Bureau of State House (BSH), members of the House of Representatives and Senate and the public. (Dowd Testimony; Dowd Ex. 4; Molk Testimony, Molk Ex. 4). They, or a couple of other Ranger IIs, would sometimes be the point person for the Rangers at the State House when there was an emergency or a specific request. (Molk Testimony; Dowd Testimony).

29. Under the section of the Interview Guide that asked, "What problems/issues would be referred to someone else?", Lt. Dowd and Lt. Molk wrote, in essence, that they would refer a serious breach of DCR policy or BSH policy to Captain A or DCR Deputy Chief Ranger Parr. (Dowd Ex. 4; Molk Ex. 4).

30. In his Interview Guide, Lt. Dowd wrote that he was not involved in the employee grievance process. (Dowd Ex. 4) Lt. Molk's Interview Guide indicated that he was not involved in the employee grievance process (as a supervisor) and only one occasion would he approve leave time requested by Ranger Is. (Molk Ex. 4).

31. As part of EOEA's review of the Appellants' request for reclassification, the Appellants' supervisors submitted their written opinions of the Appellants' requests for reclassification. In their letters, then-Chief Park Ranger Snow and Deputy Chief Ranger Parr did not support either reclassification request. Noting that the duties of a Ranger II at the State House had changed, then-Chief Park Ranger Snow and Deputy Chief Ranger Parr recommended that the human resource office conduct a review of the Ranger classification specification. (Parr Testimony, Daddabbo Testimony, Dowd Ex. 6, 7). At least some of the reasons that the Appellants were not Ranger IIIs were that they did not issue discipline, approve/disapprove Rangers' overtime requests, and did not participate in the hiring process. Additionally, this reclassification would disrupt the chain of command at the State House because both the Appellants and their supervisor would be Ranger IIIs. (Parr Testimony; Daddabbo Testimony, Dowd Exs. 6, 7). [8]

32. Ms. Daddabbo, a Classification Specialist at the EOEA human resource office, interviewed Lt. Dowd and Lt. Molk in response to their reclassification request. With Ms. Daddabbo at both interviews was another EOEA Classification Specialist, Kimberlee Costanza. (Daddabbo Testimony; Resp. PH 2).

33. After the interviews, Ms. Daddabbo reviewed the Appellants' requests for reclassification with Kimberlee Costanza and administrative leaders at EOEA and DCR and wrote an audit report for each Appellant. The report concluded that the Appellants were properly classified as Ranger IIs. (Daddabbo Testimony; Dowd Ex. 8; Molk Ex. 8; Resp. PH 1).

34. EOEA denied the Appellants' requests for classification on July 13, 2017. (Daddabbo Testimony, Resp. PH Ex. 1).

35. Lt. Molk appealed EOEA's to HRD on August 3, 2017 and Lt. Dowd appealed EOEA's decision on August 8, 2017. On February 26, 2018, HRD denied both Appellants' requests. (Molk Ex. 10; Dowd Ex. 10).

Ranger Classification Specification

36. The Summary of the Ranger Series Classification Specifications (Specifications) encompasses all Ranger duties for all parks, historic sites, and other Massachusetts lands where Rangers are assigned. (Molk Ex. 1; Dowd, Ex. 1).

37. The Specification, last modified in 1995, does not fully portray some of the duties of Rangers assigned to the State House and refer to duties for Rangers in the field.[9] (Molk Testimony; Dowd Testimony; Daddabbo Testimony; Molk Exs. 1, 6, 7; Dowd, Exs. 1, 6, 7; (Resp. PH Ex. 2).

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6. Lt. Molk and Lt. Dowd reviewed each other's Interview Guide. (Testimony of Molk)

7. Captain A left his job in June 2018. (Testimony of Dowd)

8. Rangers I, II and III are members of the same union. (Testimony of Dowd)

9. For instance, the Ranger Classification Specification states that a Ranger "assists as needed in the prevention, suppression and control of forest fires, a responsibility a Ranger at the State House in Boston would not likely encounter, although they would be required to perform such duties when they are in the field.

38. Duties of Ranger IIs that are relevant to this appeal include:

- "Supervise daily ranger services through scheduling and assignment of staff and activities, and ensure compliance with department policies; conduct evaluations/appraisals of employees and evaluate the readiness of equipment.
- Provide on the job training and orientation for assigned rangers.
- Oversee assigned inter-divisional and inter-agency projects by planning meetings and meeting agenda and coordinating the activities of project teams."

Additionally, Ranger IIs may also "procure equipment and supplies via approved budgetary procedures." (Molk Ex. 1; Dowd Ex. 1).

39. According to the Specifications, Ranger IIIs perform all of the duties of Ranger IIs but also perform the following duties that distinguish Ranger IIIs from Ranger IIs ("distinguishing characteristics"):

> Duty 1. Oversee and coordinate activities of subordinates at designated recreational areas by conducting meetings, reviewing and preparing reports, issuing procedural directives and controlling and distributing equipment needed in order to ensure efficiency of operations and maintain rules and regulations and enforcement policy continuity across assigned areas.
>
> Duty 2. Conduct formal training programs related to rules and regulations enforcement, search and rescue, informational and educational subjects pertaining to recreation, and other matters.
>
> Duty 3. Review reports, correspondence, expense accounts, etc. for accuracy, completeness and content.
>
> Duty 4. Act as ranger incident commander, when applicable during searches.
>
> Duty 5. Prepare budget request and administer program budget.
>
> Duty 6. Recommend revisions to division/department policies and procedures.
>
> Duty 7. Review narratives and statistical reports.
>
> Duty 8. Draft or recommend cooperative agreements with other agencies, organizations, special interest groups, Friends (sic) groups, state and other police agencies and departments, and the media; develop and coordinate inter-agency and inter-divisional projects.
>
> Duty 9. Coordinate and monitor program activities in order to ensure effect operations and compliance with established standards…
>
> Duty 10. Develop visitor surveys, analyze data and prepares reports related to statistical studies; perform continuing visitor services analysis and research.
>
> Duty 11. Coordinate ranger activities, initiatives, activities [sic] and schedules with site supervisors and staff; work closely with department supervisors and administrators on park management issues and planning efforts.
>
> Duty 12. Administer citation records and reports; oversee department files in accordance with official laws and procedures (emphasis added).

(Molk Ex. 1; Dowd Ex. 1)(emphasis added).

Ranger IIIs may also, based on their assignment, "represent the agency/division at meetings and conferences to provide information concerning agency objectives." (Molk Ex. 1; Dowd Ex. 1).

40. According to the Specification, Ranger IIs exercise direct supervision over, assign work to, and review the performance of 1-5 rangers and have indirect supervision over 5-10 seasonal staff. Ranger IIIs exercise direct supervision over, assign work to, and review the performance of 1-5 rangers and have indirect supervision over 6 or more rangers and 6 or more seasonal staff. (Molk Ex. 1; Dowd Ex. 1).

41. The job duties listed job description of a Ranger III and those listed in the job description of a Ranger II partially overlap except that the Ranger III job description includes the 12 distinguishing duties from the Specification (listed above). (Molk Exs. 2 and 3; Dowd Exs. 2 and 3).

42. The Appellants do not have Ranger II job descriptions with their names on them. (Molk Testimony, Dowd Testimony) and no EPRS had been conducted for the Appellants for years. (Molk Testimony; Dowd Testimony). Lt. Dowd did not discuss the lack of EPRS reports with Captain A. (Testimony of Dowd)

43. The Appellants filed the instant appeals with the Commission. (Administrative Notice)

APPLICABLE LAW

G.L. c. 30, § 49 provides:

> "Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator. . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . ."

"The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe* v. *Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher-level position the majority (i.e., at least 50% or more) of the time. *See*, *e.g.*, *Pellegrino* v. *Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski* v. *Department of Revenue*, 14 MCSR 188 (2001) (more than 50%); *Madison* v. *Department of Public Health*, 12 MCSR 49 (1999) (at least 50%); *Kennedy* v. *Holyoke Community College*, 11 MCSR 302 (1998) (at least 50%). What must be shown is that the Appellants perform the "distinguishing duties" of the Ranger III position at least 50% of the time and, in making this calculation, duties which fall within both the higher and lower title do not count as "distinguishing duties." *See Lannigan* v. *Department of Developmental Services*, 30 MCSR 494 (2017).

ANALYSIS

The Appellants have failed to establish by a preponderance of the evidence that as Ranger IIs they performed the functions of a Ranger III more than 50% of the time. Rather, they showed that they performed only some of the distinguishing duties of a Ranger III at the State House and did not establish that they performed even those duties more than half the time. The distinguishing duties of a Ranger III that the Appellants did perform were reviewing parking citations for accuracy, acting as the ranger incident commander, being involved in responding to medical emergencies at the State House and were in contact with outside agencies, such as the Boston Police, to foster collaboration on management issues and planning events. In addition, Appellant Dowd, in consultation from Appellant Molk, drafted one document regarding emergency personnel in order to organize a safe and reliable route for EMS personnel to reach all floors of the State House through one entrance and by using an appropriate set of elevators, which the Appellants' superiors subsequently converted to a policy. This activity falls under the Ranger III responsibility to draft or recommend revisions to existing policies. Additionally, the Appellants coordinated efforts to manage State House issues and planning efforts with the SHB. They both interacted with a variety of State entities and assisted with planning the daily activities for events at the State House.[10] The Appellants coordinated with outside entities to ensure parking at the State House during snow emergencies was properly handled, although it only occurred a few times each winter.

The preponderance of evidence does not show, however, that the Appellants performed these distinguishing duties more than 50% of the time. Neither Appellant indicated the percentage of time he spent on the duties he listed, and that information did not emerge from Ms. Daddabbo's report following her interviews of the Appellants. Neither Appellant stated which Ranger III duties were performed consistently, to the extent that they were primarily functioning as Captains rather than Lieutenants as they alleged.

Further, the Appellants did not perform a number of the distinguishing duties of a Ranger III at all. The first duty in the Specification that distinguishes a Ranger II from a Ranger III specifies that Ranger IIIs "oversee personnel and activities by conducting meetings, reviewing and preparing reports, issuing procedural directives, and controlling and distributing necessary equipment." It is true that the Appellants regularly gathered the Rangers they oversaw for meetings and also controlled and distributed equipment such as radios. The Appellants created a schedule for Ranger I daily assignments but did not create the entire work schedule for all Rangers, approve vacation requests, or issue directives. Rather, Deputy Chief Ranger Parr wrote and issued procedural directives and was responsible for the overall scheduling of all Rangers assigned to the State House.

The responsibility of a Ranger III to "conduct formal training programs related to rules and regulations enforcement …" is seemingly similar to the responsibility of a Ranger II to "provide on the job training and orientation for assigned rangers." The Appellants trained new DCR employees, or existing DCR employees transferred to the State House, and the Appellants performed these duties on an as-needed basis, informally. For instance, when a new hire had a question involving human resource matters, the Appellants would try to answer the question, and if they could not, they would provide a phone number or the name of someone who could answer the question. The as-needed basis of providing orientations and on-the-job trainings distinguishes this Ranger II duty from the presentation of a formal training program related to rules and regulations enforcement that a Ranger III would perform.

The area that further distinguishes the roles of a Ranger II and a Ranger III is the discipline of DCR employees. When they would see someone not performing according to policy or procedure, the Appellants would correct their actions. However, the Appellants did not take part in the formal discipline process. Rather, "Captain A" would issue a counseling or a verbal warning and a written discipline would come from the Deputy Chief Ranger Parr. Testimony at the Commission hearing supports this important difference between Ranger II and Ranger III duties. Appellant Dowd acknowledged that he has a bigger role in discipline now that he is a Ranger III than he had as a Ranger II. The evidence also showed that the Appellants did not administer the budget. The Appellants would request materials but did not oversee budgetary matters for the Rangers working at the State House.

Being on call for the State House for all three shifts, effectively 24 hours a day, is another important distinction between the duties of a Ranger II and Ranger III. It is the duty of a Ranger III to respond to calls during all three shifts to deal with personnel or other related matters at the State House. The broad oversight and constant responsibility of the Ranger III is vastly different than oversight over just one shift, after which the Ranger IIs go home with no further State House responsibilities until their next shift.

Appellant Molk wrote in his Interview Guide that his job duties have changed significantly since the events of September 11, 2001 and Appellant Dowd wrote in his Interview Guide that that although the Ranger IIs duties had changed over the years, the Ranger IIs had not been compensated therefor. The Appellants perform an important security role at the State House and their supervisors have recommended that the Ranger classification specification be altered to better reflect their duties.[11] A change in job

10. There is not enough information in the record to determine whether the Appellants performed Ranger III distinguishing duties 7, "Review narratives and statistical reports," and 10, "Develop visitor surveys, analyze data and prepares reports related to statistical studies; perform continuing visitor services analysis and research", nor was there enough information in the record to determine if Ranger IIIs assigned to the State House perform such duties.

11. Deputy Chief Parr indicated that there had been some initial discussion about possible review and/or revisions to the Ranger classification specification but no changes had been made and there was no indication when and if any revisions would be made. (Testimony of Parr)

duties does not mean the Appellants have mostly performed the duties of a higher classification. Thus, the Appellants, as Ranger IIs, have not shown by a preponderance of evidence that they perform the job responsibilities of a Ranger III more than 50% of the time. Appellant Dowd having failed to establish by a preponderance of the evidence that he performed the tasks of a Ranger III more than 50% of the time prior to being promoted to Ranger III is not entitled to backpay.

CONCLUSION

Accordingly, for the above stated reasons, the reclassification appeals of both Appellant Dowd and Appellant Molk, docketed, respectively, C-18-053 and C-18-054, are hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 8, 2021.

Notice to:

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* * * * * *

LaSHAWNNYA THOMAS

v.

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

C-18-015

April 8, 2021
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Transportation-Customer Service Representative IV to Program Coordinator III—In a close case, an Appellant in charge of supervising the Registry of Motor Vehicles Mail-In Registration Department failed to win a reclassification from Customer Service Representative IV to Program Coordinator III where she only sporadically created new standards for evaluating staff and defining new programs, and she herself estimated that much as 70 to 80 percent of her time was spent in transactional, rather than supervisory, work.

DECISION

On January 19, 2018, the Appellant, LaShawnnya Thomas (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD), in which HRD affirmed the Massachusetts Department of Transportation (MassDOT)'s denial of her request to be reclassified from Customer Service Representative III (CSR III) to Program Coordinator III (PC III). On February 20, 2018, a pre-hearing conference was held at the offices of the Commission. I held a full hearing at the same location on April 4, 2018.[1] The hearing was digitally recorded and both parties were provided with a usb drive containing a recording of the hearing.[2] Both parties filed post-hearing briefs.

FINDINGS OF FACT

Two (2) Appellant Exhibits (Exhibits 1A-1B) and nineteen (19) MassDOT Exhibits (Exhibits 1-2, 3A-3I, 4-11) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

For the Appellant:

- LaShawnnya Thomas, Appellant

For MassDOT:

- Gretchen Daley, Director of Titles and Registration, Registry of Motor Vehicles

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. The Commission subsequently had a written transcript of the hearing prepared.

- Elizabeth Rizzuto, Manager of Titles and Registration, Registry of Motor Vehicles
- Joan Makie, Manager of Human Resources Service and Operations, MassDOT

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

1. The Appellant is employed with MassDOT in the Mail-In Registration Department of the Registry of Motor Vehicles (RMV) at its Quincy headquarters, and is currently classified as a Customer Service Representative IV (CSR IV). (Exhibits 3A, 3C; Testimony of Appellant)

2. Appellant holds an associate's degree in business management and accounting principles from the Katharine Gibbs School. She has taken various professional development courses through the state's on-line PACE program, and is currently studying business management at the University of Southern New Hampshire through the College for America program. Appellant was chosen for a scholarship to pursue that program, which allows her to work towards her college degree on-line at her own pace. (Testimony of Appellant; Exhibits 3A, 3B)

3. The Appellant began work with the RMV on June 28, 1992 as Administrative Secretary to the Director of Driver Licensing. (Exhibits 4, 3B). In 2001, she was promoted to Customer Service Representative II and assigned to the RMV's Customer Contact Center. She was promoted to CSR III while in the Customer Contact Center. (Testimony of Appellant; Exhibit 3A)

4. The RMV became part of MassDOT in 2009. (Testimony of Appellant)

5. In November 2011, the Appellant was assigned to supervise the Mail-In Registration Department within the Title and Registration Unit of the RMV. The Mail-In Registration Department had been without supervision since May 2011, when the previous supervisor had retired. (Exhibit 3A; Testimony of Appellant)

6. The Mail-In Registration Department processes a high volume of correspondence and checks relating to vehicle registration and titles that arrive at the RMV by mail, rather than through the MassDOT website. Staff open and batch more than 500,000 pieces of mail annually, then run it through heavy volume scanning equipment that converts correspondence, including checks, into digital files and electronic cash deposit letters. The unit employees then go into the database to make corrections and forward the files to the RMV information processing and revenue operations departments, which use them to issue titles and registrations and to make bank deposits. Unit staff also handle telephone inquiries. (Testimony of Appellant; Testimony of Daley; Exhibits 3A, 3C)

7. When she began her job in the Mail-In Registration unit, the Appellant found that each staff member had a single job and had not been trained in all the functions of the unit. Not all employees were able to operate the scanning machines. They also were not using email or entering their time sheets and leave requests. After teaching herself how the unit worked, Appellant began cross-training each employee in all functions of the unit, including scanning and accounting. (Exhibit 3A; Testimony of Appellant)

8. Appellant also applied management strategies, including weekly one-on-one meetings with her employees, seeking their suggestions for improving the unit's functioning, sending them to trainings to learn overall goals for the RMV, and suggesting to management both progressive discipline and compliments when needed or deserved. Appellant created reports to measure incoming work and a forecasting measure to predict if the unit might not meet a target, so that she could consult with managers and adopt strategies to avoid falling behind, such as requesting temporary help. She wrote a basic step-by-step operating procedure for the unit to assist current and future employees and to avoid losing knowledge when employees left the office. She also prepared time studies to increase the unit's efficiency and instituted auditing procedures. (Exhibit 3A; Testimony of Appellant)

9. On four occasions, Appellant assisted part-time with special projects. In 2014 she spent two to three months acting as the subject matter expert for a project with the vendor Unisys, which was hired to create a system for the Unisys NDP-250 high volume scanners to create an electronic cash letter, or digital cash deposit, so that funds paid for registrations by check could be electronically deposited in the RMV's account at the Bank of America. During the months when the vendor was on site, Appellant spent about 55 percent of her time working with the engineer and answering questions, as well as with the RMV's departments of Information Technology (IT) and Revenue Operations. (Testimony of Appellant and Daley; Exhibit 3A)

10. At some point after 2014, Appellant worked on a second, two-month project with the Unisys engineers when the RMV moved from Bank of America to Santander, spending about the same time working with the vendor's engineer and other RMV departments. (Testimony of Appellant; Exhibit 3A)

11. On a third occasion, Appellant worked for about a month on a third Unisys project, when the RMV again changed banks, this time returning to the Bank of America. (Testimony of Appellant; Exhibit 3A)

12. Appellant also described a project she worked on more recently with her supervisors, her manager Elizabeth Rizzuto and her director Gretchen Daley, to improve her unit's efficiency. The project was assigned by the MassDOT's Office of Performance Management and involved creating metrics to measure performance and making changes to improve efficiency. Appellant attended meetings and helped test proposed changes. (Testimony of Appellant, Testimony of Daley)

13. One of Appellant's successes in improving efficiency was described by her director, Gretchen Daley. During peak seasons, the Mail-In Registration unit generally needed extra staff to handle the extra work in the fall and again in June. Also, when the unit

was not able to keep current, customers would call or come into service locations to complete their registrations, creating more work and sometimes creating errors where duplicate registrations were created. In the fall of 2017, Appellant was able to keep the unit ahead of its work for the first time without using any extra staff, which created a more streamlined and efficient process. (Testimony of Daley)

14. During her special projects, Appellant continued to supervise the Mail-In Registration Department and continued to help with scanning and renewal transactions, which required "all hands on deck." During typical times, Appellant estimated that she spent 70 to 80 percent of her time working on transactions. (Testimony of Appellant)

15. Gretchen Daley, the Director of the Title and Registration Department, estimated that Appellant spent about 40 percent of her time helping her staff process transactions and about 60 percent of her time on management tasks. (Testimony of Daley)

16. After the Unisys projects were completed, the Unisys engineer would make a monthly site visit pursuant to the maintenance contract, and Appellant would bring up any issues that had arisen. She would also speak with the engineer by telephone in between visits if an issue arose, to be sure she managed the situation correctly. (Testimony of Appellant)

17. Appellant worked largely independently as the supervisor of the Mail-In Registration Department. Although she would reach out to her manager Elizabeth Rizzuto and the division's Director Gretchen Daley if problems arose or she needed assistance, neither supervisor assigned work to her. Ms. Rizzuto prepared and signed Appellant's EPRS (Employee Performance Review System) form. (Testimony of Appellant, Testimony of Daley, Testimony of Rizzuto; Exhibit 11)

18. Appellant supervised seven employees, five clerks and two receiving tellers. The clerks all held titles of CSR I or CSR II. Appellant assigned the employees' work and prepared their EPRS forms. None of her employees supervised other people. (Testimony of Appellant, Testimony of Daley, Testimony of Rizzuto; Exhibit 11)

19. The organizational chart for the RMV's Title and Registration Department as of 2015 shows six units that have supervisors at the Appellant's level. Besides the Appellant, who was a CSR III, the supervisors held titles of PC III (Supervisor, Special Plates and Uninsured Motorist System), Training Tech II (Supervisor, Electronic Vehicle Registration), PC I (Supervisor Section 5 or dealer plates), Admin Review Officer I (Supervisor, International Registration Plan and Federal ID), and CSR II (Floor Supervisor, in Title Records). Additional employees with PC III titles are shown on the chart who do not supervise any other employees. (Exhibit 3D; Testimony of Appellant, Testimony of Daley)

20. One of the PC III employees shown on the RMV Title and Registration Department organizational chart, the supervisor of special plates and uninsured motorist system, functions as an operations manager. This person supervises five people. Based on Gretchen Daley's observations, this person also spends approximately 40 percent of her time processing transactions and about 60 percent of her time performing management functions. (Exhibit 3D; Testimony of Daley)

21. On September 21, 2015 the Appellant filed a classification appeal to the MassDOT Human Resources Department (MassDOT HR), seeking the title of Program Coordinator III (PC III). (Exhibit 1)

22. An audit interview was conducted on October 20, 2015 by Evelyn Smith, MassDOT Personnel Analyst. Prior to the audit interview, appellant provided Ms. Smith with her resume and a five-page interview guide, and her supervisor, Elizabeth Rizzuto, Manager of the RMV Titles and Registration Department, provided answers to questions concerning Appellant's duties. A different HR representative was assigned to Appellant's case when it was considered by MassDOT HR in 2017. (Testimony of Appellant; Exhibits 3A, 3B, 3C)

23. On March 1, 2016 a new Classification Specification became effective for the Customer Service Representative title series. The new specification added a new title of Customer Service Representative IV (CSR IV) and redefined the positions of CSR I, CSR II, and CSR III. The change arose as part of a review by the Registrar of all positions at the RMV, in order to improve service delivery. One goal of the changes to the CSR series was to increase the minimum entrance requirements so that new employees would have more experience handling cash and working with the public. (Exhibits 3H, 10; Testimony of Makie)

24. From February to June 2017, the Appellant contacted various MassDOT HR employees to request that her 2015 appeal be processed. (Testimony of Appellant; Exhibit 8)

25. On or before July 11, 2017 the MassDOT HR completed its Classification Appeal Recommendation, recommending that she retain her classification of CSR III for the period of her appeal to February 28, 2016, and that she be reclassified as CSR IV beginning on March 1, 2016 (the date when the CSR IV title became effective). The recommendation was signed by Registrar of Motor Vehicles Erin Deveney on July 11, 2017 and by MassDOT Human Resources Manager Joan Makie on August 18, 2017. (Exhibit 4)

26. On September 14, 2017, Boris Lazic, Senior Director of Human Resources for MassDOT, sent the Appellant a letter notifying her of the preliminary recommendation to deny her appeal to be reclassified as PC III, but approving her appeal to the extent of reclassifying her as CSR IV. The reason given was that the title of CSR IV appropriately described the duties performed by the Appellant on a daily basis. Mr. Lazic enclosed copies of the documents relied upon by MassDOT HR and provided Appellant with her right to send a rebuttal within ten days. (Exhibit 5)

27. On September 20, 2017, Appellant wrote to Mr. Lazic seeking reconsideration. (Exhibit 6)

28. On October 6, 2017, Mr. Lazic notified the Appellant that her appeal was denied by MassDOT HR. He informed her of her right to appeal to the Commonwealth's Human Resources Division (HRD). (Exhibit 7)

29. On October 24, 2017, the Appellant sent her appeal letter to George Bibilos, Director of the Organization Development Group at the Commonwealth's HRD, enclosing all documents related to her appeal. (Exhibit 8)

30. On December 26, 2017, Alexandra McGinnis, Senior Personnel Analyst in HRD's Classification and Compensation Unit, wrote the Appellant notifying her that her appeal seeking classification as a PC III was denied, and that HRD had concluded that Appellant's duties are best classified as CSR IV. Ms. McGinnis also provided Appellant with her appeal rights. (Exhibit 9)

31. On January 25, 2018, Mr. Lazic wrote Appellant to notify her she would receive retroactive compensation of $6,428.07 based on her reclassification to CSR IV as of March 1, 2016. (Exhibit 10)

32. The duties of a Program Coordinator III are set out in Exhibit 3I, the Classification Specification for the Program Coordinator series.

33. The series Summary describes the function of a Program Coordinator as follows:

> Incumbents of positions in this series coordinate and monitor assigned program activities; review and analyze data concerning agency programs; provide technical assistance and advice to agency personnel and others; respond to inquiries; maintain liaison with various agencies; and perform related work as required.
>
> The basic purpose of this work is to coordinate, monitor, develop and implement programs for an assigned agency.

(Exhibit 3I)

34. The PC Classification Specification lists the following under "Examples of duties common to all levels of the Program Coordinator series":

- Coordinates and monitors assigned program activities to ensure effective operations and compliance with established standards.
- Reviews and analyzes data concerning assigned agency programs to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc. and to devise methods of accomplishing program objectives.
- Provides technical assistance and advice to agency personnel and others concerning assigned programs to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards.
- Responds to inquiries from agency staff and others to provide information concerning assigned agency programs.
- Maintains liaison with various private, local, state and federal agencies and others to exchange information and/or to resolve problems.
- Performs related duties such as attending meetings and conferences; maintaining records; and preparing reports.

(Exhibit 3I)

35. Under "Differences in Levels in Series" the PC Classification Specification states that those in the following levels, and those in higher levels, perform the following duties:

> Program Coordinator II:
>
> - Provide on-the-job training and orientation for employees.
> - Develop and implement procedures and guidelines to accomplish assigned agency program objectives and goals.
> - Review reports, memoranda, etc. for completeness, accuracy and content.
> - Confer with management staff and other agency personnel in order to determine program requirements and availability of resources and to develop the criteria and standards for program evaluation.
> - Evaluate program activities in order to determine progress and effectiveness and to make recommendations concerning changes as needed.
> - Program Coordinator III:
> - Develop and implement standards to be used in program monitoring and/or evaluation.
> - Oversee and monitor activities of the assigned unit.
> - Confer with management staff and others in order to provide information concerning program implementation, evaluation and monitoring and to define the purpose and scope of proposed programs.

(Exhibit 3I)

36. Under "Supervision Received" the PC Classification Specification provides for those at each level, including PC III:

> Incumbents of positions at this level receive general supervision from employees of higher grade who provide guidance on policy and procedure, assign work and review performance for effectiveness and conformance to laws, rules, regulations, policy and procedures.

(Exhibit 3I)

37. The PC Classification Specification provides under "Supervision Exercised" as to those at the PC III level:

> Program Coordinator III
>
> Incumbents of positions at this level exercise direct supervision (i.e., not through an intermediate level supervisor) over, assign work to and review the performance of 1-5 professional personnel; and indirect supervision (i.e., through an intermediate level supervisor) over 6-15 professional, administrative, technical and/or other personnel.

(Exhibit 3I)

38. The new Classification Specification for the Customer Service Representative Series, signed in December 2015 and effective in March 2016, provides under "Summary of Series":

Employees in this series confer with agency customers and the general public by telephone, in person or in writing; assist agency customers and the public in applying for agency programs, services, licenses or permits; explain agency programs, services, procedures and fees; respond to inquiries; resolve complaints or refer them to appropriate staff; process applications and other documents; may enter application data into computers; establish and maintain coding and filing systems of case logs; may collect and record receipt of application fees; may prepare licenses or permits and may digitally image customers; provide information on certificates of titles, registrations, rebates, excise tax, sales tax, license and registration suspension, civil motor vehicle infractions, warrants, electronic toll and parking violations and other Registry of Motor Vehicle functions and procedures.

(Exhibit 3H)

39. Under "Examples of Duties Common to All Levels in Series" the CSR Classification Specification provides:

- Interacts with customers to respond to inquiries and complaints.
- Issues licenses, identification cards and motor vehicle registrations.
- Communicates with internal and external contacts through a variety of means such as telephone, mail, e-mail, fax or in-person.
- Uses computer terminals, vision instruments, automatic testing devices and other equipment.
- Administers vision tests in accordance with agency policy.
- Operate computer equipment to create, retrieve, review, change or update driver/vehicle/business information.
- Ensure appropriate confidentiality and security of information.
- Reviews reports for compliance with state and federal guidelines.
- Collects fees (cash and checks) and performs credit card transactions.
- Reconciles receipts with revenue control documents.
- Operates computer terminals and photo imaging software.
- Schedules road examinations.
- Prepares forms and other documents related to licenses, registrations, identification cards and receipts for titles.
- Amends title and registration records.
- Maintains Registry of Motor Vehicle filing systems.
- Reviews customer documents in support of transactions for accuracy and veracity.
- Conducts research for additional information from third parties (other states, state agencies, etc.) to complete transactions.
- Assists other state and local agencies with Registry of Motor Vehicle information.
- Assists customers with problem resolution.
- Provides information to the public regarding Registry of Motor Vehicles guidelines, requirements and procedures in-person and on the phone.
- Greets customers, determines customer's purpose, assesses readiness, and directs them to the appropriate line.
- Directs customers to Kiosks and other automated services where appropriate.
- Assesses that customers have the correct forms/applications, supporting documents, and acceptable payment.
- Returns improper or incomplete forms or documents to the applicant explaining reasons for rejection and steps necessary to complete forms/applications.
- Provides checklists and assistance in completing forms/applications.
- Provides information to the public regarding Registry of Motor Vehicles guidelines, requirements and procedures in-person and on the phone.

(Exhibit 3H)

40. Under "Differences Between Levels in Series" the CSR Classification Specification provides:

Customer Service Representative II:

- Provides technical assistance and guidance on tax exemption issues.
- Authorizes or denies sales tax exemptions for motor vehicles at the time of registration, based on evaluation of documentation and knowledge of both Registry of Motor Vehicles and Department of Revenue rules.
- Receives revenue for licenses, registrations, titles, sales tax and other fees and maintains records and accounts of all financial transactions in ALARS/lmaging system.
- Reconciles financial receipts and prepares daily bank deposits and work reports for designated branch office.
- Makes periodic daily collections of revenue from the clerical personnel at the public counter and reconciles accounts.
- Opens/closes branch offices, as needed.
- Reconciles daily branch deposits.

Customer Service Representative III:

- Assist customers with reporting, eligibility and compliance requirements; appropriate processes to follow, information to process and actions to take in accordance with standard procedures.
- Inquires with customers, as needed, to determine appropriate service; explains additional information or action required when customer fails to meet license or operating requirements.
- Performs senior level or lead customer service activities by providing assistance, guidance and instruction to less experienced customer service personnel.
- Perform research, analysis and judgment to determine an appropriate course of action to provide the public with the full range of services available.
- Oversees office operations.
- Provides training and support to employees.

- Ensures accuracy of cash control.
- Incumbents at this level perform work that requires considerable independence in the exercise of judgment, in determining approaches and in the interpretation and application of policies, laws, standards and procedures.
- Creates reports and statistical tables.

Customer Service Representative IV:

- Interpret, monitor and implement rules, regulations, policies and procedures for carrying out daily activities.
- Ensure that completed work meets standards of quality and timeliness.
- Supervises subordinate personnel including delegating assignments, training, monitoring and evaluating performance.
- Maintains efficient workflow by evaluating production and revising processes and work assignments.
- Adjusts own activities and priorities according to changes in workload, team member absences, and to enable team members to take appropriate breaks.
- Provides input regarding work plans, schedules and daily operations.
- Assists in office support tasks such as tracking inventories, ordering supplies and handling deposits.
- Oversees operations at satellite branch offices.
- Assists Branch Manager with operations at major branch offices, filling in when the Branch Manager is not available.
- At this level, incumbents are expected to perform or be able to perform the duties described for Levels I, II and III; however, the primary focus is to provide program oversight, guidance and review of others' work.
- Communicate with appropriate MassDOT enterprise service areas to address workplace facility and security issues.

(Exhibit 3H)

41. Supervision received by a CSR IV is described in the Classification Specification as:

> Customer Service Representative IV
>
> Incumbents of positions at this level receive general supervision from Branch Managers and other employees of a higher grade who provide procedural and policy guidance, assign work and review for effectiveness and compliance with laws, rules and regulations.

42. Supervision exercised by a CSR IV is described in the Classification Specification as:

> Incumbents exercise direct supervision over, assign work to, provide training for and review the performance of Customer Service Representatives and provide indirect supervision to employees of a lower grade. Incumbents may also participate in the interviewing process or make recommendations for new hires.

LEGAL STANDARD

> Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal . . . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it.

G.L. c. 30, § 49.

The Appellant has the burden of proving that she is improperly classified. "The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe* v. *Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher-level position the majority (i.e., at least 50% or more) of the time. *See, e.g.*, *Pellegrino* v. *Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski* v. *Department of Revenue*, 14 MCSR 188 (2001)(more than 50%); *Madison* v. *Department of Public Health*, 12 MCSR 49 (1999)(at least 50%); *Kennedy* v. *Holyoke Community College*, 11 MCSR 302 (1998)(at least 50%). In making this calculation, it must be noted that duties which fall within both the higher and lower job title do not count as "distinguishing duties." *See Lannigan* v. *Department of Developmental Services*, 30 MCSR 494 (2017).

That another employee may be misclassified "does not entitle the Appellant to the reclassification requested." *Gaffey* v. *Dept. of Revenue*, 24 MCSR 380, 381 (2011).

Parties' Arguments

MassDOT argues that Appellant's duties fall squarely within the specifications for a Customer Service Representative IV and its inclusive lower level titles, which require her to exercise operational supervision over all aspects of the RMV's Mail-In Registration Department. MassDOT also highlighted several duties within the CSR IV and lower level CSR specifications that require exercise of judgment, revision of work processes to promote efficiency, creation of reports and statistical tables, and providing "input" as to work plans, schedules, and daily operations.

In contrast, MassDOT argues that the Appellant's primary duties do not fit within the agency "program activities" described in the Program Coordinator series or the PC III specifications. Included within the distinguishing duties of a PC III are "Develop and implement standards to be used in program monitoring and/or evaluation" and "Confer with management staff and others in order to provide information concerning program implementation, evaluation and monitoring and to define the purpose and scope of proposed programs." Although another level-distinguishing duty of a PC III is "Oversee and monitor activities of the assigned unit," this general description of supervision overlaps with many aspects of a CSR IV and CSR III and cannot serve as the basis for a reclassification. MassDOT argues that Appellant thus has not shown that

she spends more than 50 percent of her time performing a duty that distinguishes PC III from CSR IV.

MassDOT also points out that Appellant's supervisory duties are different in type and extent from those described in the PC III classification. PC III employees supervise 1-5 "professional personnel" who in turn are collectively supervising 6-15 others. Appellant is supervising approximately 7 employees at the CS I and CS II level, who themselves do not supervise others.

Additionally, MassDOT argues that the existence of another employee holding the PC III title and performing comparable work cannot justify reclassification. Rather, the Commission must consider the work that the Appellant is performing and the classification standards.

The Appellant argues that the process used by MassDOT HR for evaluating her appeal was flawed because she was never interviewed and the agency was not fully aware of her duties and accomplishments. No desk audit of her duties was performed, and she was not consulted before being placed in the new title of CSR IV. By 2017, the personnel analyst who conducted her audit interview in 2015 had been replaced by a new MassDOT HR person. Additionally, her manager, Ms. Rizzuto, and her director, Ms. Daley, both began supervising the Mail-In Registration Department in 2014, so they were also not fully aware of the extent of her vendor project work or her reorganization of her unit's work structure since 2011.

As to distinguishing duties, Appellant points out her work on vendor projects, her work with the Office of Performance Management to develop efficiency metrics, her implementation of new work processes to improve her unit's service delivery, her creation of written standard operating procedures, her development of training measures, and the authority she was given to make decisions relating to vendor projects, technology, and maintenance. Appellant argues that her position requires great responsibility because of the millions of dollars in revenue it generates.

Appellant also lists many other areas in which employees within the Project Coordinator series are working in operational management.

Finally, Appellant points out her loyalty and dedication to the RMV.

ANALYSIS

This is a close case because of the extensive overlap between the duties of a CSR-IV and those of a PC III. Nevertheless, viewing the entirety of Appellant's position and duties within the Mail-In Registration Department, she is correctly classified as a CSR-IV. Despite her many projects and initiatives, Appellant has not shown that she devotes more than 50 percent of her time to the distinguishing duties of a PC III.

The record shows that Appellant has devoted extensive time, effort, and talent to improving the working conditions, productivity, and functioning of the RMV's Mail-In Registration Department. The appointing authority agrees that she is a valued and hard-working employee, and Appellant has documented her exemplary accomplishments and her devotion to furthering the RMV's mission to achieve a high level of service to the public.

Many of Appellant's activities over the years do fall within the functions of a Project Coordinator III. As MassDOT points out, the duties that distinguish a PC III from a CSR IV include development of "standards to be used in program monitoring and/or evaluation." Although Appellant's primary duties were not monitoring, she did create new protocols for her unit, including changing the training and work assignment processes, documentation of those processes, creating workload and forecasting reports, and instituting time management tools that improved efficiency. She also worked part-time on vendor projects that involved creation of new technical processes for scanning and electronic bank deposits.

Although her director testified that Appellant spent about 60 percent of her time on management, as opposed to working side-by-side with her staff on transactional duties, routine management duties do not distinguish a CSR IV from a PC III. Only a portion of Appellant's work as a manager involved creation of new standards for evaluating her staff and unit, or defining the scope of a new program. Those duties occurred during sporadic intervals and were always accompanied by Appellant's careful attention to her other duties. Appellant herself estimated that she spent as much as 70 or 80 percent of her time on transactional work.

Additionally, a PC III is a second-tier supervisor, exercising supervision over a relatively small number (1-5) of "professional personnel," who are themselves supervising from 8 to 15 other employees. Although a CSR IV may provide indirect supervision through a CSR III, who supervises employees at a lower grade, Appellant in fact does not provide any indirect supervision, as her employees are all at the CSR I or CSR II level. The supervisory provisions of the PC III classification also reflect the overall function of a PC III, which involves development and monitoring of agency programs, rather than direct supervision of a program.

Finally, reclassification cannot be justified based on the classifications of other employees. To succeed in a request for reclassification, an employee must show that she devotes more than 50 percent of her time to duties within the distinguishing duties of the requested title. That other employees may be misclassified cannot support a reclassification request.

For all these reasons, the Appellant's appeal under Docket No. C-18-015 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on April 8, 2021.

Notice to:

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MARCOS E. BELLIARD-GONZALEZ

v.

CITY OF LAWRENCE

G1-20-058

May 6, 2021
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Police Officer-Flunking Firearms Qualification Test at Academy-Failure to Report Injuries—The City of Lawrence was perfectly justified in bypassing a candidate for original appointment to the police force where he had previously been appointed but washed out of the police academy after failing the firearms qualification test no less than six times. While at the Academy, he had also failed to report a shoulder injury despite explicit instructions to report all injuries to allow the City to process workers compensation claims.

DECISION

The Appellant, Marcos E. Belliard-Gonzalez, appealed, pursuant to the provisions of G.L. c. 31, § 2(b), to contest the decision of the City of Lawrence ("City") to bypass him for original appointment to the position of permanent full-time Police Officer with the Lawrence Police Department ("LPD").[1] A pre-hearing conference was held on May 11, 2020, at the Armand Mercier Community Center in Lowell, and a full hearing was held on June 11, 2018, via videoconference (Webex), which was audio/video recorded with a link to the recording provided to the parties.[2] The City filed a Proposed Decision but the Appellant did not. For the reasons set forth below, Mr. Belliard-Gonzalez's appeal is denied.

FINDINGS OF FACT

Based on the twelve exhibits entered into evidence and the testimony of the following witnesses:

Called by the City:

- Frank Bonet, Personnel Director, City of Lawrence
- Dean Murphy, Detective, LPD
- Charles Dichiara, Patrol Officer, Waltham Police Department (via affidavit)[3]

Called by Mr. Belliard-Gonzalez:

- Marcos Belliard-Gonzalez, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant took and passed the civil service examination for Police Officer on March 23, 2019, and his name was placed on the eligible list established by the Human Resources Division ("HRD"). (*Ex. 1; Admin Record - HRD letter of May 5, 2020; Stipulated Facts*)

2. In the Fall of 2019, the City submitted a Requisition Form 13 to HRD for a certification from which it may appoint ten permanent full-time Police Officers. (*Admin Record - HRD letter of May 5, 2020*)

3. On September 16, 2019, HRD issued Certification/Referral No. 06573 to the City. (*Admin Record - HRD letter of May 5, 2020*)

4. The Appellant's name appeared in a tie-group in the 11th position on Certification 06573. (*Admin Record - HRD letter of May 5, 2020*)

5. At least one candidate whose name appeared below the Appellant on Certification 06573 was hired by the City as a permanent full-time Police Officer. (*Admin Record - HRD letter of May 5, 2020; Testimony of Bonet*)

6. The City submitted three letters to HRD setting forth its reasons for bypassing the Appellant. These letters are dated November 27, 2019, January 3, 2020, and February 5, 2020. (*Exhs. 2A, 2B, and 2C, respectively; Testimony of Bonet*)

7. The reasons for bypass set forth in said letters to HRD address the following concerns of the City: (a) Appellant's failure to complete the Northern Essex Community College Police Academy (the "Police Academy) in 2018 after Appellant had been given a conditional offer of employment as a permanent full-time Police Officer for the City during a prior hiring round (Certification 05008), coupled with the City's consistent practice of not offering employment again to a candidate who had previously failed to complete the Police Academy given the expenditure of significant resources to appoint and enroll a candidate in the Police Academy

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission, with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

3. At the conclusion of the hearing, I left the record open and requested the City provide the Commission with documents regarding the Appellant's firearms qualification scores while attending the Northern Essex Community College Police Academy in 2018. Upon receipt and review of these records, I determined that witness testimony would be necessary to explain certain entries on these records. The City was directed to make reasonable efforts to secure testimony from Officer Dichiara or another lead instructor, which could be submitted through an affidavit. The City submitted an affidavit from Officer Dichiara on September 4, 2020. The affidavit and the Appellant's firearms qualification scores were entered into the record as Exhibit 12. The record was then closed on September 15, 2020. The Appellant did not dispute any aspect of Officer Dichiara's affidavit prior to the close of the record.

and (b) the Appellant's failure to file a timely report about a shoulder injury allegedly sustained while at the Police Academy in 2018. (*Exhs. 2A, 2B, and 2C*)

8. On February 11, 2020, HRD notified the Appellant and the City of its acceptance of the City's reasons for the bypass. (*Stipulated Facts*)

9. At the City's prior Police Officer hiring round in 2017, the Appellant was given a conditional offer of employment and commenced the Police Academy on April 2, 2018. Completion of the Police Academy is a condition of employment with the LPD. (*Testimony of Bonet and Murphy; Exhs. 2A, 2B, 2C; Dichiara Affidavit - Ex. 12*)

10. All police recruits must demonstrate proficiency in the use of firearms by passing a firearms qualification test as a prerequisite for satisfactory completion of the Police Academy. Prior to taking the firearms qualification test in June 2018, the Appellant and other student officers received sixteen hours of classroom training on topics such as types and nomenclature of pistols and how to break down and clean them, as well as forty hours of shooting practice at the firing range. After initially failing the firearms qualification test on June 13, 2018, the Appellant was provided with three hours of remedial training; he then failed the firearms qualification test two times on June 14th, and three times on June 15th, for a total of six failed attempts to qualify in the use of firearms. Despite the standard firearms training and remedial training, the Appellant was never able to qualify in the use of firearms. As a result, the Appellant was dismissed from the Police Academy on June 18, 2018. (*Exhs. 4 and 12; Testimony of Murphy*)

11. As a result of the Appellant's dismissal from the Police Academy, the City terminated his employment with the City effective June 18, 2018. (*Exh. 9*)

12. The City, which has substantial financial challenges, incurs expenses of over $26,000.00 to hire a Police Officer candidate and send him or her to the Police Academy; these expenses, which include but are not limited to background checks, recruit salaries, uniforms, and equipment, are not recouped in the event of a candidate's failure to complete the Academy. (*Testimony of Bonet*)

13. The City had an "on-boarding" meeting with the Appellant and other selected candidates prior to their attendance at the Police Academy in April 2018. The Appellant and the others were instructed, among other things, on workers compensation matters and the importance of reporting promptly any injuries sustained while at the Academy. (*Testimony of Bonet*)

14. While at the Police Academy, the Appellant was specifically and repeatedly instructed by Academy staff to report any changes to his medical condition including any injuries sustained at the Academy. It is also standard practice at the Academy for instructors to ask the students if they have any issues or injuries at the end of each day at the firing range and to document any injuries. (*Testimony of Murphy; Dichiara Affidavit - Exh. 12*)

15. In May 2018 while at the Police Academy, the Appellant sustained an injury to his leg which he promptly reported and for which a workers compensation claim was processed. This was the only injury reported by the Appellant while he was at the Academy. (*Testimony of Bonet and Murphy; Exhs. 6A and 6B*)

16. The Appellant testified that he sustained an injury to his shoulder at the 2018 Police Academy during defensive tactics training. He also testified that he did not file any report with the City or Academy staff about that injury when it occurred. (*Testimony of Appellant*)

17. The Appellant acknowledged in his testimony that he was directed by Detective Murphy to promptly report any changes in his medical status, but that he did not do so with respect to the shoulder injury because of what he perceived to be peer pressure against reporting what might merely be soreness. (*Testimony of Appellant*)

18. No workers compensation claim relating to an injured shoulder has been approved for payment to the Appellant by the City's workers compensation carrier. (*Testimony of Bonet; Exh. 8*)

19. The Appellant did not offer the City, nor did he explain in his Commission testimony, any basis to infer that his lack of proficiency with a firearm had improved since his dismissal from the Police Academy. (*Testimony of Appellant*)

LEGAL STANDARD

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*.,423 Mass.1106 (1996)

Basic merit principles in hiring and promotion call for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established; those lists rank candidates according to their exam scores, along with certain statutory credits and preferences, and appointments are made, generally, in rank order, from a "certification" of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons—positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has "reasonable justifica-

tion" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton,* 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211,214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. "[T]he commission owes substantial deference to the appointing authority's exercise of judgment in determining whether, on the facts found by the Commission, there was "reasonable justification" shown. Such deference is especially appropriate with respect to the hiring of police officers. The commission "cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) (*emphasis added*)

In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. *City of Beverly* v. *Civil Service Commission*, 78 Mass. App. Ct. 182, 188 (2010) However, the governing statute, G.L.c.31,§2(b) , also gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action"; it is not necessary for the Commission to find that the appointing authority acted "arbitrarily and capriciously." *Id*.

ANALYSIS

Based upon applicable legal standards and the evidence presented in this case, the City has demonstrated by a preponderance of the evidence that it had a reasonable justification for bypassing the Appellant for original appointment to the position of permanent full-time Police Officer.

Initially, I conclude that the City conducted an open, fair and impartial appointment process. There was no evidence presented that any improper political influences, motives, or malice towards the Appellant played any role in the bypass decision. With respect to the specific reasons set forth on the bypass letter, the preponderance of the evidence proved the following reasonable justification to bypass the Appellant for the specific reasons set forth below.

Dismissal from Police Academy

Less than two years prior to the current round of hiring for the LPD under Certification 06573, the Appellant had received from the City a conditional offer of employment as a LPD Police Officer under Certification 05008. In furtherance of that prior conditional offer, the Appellant was assigned to the Police Academy with a start date of April 2, 2018. Completion of the Police Academy is a condition of continued employment with the City, and passing the firearms qualification test is a condition of successful completion of the Academy.

While at the Police Academy in 2018, the Appellant received classroom instruction in the use and care of firearms as well as forty hours of practice at the firing range prior to taking the firearms qualification test. To say that the Appellant's performance on the qualification test was dismal is an understatement, given that he failed all six opportunities he was afforded to pass it, even after undergoing additional remedial training after the first failure. As a result, he was dismissed from the Academy on June 18, 2018, and his employment as a police recruit with the City was also terminated as of that date.

In September 2019, fifteen months after his dismissal from the Police Academy and his employment termination with the City, the Appellant appeared again on the latest certification for an LPD Police Officer position.

In light of the Appellant's poor performance on the firearms qualification test in 2018, the City was reasonably justified to conclude that it was not in the best interests of the City and its taxpayers to take the risk of sending Mr. Belliard-Gonzalez to another Police Academy at a substantial, non-reimbursable costs to the City. No credible evidence was presented to mitigate the City's concerns, such as documentation that the Appellant has subsequently trained for and was likely to pass a comparable firearms qualification test. I find the City's conclusion entirely reasonable.

Failure to Report an Injury

The unrebutted evidence demonstrates that during the prior hiring round and, repeatedly, which in attendance at the Police Academy in 2018, the Appellant was specifically instructed about the necessity of reporting promptly any injuries and changes to his medical condition.

Indeed, the Appellant did so with respect to a leg injury sustained at the Academy in May 2018. Yet, although also claiming that he sustained a shoulder injury during a defensive tactics class at the Academy, and contrary to the repeated instructions given to him and other candidates, he failed to promptly file any reports with respect to that purported injury. Particularly troubling is Appellant's acknowledgement that he did not report the shoulder injury because of perceived peer pressure against reporting what might merely be soreness.

The City was reasonably and justifiably concerned about Appellant's failure to follow explicit instructions and directives about the timely reporting of injuries. Such reporting is important to the City so that it may appropriately process workers compensa-

tion claims to the Academy staff, as was done with the Appellant's leg injury, in order to make accommodations to further the safety of an injured student officer, reduce the risk of aggravating his/her injury, and protect other student officers.

In a paramilitary organization such as a police department, the ability to follow instructions and directives is of paramount importance. The City is entitled to expect and require that the Appellant do so. The Appellant knew what he was supposed to do as demonstrated by his timely filing of a report about a leg injury, but the Appellant failed in this obligation with respect to reporting a shoulder injury.

The City was also reasonably and justifiably concerned about The Appellant's unjustifiable peer pressure rationale for not reporting the shoulder injury. His bowing to peer pressure reflects a level poor judgment that further supports the City's bypass decision.

In sum, the Appellant's unwillingness to comply with the required injury reporting instructions because of peer pressure calls into question whether he can be relied upon to act appropriately when placed into difficult situations as a police officer. The risk of succumbing to that pressure cannot be condoned and provides an alternative reasonable justification to bypass the Appellant.

CONCLUSION

For the reasons stated herein, the appeal of Appellant, Marcos E. Belliard-Gonzalez, under Docket No. G1-20-058 is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

Marcos E. Belliard-Gonzalez
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* * * * * *

SHANA HICKS

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

C-20-128

May 6, 2021
Paul M. Stein, Commissioner

Reclassification Appeal-Executive Office of Health and Human Services-Clerk III to Administrative Assistant II—The Commission dismissed a 2020 reclassification appeal from an employee of the Massachusetts Department of Health seeking a reclassification from Clerk III to Administrative Assistant II where the Appellant had herself stipulated that she was unable to prove that she performed the level-distinguishing duties of the sought-after classification a majority of the time. The Commission did, however, leave open a 2012 reclassification appeal from the same Appellant that had never been acted upon by HRD pending further agency action. It did so by issuing a dismissal *nisi* to become effective July 31, 2021, but allowing the Appellant to reinstate the appeal if the agency should deny the 2012 appeal by that date.

DECISION

The Appellant, Shana Hicks, is an employee of the Massachusetts Department of Health (DPH), an agency within the Executive Office of Health and Human Services (EOHHS). Since at least 2011, Ms. Hicks has been assigned to the Ambulatory Care Center (ACC) at Lemuel Shattuck Hospital where she holds the classification title of Clerk III and the functional title of ACC Clerical Assistant. (*Resp Exhs.19 through 22; App.Exhs.21 & 30*)

In 2012, Ms. Hicks requested a reclassification of her title from Clerk III to Administrative Assistant II (the "2012 Request"). (*App.Exh.30*) For reasons that are disputed, EOHHS never approved or denied the 2012 Request. On August 19, 2020, purportedly acting pursuant to G.L.c.30, §49,[1] Ms. Hicks brought this appeal to the Commission. Her claim of appeal stated, in part:

> "Please accept this as a formal request motion for summary judgement to enforce the onset approval for Administrative Secretary II Position Classification Appeal Form and Appeals Procedure based upon the finalized review, analysis, and reconsiderations on or about March 28, 2014, by Employment Services Manager/HR Director, EHS Health Cluster, Lisa T. Bacon JD—in accordance to including but not limited to Massachusetts General Laws Chapter 30, Section 49, EOHHS Human Resources Form ES-28 Position Classification Appeal Form and Appeal Procedures, and Unit One Collective Bargaining Contract."
>
> "That my position is reclassified and funded to an Administrative Secretary II, effective July 17, 2012, and will be made whole."

(*Claim of Appeal*) (sic)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

On September 11, 2020, the Respondent presented a Motion to Dismiss the appeal for lack of jurisdiction. The Commission held a prehearing on September 15, 2020 via remote videoconference (Webex). After two Procedural Orders were issued to address the jurisdictional issues presented by the appeal, the Appellant processed a new reclassification request (the 2020 Request) that was denied by EOHHS on December 4, 2020 and denied, after review by the Massachusetts Human Resources Division (HRD) on March 1, 2021. (*Resp.Exhs. 3 through 10 & 22; App.Exh.21*)

A Full Hearing of the appeal commenced via remote videoconference (Webex) on April 16, 2021, which was audio/video recorded with a link to the recording provided to the parties.[2] The Appellant introduced thirty (30) Exhibits (*App.1 - App. 30*) and the Respondent introduced twenty-two exhibits (*Resp. 1 - Resp. 22*). Prior to the introduction of testimony, however, the Appellant stipulated that she did not contest the decision of EOHHS and HRD denying the 2020 Request and intended to proceed solely to challenge the failure of the EOHHS to approve her 2012 Request. The Respondent asserted that the only request properly before the Commission was the 2020 Request and that Appellant never received a decision from EOHHS or HRD on the 2012 Request, which is a prerequisite to the Appellant's right to appeal to the Commission under G.L.c.30,§49. The Respondent also asserts that it was not required to defend and was not prepared to defend the merits of the 2012 Request or the EOHHS's failure to issue a final decision on that request. The Appellant contends that her Claim of Appeal to the Commission did, indeed, include the 2012 Request and the Respondent should not be allowed to complain about its own alleged lack of due diligence in processing that request. The Appellant sought a continuance of any evidentiary hearing on the merits of the 2012 Request on the grounds that EOHHS had only recently located the original 2012 Request file and just provided her counsel with that file the previous day.

I conclude that the Appellant's appeal must be denied as moot, as to the 2020 Request, in view of the Appellant's stipulation that she now does not dispute the EOHHS and HRD decisions to deny that request. I also conclude that, for administrative efficiency, in lieu of addressing the disputed issues regarding the Commission's jurisdiction over the 2012 Request at this time, an order of dismissal nisi would be appropriate so as to first afford the Appellant the opportunity to obtain a resolution of the merits of the 2012 Request through EOHHS and/or HRD and, thereby, avoid further need to adjudicate the disputed issues of the Commission's jurisdiction and/or the merits of that matter.

ANALYSIS

G.L.c.30, §49 provides:

> A*ny manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator[HRD]. . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission*. Said commission shall hear all appeals as if said appeals were originally entered before it. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . . (*emphasis added*)

G.L.c.30, §57 states:

> The decision of the civil service commission shall be final and binding on all agents and agencies of the commonwealth; provided, however, that any such decision may have retroactive effect pursuant to the applicable provisions of section forty-nine and also pursuant to rules made under the provisions of section fifty-three; and, provided further, that no such decision shall require any payment to be made as of any date before the beginning of the fiscal year in which such decision shall be rendered, except to the extent such payment is permitted pursuant to the provisions of said section forty-nine *and subject to appropriation for the purposes thereof*. If such decision shall require the payment of money to any employee of the commonwealth, the civil service commission shall notify the appointing authority, the personnel administrator, the budget director, and the comptroller of the amount or amounts thereof, and such amount or amounts shall be paid from available appropriations if in accordance with law. (*emphasis added*)

"The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification." *Roscoe* v. *Department of Environmental Protection*, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher-level position the majority (i.e., at least 50% or more) of the time. *See, e.g.*, *Pellegrino* v. *Department of State Police*, 18 MCSR 261 (2005) (at least 51%); *Morawski* v. *Department of Revenue*, 14 MCSR 188 (2001) (more than 50%); *Madison* v. *Department of Public Health*, 12 MCSR 49 (1999) (at least 50%); *Kennedy* v. *Holyoke Community College*, 11 MCSR 302 (1998) (at least 50%). What must be shown is that the employee performs the "distinguishing duties" of the higher position at least 50% of the time and, in making this calculation, duties which fall within both the higher and lower title do not count as "distinguishing duties." *See Lannigan* v. *Department of Developmental Services*, 30 MCSR 494 (2017)

Similarly, when an employee agrees to work overtime or temporarily works "out-of-grade", he or she may have some other claim (such as under a collective bargaining agreement) to receive a pay-differential for the time spent working in that capacity, but temporary, voluntary or overtime assignments are not, as a general rule, meant to be transformed into permanent promotions through the reclassification statute. *See, e.g., Hartnett* v. *Department of Revenue*, 30 MCSR 398 (2017); *Baran* v. *Department of Conservation & Recreation*, 18 MCSR 355 (2005). *See generally*, *Boston Police Dep't* v. *Jones*, 98 Mass. App. Ct. 762 (2020) (in general, voluntary overtime and detail pay are not part of the regular compensation of a tenured civil servant)

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use this recording to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

Based on the stipulation of the parties, insofar as the Appellant's 2020 Request for reclassification is concerned, Ms. Hicks does not dispute that, as of the date she filed the 2020 Request, she is unable to prove that, as of the date of that request, she performed the duties of an Administrative Secretary II at least 50% of the time. She continues to claim, however, that, for some period of time in and after 2012, she did perform the duties of an Administrative Secretary II (or, perhaps the duties of another higher title) and deserves to be reclassified from a Clerk III as of 2012. It remains uncertain that Ms. Hicks can prove by a preponderance of the evidence, which is her burden, that she was performing at the level of an Administrative Secretary II, especially, given the passage of time, but, under the unique circumstances, both the Appellant and the Respondent shall be allowed an additional period to consider the options for expeditious resolution of the 2012 Request by EOHHS and/or HRD prior to further action by the Commission, if any, on that aspect of her claim.

CONCLUSION

Accordingly, it is hereby ORDERED:

1. The Appellant's appeal in Case No. C-20-128. is hereby ***denied, in part***, insofar as it claims a reclassification from Clerk III to any higher title, effective in 2020, as asserted in the 2020 Request.

2. The Appellant's appeal in Case No. C-20-128 is ***dismissed nisi, in part, to become effective July 31, 2021,*** insofar as it seeks a reclassification from Clerk III to any higher title effective prior to 2020 pursuant to the 2012 Request. If, however, prior to July 31, 2021, the Appellant receives a denial of the 2012 Request from the EOHHSS and HRD, the Commission will entertain a Motion to Revoke the Dismissal Nisi and reinstate the Appellant's appeal under Docket Number C-20-128, on such terms and for such further consideration of the issues presented by the 2012 Request as the parties may agree or the Commission may order. No additional filing fee will be required.

3. The denial of this appeal insofar as it claims a reclassification from Clerk III to any higher title pursuant to the 2020 Request is final as of the date hereof.

4. In the absence of a timely-filed Motion to Revoke, the dismissal nisi of this appeal shall become final for all purposes of G.L.c.31,§44, on July 31, 2021.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

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Massachusetts Department of Health
250 Washington Street
Boston, MA 02108

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CHRISTINE JEAN-BAPTISTE

v.

CITY OF CAMBRIDGE

G1-19-157

May 6, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Cambridge Police Officer-Erratic Employment History-Untruthfulness About Employment and Educational History-Conduct Unbecoming a Police Candidate—The Commission affirmed the 2019 bypass of a Haitian-American candidate for original appointment to the Cambridge Police Department where her employment history was shambolic and proved her incapable of holding a job for more than a year. In addition, her omissions and untruthfulness during the application process would have been enough to justify her bypass—untruthfulness that included an invented degree from UMass in nursing. The candidate was also found to have shown conduct unbecoming a candidate for the police force during her one-year stint as a paraprofessional in the Cambridge Public Schools. This conduct involved swearing at other staff in front of students.

DECISION

On July 30, 2019, the Appellant, Christine Jean-Baptiste (Appellant), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Cambridge (City or Respondent) to bypass her for original appointment to the position of Police Officer. On August 27, 2019, a pre-hearing conference was held at the offices of Commission. I held a full hearing at the same location on October 7, 2019.[1] The full hearing was digitally recorded and both parties received a CD of the proceedings.[2] On November 6, 2019, the City submitted a post-hearing brief in the form of proposed decisions and on November 21, 2020, the Appellant filed her closing argument.[3]

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the CDs should be used to transcribe the hearing.

3. The City was permitted to respond to the Appellant's late-submitted closing argument. In that response, the City requested the Commission not address any claims of discrimination raised in the hearing. Although the Appellant discussed her complaint of discrimination with MCAD, the Appellant did not state she had

FINDINGS OF FACT

The parties submitted two (2) joint exhibits (Jt. Ex. 1-2). The Respondent submitted twenty-one exhibits (Resp. Ex. 1-21) and the Appellant submitted two (App. Ex. 1-2). After the hearing, at my request, the Respondent submitted three (3) exhibits, (PH Ex. 1-3), the second of which was the video recording of the February 2019 interview with the Appellant.

Based on the documents submitted and the testimony of the following witnesses:

Called by the City:

- Michael Carter, Detective, Cambridge Police Department (CPD), Professional Standards Unit/Background Investigations Office
- Jamie Matthews, Deputy Director of Personnel, City of Cambridge
- Silverio Ferreira, Lieutenant, Cambridge Police Department (CPD), Professional Standards Unit
- Branville G. Bard, Jr., Commissioner, Cambridge Police Department (CPD)

Called by the Appellant:

- Christine Jean-Baptiste, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, I find the following:

BACKGROUND

1. The Appellant is an African American woman who is a life-long resident of the City of Cambridge. She graduated from Cambridge Rindge and Latin in 2009 and has a B.A. in Criminal Justice. She lives with her child, who has been diagnosed with a medical condition. Although she had once wanted to be a nurse, her dream is to be a police officer and serve her community. In addition to English, she is fluent in three languages: Spanish, Haitian-Creole, and French. (Appellant Testimony; Bard Testimony, Resp. Ex. 11, 17).

2. The Appellant applied twice for a position of police officer, the first in December 2015 and the second in December 2017. The Appellant signed the releases and the section of the applications stating that the information she presented was true. (Resp. Ex. 11; 17; Carter Testimony; Ferreira Testimony).

3. The City's hiring process includes an intake interview with a panel, as well as a second interview with an investigator and a supervisor to clarify information. All candidates during the 2018-2019 hiring process were interviewed twice. At each of these interviews, candidates have the opportunity to amend their applications with a "written statement" documenting information or details that are discussed during the interview. (Carter Testimony; Ferreira Testimony). After the investigation and interviews are completed, the investigator writes a summary, which the Commissioner uses to make a determination of whether the candidate will move to the next stage of interviewing. At the end of the process, the Commissioner then recommends the final candidates to the City's Town Manager. (Ferreira Testimony; Bard Testimony).

4. During the hiring process, the City looks for an "overall view" of each candidate, including the candidate's professionalism, interactions with co-workers, and job performance. (Ferreira Testimony). The application process is designed to be protective of the public and remove candidates who do not show trustworthiness and dependability. (Bard Testimony).

2015 Reasons for Bypass

5. After taking the Civil Service Exam on April 25, 2015, the Appellant applied to be a police officer.[4]

6. Detective Carter (Det. Carter or Carter), a detective who has worked for the City's Police Department for twenty-one years, has been trained to conduct investigations, and has written investigation reports since 2013, conducted the Appellant's background investigation. (Carter Testimony).

7. The Appellant's interviews took place on March 28, 2016 and March 31, 2016. (PH Ex. 3). Det. Carter took part in the Appellant's interview process. (Resp. Ex. 19, 20; Carter Testimony).

8. The Appellant was bypassed for the position of police officer. (Resp. Ex. 2, Appellant Testimony, Carter Testimony). The three reasons she was bypassed were her employment history, the details of which are discussed later in this decision; an alleged lack of truthfulness about her employment history; and alleged lack of truthfulness about her educational background. (Resp. Ex. 2; Carter Testimony). (Resp. Ex. 2).

9. Along with the bypass, the City sought the Appellant's removal from the eligible list pursuant to Personnel Administration Rule 3 and Rule 9 based on several factors including her unsatisfactory employment history and untruthfulness. (Resp. Ex. 3, 4). A removal under PAR .09 was granted by the state's Human Resources Division in June 2016. That list expired August 31, 2017. (Resp. Ex. 4).

2019 Application and Bypass

10. On March 25, 2017, the Appellant took the next Civil Service Exam. She was number 27 on Certification 05912. She submitted her application for original appointment to be a police officer on December 6, 2018. (Stipulated Facts).

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been bypassed in 2019 for reasons other than the reasons listed in the City's letters bypassing her for appointment. The Appellant testified at the CSC hearing that MCAD found no probable cause in her claim.

4. After her application was submitted, the Appellant testified that the then- Police Superintendent Burke counseled her to withdraw her application, which she did; but she then re-filed it again. The Appellant brought a claim to the Massachusetts Commission Against Discrimination (MCAD) regarding this incident. (Appellant Testimony).

11. Det. Carter conducted the background investigation for the Appellant. This investigation was a "continuation" of the Appellant's previous application and included a review of the Appellant's 2015 application as well as a review of new information on the application up to 2018. Det. Carter compared the work history listed on the two applications. In addition, Det. Carter looked to verify employment that he had not previously verified. (Carter Testimony).

12. The initial interviews of the Appellant occurred on December 6, 2018 and a second interview was held on February 6, 2019. (PH Ex. 2, 3).

13. The investigative report dated March 16, 2019 discusses the Appellant's personal information, military experience, education, employment history, RMV status, and "other", which included the Appellant's strengths in languages. This report contained detailed information about the Appellant's employment and discipline in the three years since she had first applied, as well as details from the 2016 investigative report. (Resp. Ex. 9).

14. The Appellant was notified on June 19, 2019 that she was bypassed for appointment as a police officer. (Stipulated Facts). The City's letter to the Appellant stated three reasons for bypass, including those reasons for bypass listed in May 2016: poor employment history, lack of truthfulness regarding employment history, and conduct not befitting a police candidate. The City's decision regarding poor employment history was based on their determination that the Appellant had worked at three different places since 2016, and that prior to 2016, the Appellant had multiple places of employment, some for short time, with the longest period lasting approximately 11 months. The City's 2019 determination that the Appellant had been untruthful in her disclosure of employment history was based on the following reasons cited in the letter:

- Employment history at Bertucci's was omitted from the 2018 application.
- Comparison of 2015 application to 2018 application showed different reasons for leaving Starbucks than abandonment of her position.
- The 2018 and 2015 applications showed an employment history but did not contain a complete and accurate account of entire employment history.
- The 2018 and 2015 applications failed to disclose reason for termination from TJ Maxx.

Regarding conduct unbecoming for a police candidate, the City cited recent warnings at the Cambridge Public School the Appellant worked at as a paraprofessional (assisting a teacher) for verbally arguing and using profanity with another staff member at school and violating policy; receiving a suspension from the school; and the School Department's decision to place her on leave and then not reinstate her contract as reasons her conduct did not comport with the high standards of conduct and professionalism. In sum, the City concluded that the Appellant's "multiple terminations, failure to fully disclose the issues surrounding [her] employment, and specifically the multiple thefts from co-workers at TJ Maxx, discipline history… [and] willingness to deliberately withhold and provide false information during the application and background investigation process [were] all indications that [the Appellant] does not meet the standards of the Police Department." (Resp. Ex. 2; Carter Testimony). In addition to these reasons, the letter also stated "[a]side from the information that came out of the 2018 application process, all of the reasons cited for your prior bypass in the May 17, 2016 bypass letter continue to apply." (Resp. Ex. 1; Carter Testimony). The City's 2019 bypass of the Appellant specifically incorporated its reasons for bypass provided in its bypass letter to the Appellant in 2016. (Resp. Exs. 1 and 2).

Employment History

15. On her 2018 application, the Appellant listed her employment history and reasons for leaving those employers.

- She was terminated several times: from Target after 7 months of employment in 2009; from TJ Maxx after 11 months in 2011; from Tasty Burger after one month of employment in 2012; and from the South End Buttery after 10 months of employment in 2014.
- The Appellant had voluntarily quit: Aeropostle after two months in 2009; Bertucci's after one month in 2015; and Starbucks after nine months in 2015.
- The Appellant also worked as a paraprofessional in the Cambridge Public Schools for the 2017-2018 school year. She listed her reason for leaving on her 2018 application as "contract ended."
- In August, 2018, the Appellant started work at Baycove Human Services of Boston and was working there at the time of her application. (Resp. Ex. 11)

On her 2015 application, the employment history was nearly the same as above, except that she stated the reason for leaving Starbucks was that she was "taken off system" and she had omitted Bertucci's as an employer. (Resp. Ex. 17)

16. The 2018 application, just as the 2015 application, requested that the candidate list all employment and provide details where the candidate had been terminated, left work without notice, violated policies, among other employment issues. (Resp. Ex.11; Carter Testimony).

Question 44 on the Application asks the following questions relevant to this appeal:

> 44. Have you ever been dismissed, terminated or asked to resign from any position of employment you have held?
>
> 44a. Have you ever violated the rules or and regulations of a company or employer?
>
> 44b. Have you ever failed to abide by the policies or procedures of a company or employer?
>
> 44d. Have you ever been counseled, verbally or in writing, for poor job performance, inappropriate behavior, attendance tardiness or any other work-related issue?
>
> 44e. Have you ever received disciplinary action, verbally or in writing, for poor job performance, inappropriate behavior, attendance tardiness or any other work-related issue?
>
> 44f. Have you ever quit any job or position of employment without giving notice?

> 44h. Are you ineligible for rehire with any of your former employers?

The Appellant disclosed on her 2018 application that she had been terminated, disciplined, and counseled, checking "yes" in the appropriate boxes and answered "no" to questions about violating rules, regulations, policies, or procedures. She also answered "no" to questions about quitting a job without notice and "no" to the question of being ineligible for rehire with a former employer. On her 2015 application, the Appellant wrote the same answers except on 44f, where she answered "yes" to questions about quitting a job without notice and "yes" to the question about being ineligible for rehire with a former employer. (Resp. Ex. 11, 17).

17. The investigator received documentation from Starbucks that the Appellant had missed several shifts, had not responded to phone calls about those shifts, and that she was separated from employment because of "abandonment." (Resp. Ex. 18). The Appellant explained that she had told her manager at Starbucks that she was leaving the job to start school and that the manager did not convey that information to another manager at that store. (Appellant Testimony).

18. The Appellant was asked about her employment at TJ Maxx during her interview on February 6, 2019, and explained that the reason for leaving was that she had been terminated for an accusation of theft.[5] She had not disclosed the information about alleged theft in the application process of 2015, but had disclosed that she had been terminated.[6] (Resp. Ex. 17; 21).

19. During the February 2019 interview, the Appellant was forthcoming about reasons for being disciplined while a paraprofessional at Cambridge Public Schools. Her discipline from the school included verbal warnings for outbursts with two staff members. (PH Ex. 2; Resp. Ex. 13, 14, 15). One of the warnings she received was for swearing during an altercation with another staff member in front of students. (Resp. Ex. 13). After the second warning, she was asked to "stay home," which constituted a suspension. (PH Ex. 2). The Appellant told the investigators that the person with whom she had been arguing "got the best of [her] and they "went off on each other." (PH Ex. 2). She received another warning for interacting with a counselor in an inappropriate manner. (Resp. Ex. 13, 14, 150). The Appellant documented details of her discipline on a "written statement" at the interview. (PH Ex. 2; Resp. Ex. 11).

20. During the Appellant's interview on February 6, 2019, the Appellant also told the investigators that the school had placed her on Administrative Leave for an allegation regarding text messaging between her and the teacher in the classroom where she was placed. (Ex. Interview; Appellant Testimony). Ultimately, the school found the Appellant not to have engaged in inappropriate behavior via text but did not hire her for the next school year. (Jt. Ex. 1, 2; Appellant Testimony). The Appellant's colleague wrote a letter of support for the Appellant stating that, throughout the school year, the Appellant had followed protocol while at the school. (App. Ex. 1).

21. The information about administrative leave was not included in the application. (Resp. Ex. 11). During her second interview, the Appellant wrote a "written statement" that amended her answer to Question 44h ("Are you ineligible for rehire with any of your former employers?") from no to yes at the request of the interviewers. (PH Ex. 2).

22. The Appellant also provided more information about the reason for leaving Bertucci's without giving notice at the February 2019 interview. (Carter Testimony; Resp. Ex. 1; PH Ex. 2). She stated that she stopped going to work because she "wasn't feeling it" and stated that she had not included this employer on her 2015 application because she had forgotten about the job. (PH 2).

23. The City found the Appellant untruthful for answering "no" to Question 44f (Have you ever quit any job or position of employment without giving notice?) because she had left Bertucci's without giving notice; had omitted Bertucci's from her 2015 application despite it being the most recent job prior to that application; had not included specific details about the reasons for her terminations, including the reason for leaving Starbucks; and had stated that she had followed employers' policies and procedures, when she had received warnings, discipline, and was terminated from several positions on the basis of not following policies and procedures. (Resp. Ex. 1).

Educational History

24. When first attending college for her Associate's degree, the Appellant had been working towards a nursing degree but switched to criminal justice program. (Appellant Testimony).

25. On her 2015 application and 2018 application, the Appellant wrote that she had earned an Associate's Degree in Criminal Justice in December 2015 and a Bachelor's Degree in Criminal Justice from Newbury College in May 2018. (Resp. Ex. 11, 17).

26. When asked about her education during her interview during the 2015-2016 application process, the Appellant stated that she had earned a Bachelor of Science from the University of Massachusetts Boston (UMass) in Nursing in 2010. (PH Ex. 3). She wrote down the classes and instructors who taught her at UMass for her Nursing degree. (Resp. Ex. 17). She stated that

5. Det. Carter discussed with TJ Maxx personnel their internal investigation of the Appellant. He learned that TJ Maxx had opened their own investigation and videotaped the Appellant with co-workers' possessions. TJ Maxx told the investigator that the Appellant had signed a document admitting to theft and agreeing to termination. The City did not present a copy of the tape and the document. When asked about her termination from TJ Maxx, the Appellant did not offer any other information other than she had permission to take money from a friend's belongings on that one occasion. (Ex. Interview; Carter Testimony; Ex. 20). Because no documentation supports the details provided by TJ Maxx, I give little weight to the information from TJ Maxx about the video and document.

6. Det. Carter inquired about the Appellant's complaint to the EEOC about an employment issue at TJ Maxx. (Ex. 19). That issue is not relevant to the issues raised in this appeal other than to provide information that the Appellant worked in two TJ Maxx locations, the second of which is the location from which the Appellant was terminated for theft.

when she tried to get a copy of her transcript from UMass, they were "having trouble with the system" so that she was unable to get her files. She also stated that her mother had taken her diploma to Haiti. This information was included in "written statements" that the Appellant wrote at her interview. (Resp. Ex. 17; PH 3).

27. The investigator obtained documentation from UMass dated March 31, 2016 indicating that the Appellant had never attended UMass. Although she had applied there, she had been denied admission. (Resp. Ex. 5). This was one of the reasons that the City cited in its bypass letter to the Appellant in 2016, which letter was explicitly incorporated into the City's 2019 bypass letter to the Appellant. (Resp. Exs. 1 and 2)

28. At the Commission hearing, the Appellant said that she had not graduated from Newbury College in May 2015, despite having written that date on her 2015 and 2018 applications. She had been able to participate in the graduation ceremony in 2015 but did not receive her degree until 2016, after she had completed a class. (Resp. Ex. 6; Appellant Testimony).

Conduct Unbecoming a Police Candidate

29. The City found that the Appellant's conduct as a paraprofessional at Cambridge Public Schools reflected poorly on her judgment and did not show that the Appellant exhibited the qualities required of a police officer, such as remaining calm and exercising self-control at all times. (Resp. Ex. 1; Carter Testimony).

30. CPD Police Commissioner Bard stated that the Appellant has many positive attributes, such as being a lifelong resident of Cambridge, a minority, multi-lingual, and having a Bachelor's degree. However, he did not recommend the Appellant as a viable candidate because of her employment history, her omissions and untruthfulness during the application process, and the frequency of poor behavior, among other reasons. (Bard Testimony).

LEGAL STANDARD

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.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003). More recently, the Supreme Judicial Court confirmed that the appointing authority's reasonable justification must be proved by a preponderance of the evidence. *Boston Police Department* v. *Civil Service Commission and Gannon*, 483 Mass. 461 (2019).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010), citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006), and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly* citing *Cambridge* at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington and another* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Because police officers work within communities and hold a position of unique power requiring discretion, integrity, morals, and trustworthiness, they are held to a higher standard of conduct. "Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." *Police Comm'r* v. *Civil Service Comm'n*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27, 32 *rev. den*. 398 Mass. 1103, 497 N.E.2d 1096 (1986). An appointing authority is justified in refusing to hire and/or to terminate a police officer who repeatedly demonstrates his "willingness to fudge the truth". *See City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. 300, 303 (1997)("a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt."). *See also Everton* v. *Town of Falmouth*, 26 MCSR 488 (2013) and cases cited, *aff'd*, SUCV13-4382 (2014); *Gonsalves* v. *Town of Falmouth* and cases cited, 25 MCSR 231 (2012), *aff'd*, SUCV12-2655 (2014); *Keating* v. *Town of Marblehead*, 24 MCSR 334 (2011) and cases cited.

ANALYSIS

Both parties submitted post-hearing briefs, as noted above, and I considered both in depth and in detail. The Appellant's brief was 27 pages long and contains statements asserting that the City exhibited bias against her personally in the police application process and that she has been mistreated in her employment experiences because of racism. I take Ms. Jean-Baptiste's words (in her brief as well as her testimony) very seriously, especially in view of the text of section 1 of Massachusetts civil service law, which obliges the Commission and employers to assure fair treatment of all applicants and employees "without regard to political affil-

iation, 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." G.L. c. 31, § 1. I have carefully reviewed each of the Appellant's allegations against the evidence in the record. For example, I note that the City's application asks candidates to "provide details" about employment issues and that the Appellant provided certain details on her 2018 application, and later explained more fully during the interview. Specifically, the Appellant disclosed the warnings she received from the school where she was a paraprofessional. Further, when the City needed more information beyond what the Appellant provided in her 2018 application, the Appellant provided added information. In addition, the City believed that being put on administrative leave during the school investigation of her conduct should have been disclosed as discipline. However, it is reasonable that the Appellant believed, since she was exonerated, that this information did not constitute discipline. Further, although the Appellant did not disclose on her application that her contract at the school was not renewed, the Appellant stated that she had accepted a one-year position and that position ended. The City interpreted the end of the Appellant's school contract to mean that she was ineligible for re-hire, considering it to be another instance of untruthfulness on the Appellant's part. This interpretation is not supported in the record. Also, a decision to not renew a school employment contract does not necessarily mean that the Appellant is not eligible for re-hire.

The Appellant certainly brings positive qualities to her application for the position of police officer, including being a lifelong Cambridge resident, speaking several languages fluently, and obtaining a college degree in criminal justice while raising a child with special needs. Unfortunately, as Police Commissioner Bard stated, the City had reasonable justification to bypass because the positives were outweighed by the negatives. There is a mountain of credible evidence in the record indicating that the Appellant omitted certain information that the hiring process requires all applicants to provide and she has provided inconsistent and/or conflicting information on her application and at her interview for the police officer position. Further, the 2019 bypass letter sent to the Appellant explicitly references and relies on the same or similar shortcomings in the Appellant's 2016 application, both of which indicate that the Appellant has been dishonest about her poor employment record and her education.

"The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer, *MacHenry* v. *Wakefield*, 7 MCSR 94 (1994). In fact, lying in a disciplinary investigation alone is grounds for termination. *LaChance* v. *Erickson*, 118 S.Ct. 753 (1998), citing *Bryson* v. *United States*, 396 U.S. 64 (1969). The Commission has stated that "it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens …." *Garrett* v. *Haverhill*, 18 MCSR at 381, 385 (2005). Specifically, there "is a strong public policy against employing police officers who are untruthful …." *Royston* v. *Billerica*, 19 MCSR 124, 128 (2006). The Commission has also consistently held that an allegation of untruthfulness, particularly when made against a law enforcement officer or candidate, should be made with an appropriate level of seriousness and due diligence. *See Morley* v. *Boston Police Department*, 29 MCSR 456 (2016). *See also Grasso and Moccio* v. *Town of Agawam*, 30 MCSR 347, 369 (2017).

The City has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. While it relied heavily on the Appellant's employment history in its determination, the investigation into the Appellant's employment history and education was thorough and the Appellant had multiple opportunities to clarify information about her work history. Further, although the investigator utilized his 2016 investigative conclusions to supplement the reasons for bypass in 2019, he did not solely rely upon the former investigation or former findings.

In its 2018-2019 investigation, the City noted the Appellant's working history since 2016, including for the Cambridge Public Schools and Baycove Human Services. Answers to Question 44 from the 2018 application indicated a lack of truthfulness when the Appellant was completing her 2018 application. For instance, the Appellant's 2018 application stated that she did not ever quit a job without giving notice, which was untrue because she had stopped going to work at Bertucci's after a short time of employment. The verbal warnings that the Appellant received as a paraprofessional at a school for twice engaging in verbal altercations with other staff demonstrated a lack of professionalism and the ability to remain calm in stressful situations. Omitting Bertucci's on the list of employers, when the Appellant left that job without giving notice and stated on her application that she had never left a job without giving notice, was also untruthful. This new information on the investigator's 2019 report demonstrates that the City considered the Appellant's recent circumstances in its determination in addition to her prior work experiences.

In addition to the City's 2018 findings of untruthfulness, the City expressed concern about the Appellant's untrue statements made during the 2015-2016 interview process, incorporating the bypass reasons from 2016 into its bypass letter. For example, the statements that the Appellant had made that she had obtained a nursing degree after attending the University of Massachusetts (UMass.) were "completely false." This in itself might have been considered a reason for bypass. On question 43, the Appellant stated that she was "taken off the system" at her job at Starbucks, a statement which was contradicted by that company's documentation. In response to question 44b of her application, the Appellant stated that she had followed employers' policies and procedures, which the CPD investigator found to be false based on documentation and discussions with Starbucks, South End Buttery, Tasty Burger, TJ Maxx, and Target, all of which indicated that she was terminated from those positions for not following policy or procedure. Ex. 2; Carter Testimony. The Appellant did not fully answer all parts of question 44 in full detail and, therefore, omitted pertinent details, such as that the Appellant had been terminated from employment at TJ Maxx for theft. (Resp. Ex. 2; Carter Testimony).

The candidate's employment history between the 2015 and 2018 applications, while reflecting more stable patterns than in the past, demonstrated that the Appellant did not have a recent discipline-free employment history, and that she lacked the ability to work at one place of employment for longer than a few months. Also difficult for the Appellant is that she has been terminated from so many positions, even as recently as 2016, three years prior to her 2018 application. Even if the Appellant had extenuating circumstances excusing those terminations, which she does not, she has not maintained a job for more than a year.[7] Thus, the City has shown by a preponderance of evidence that there was reasonable justification for bypassing the Appellant.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-19-157 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on May 6, 2021.

Notice to:

Christine Jean-Baptiste
[Address redacted]

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SCOTT McCABE

v.

CITY OF LAWRENCE & HUMAN RESOURCES DIVISION

E-19-158

May 6, 2021
Cynthia A. Ittleman, Commissioner

Non-Bypass Appeal-Seniority Date-Original Appointment as a Lawrence Police Officer-Late Filing-Dismissal—The Commission dismissed as late-filed a non-bypass equity appeal from a Lawrence police officer seeking a retroactive adjustment in his civil service seniority date from 2014 to 2001. This highly unusual appeal arose from a year 2000 bypass of the Appellant that was successfully appealed to the Commission resulting in the placement of his name at the top of the certification list for ten years until the Appellant was finally appointed in 2014. Clearly this Appellant should have filed this appeal a very long time ago and it was rejected, as was his request for an investigation by the Commission.

DECISION ON CITY OF LAWRENCE'S MOTION TO DISMISS

On July 30, 2019, pursuant to G.L. c. 31, §§ 2(a) and 2(b), the Appellant, Scott McCabe (Appellant), a full-time police officer in the City of Lawrence (City)'s Police Department (LPD), filed a non-bypass equity appeal or, in the alternative, a request for investigation, with the Civil Service Commission (Commission), seeking a retroactive adjustment in his civil service seniority date *from* November 17, 2014 *to* September 9, 2001 or October 28, 2003. On August 12, 2019, I held a pre-hearing conference at the Mercier Community Center in Lowell. The City subsequently filed a Motion to Dismiss and the Appellant filed an opposition. On November 22, 2019, I held a motion hearing at the same location. For the reasons stated below, the City's Motion to Dismiss is allowed; the Appellant's non-bypass equity appeal is dismissed; and his request for investigation is denied.

It is undisputed that the City bypassed the Appellant for appointment for the position of full-time police officer in 2000. In 2000, the City notified HRD of the reasons for bypass and, after review, HRD notified the Appellant that: a) HRD had approved the City's reasons for bypass and b) the Appellant may appeal this determination to the Commission. The Appellant subsequently filed a timely bypass appeal with the Commission; attended a pre-hearing conference; and participated in a full hearing before the Commission. In short, the Appellant was aware of the process for contesting a bypass; exercised his right to file an appeal with the Commission; and actively participated in the entire appeal process regarding the bypass.

On October 24, 2002, the Commission allowed the Appellant's 2000 bypass appeal and ordered the following relief:

7. I need not explore the contradiction between the Appellant's version of leaving Starbucks and Starbuck's documentation of "abandonment," since even without this employment, the record shows a pattern of short periods of employment.

> "Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission directs the Personnel Administrator [HRD] to place McCabe's name at the top of the current eligibility list, or, if necessary, revive his eligibility and place him at the top of the next requested certification, so that McCabe will be considered for the next appointment as a police officer with the City's Police Department."

(*McCabe* v. *Lawrence*, 15 MCSR 70 (2002))

Based on the plain reading and the intent of that order, the Appellant was to be given one additional opportunity for reconsideration for appointment as a Lawrence police officer. Further, by placing his name at the top of the next Certification, a non-selection by the City would constitute a bypass that could be appealed to the Commission.

Accepting, as true, the sworn affidavit of the Appellant, he became aware, sometime "in late 2002" that the City was appointing police officers and he (the Appellant through counsel) inquired with the City as to why the Appellant had not been considered for appointment. Assuming all facts in the light most favorable to the Appellant, the appointment of any candidates in "late 2002" would have constituted a bypass of the Appellant if the Appellant's name should have been at the top of the Certification used during that hiring cycle. Importantly, the Appellant, despite being aware that candidates had been appointed from that 2002 Certification, did not file a bypass or any other type of appeal with the Commission in 2002.

Moving forward, it is undisputed that the Appellant's name, consistent with the Commission's 2002 order, did appear at the top of a subsequent Certification issued to the City on September 15, 2004. The Appellant acknowledges that he did sign the Certification as willing to accept appointment. The documentary evidence shows that: the City notified HRD of the proposed reasons for bypass; HRD approved the reasons; and HRD notified the Appellant of their approval along with the Appellant's right to file an appeal with the Commission. Again, however, accepting the Appellant's affidavit as true, he did not receive the HRD notification. The Appellant was, however, aware that other candidates, who must have been ranked below him, were appointed. Despite being well versed with the avenue for filing an appeal with the Commission, the Appellant did not do so. The Appellant seeks to justify his failure to file an appeal with the Commission by stating that his attorney at the time purportedly told him his only right of appeal was to Superior Court, which the Appellant did not pursue.

What occurred next is perplexing. Notwithstanding the fact that the Appellant's name had indeed appeared at the top of at least one Certification issued to Lawrence, from which he was considered for appointment; and notwithstanding the fact that the last time the Appellant took a civil service examination for police officer was in 2003, the Appellant's name appeared at the top of certifications for police officer issued to Lawrence for an additional ten years. Ultimately, the Appellant was appointed as a full-time police officer by the City in 2014. Despite the open question of whether the Appellant's name should have appeared on any Certifications issued to Lawrence after 2004, the Appellant, who was appointed from a Certification in 2014, now seeks a retroactive civil service seniority date back to 2003. In his affidavit, the Appellant states in part that he seeks such relief: " … to help avoid layoff risk in the future and simply because of the principle of the matter, which is very important to me." Such relief is not warranted for the reasons discussed below.

Even when the facts are viewed most favorably to the Appellant, he knew, *for years*, that candidates ranked below him on Certifications were being appointed by the Lawrence Police Department. He was intimately familiar with the process of filing an appeal with the Commission and he chose not to do so. He acknowledges that he consulted with his attorney, who suggested filing action in Superior Court, which the Appellant chose not to do. The Commission has squarely addressed this issue in the past. In *Pugsley* v. *City of Boston, et al*, 24 MCSR 544, 547 (2011), the Commission stated that:

> " … embraces the principle that a party coming before the Commission to seek equitable relief … must exercise reasonable diligence in pursuit of that relief. Accordingly, where a person has had actual notice—whether in writing or not—of an action or inaction by HRD or an appointing authority that the person reasonably knew or show have known was a violation of civil service law or rules, that person cannot sit on those rights indefinitely. Thus, it is a fair requirement that once such a person discovers that he or she has been harmed by an action or inaction of HRD, he had an obligation to promptly file a claim of appeal, or lose the right to press it."[1]

See also Mulligan v. *Boston Police Department*, 28 MCSR 57 (2015) (Commission denied appeal filed years after Appellant was purportedly bypassed for appointment although not receiving a written notice at the time.)

Further, the Appellant's appeal rests largely on speculation and assumption, including the assumption that, had the Appellant contested his bypass in 2003 or 2004, the Commission would have allowed his appeal and ordered a retroactive civil service seniority date, something the Commission chose *not* to do in 2002.

Finally, any request for investigation regarding this matter would need to address whether the Appellant's name should have appeared on any Certification after 2004, including the 2014 Certification from which the Appellant was appointed. Put another way, such an investigation is more likely to harm, rather than help, the Appellant.

For all of above reasons, the Appellant's appeal under Docket No. E-19-158 is hereby ***dismissed*** and his request for investigation is ***denied***.

* * *

1. I carefully reviewed the decisions cited by the Appellant regarding instances in which the Commission has exercised its discretion to grant retroactive civil service seniority dates. They are either not on point, inapposite or not persuasive in the context of the undisputed facts of the instant appeal.

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

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* * * * * *

NORMA QUIMBY

v.

MassDOT

C-20-141

May 6, 2021
Christopher C. Bowman, Chairman

Reclassification Appeal-Massachusetts Department of Transportation-Customer Service Representative II to Program Coordinator II or Customer Service Representative IV—Although a hardworking Registry employee and one that was highly regarded by her supervisors, the Appellant did not win her bid for reclassification from Customer Service Representative II to either Program Coordinator II or Customer Service Representative IV because she never performed the one-year of supervisory responsibilities that are part of the minimum entrance requirements for the CSR IV position; nor even the vast majority of the duties of that position.

DECISION

On September 30, 2020, the Appellant, Norma Quimby (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD), in which HRD affirmed MassDOT's denial of her request to be reclassified from Customer Service Representative II (CSR II) to either Program Coordinator II (PC II) or Customer Service Representative IV (CSR IV). On October 20, 2020, I held a remote pre-hearing conference through Webex Video Conferencing. I held a full hearing, also through Webex Video Conferencing, on January 13, 2021.[1] The hearing was recorded via Webex, and both parties were provided with a link to the video recording of the hearing. The Commission also retained a copy of the hearing recording.

FINDINGS OF FACT

Twenty-nine (29) Appellant Exhibits (Exhibits 1-29) and twelve (12) MassDOT Exhibits (Exhibits 30-41) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

For the Appellant:

- Norma Quimby, Appellant
- Gretchen Daley, Program Coordinator, Commercial Driver's License Program, Registry of Motor Vehicles
- Colleen Ogilvie, Senior Deputy Registrar of Operations, Registry of Motor Vehicles
- Phyllis Burke, Supervisor, Special Plates, Registry of Motor Vehicles

For MassDOT:

- Evelyn Smith, Personnel Analyst, Classification and Compensation Department, MassDOT
- Phyllis Burke, Supervisor, Special Plates, Registry of Motor Vehicles
- Amy Lynch, Manager, Classification and Compensation Department, MassDOT

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

Appointed as CSR I

1. The Appellant received her high school diploma from Attleboro High School in 1995. While in high school, the Appellant took courses in business management. She is trilingual in English, Spanish, and Portuguese. (Exhibit 36, Testimony of Appellant)

2. Prior to commencing work at MassDOT, the Appellant spent two years, from 2013 to 2015, at the South Carolina Department of Motor Vehicles (SCDMV), where she worked as a Customer Service Representative at one of the SCDMV's branch offices in Charleston, SC. She also previously held positions as program assistant for the Women Infants and Children (WIC) program in Taunton, fast-food cook, and receptionist and clerk at chiropractic offices. (Exhibit 36; Testimony of Appellant)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

3. The Appellant was hired by MassDOT on February 28, 2016. She was assigned to the RMV's Milford Service Center as a Customer Service Representative I (CSR I). (Exhibits 33, 36; Testimony of Appellant)

Promoted to CSR II Position

4. On June 3, 2018, the Appellant was promoted to Customer Service Representative II (CSR II) in the RMV's Special Plates Department, located at RMV headquarters in Quincy. The Supervisor of the Special Plates Department was Phyllis Burke, who was a Program Coordinator III (PC III). The CSR II position had been created and posted so that a CSR II employee, rather than Ms. Burke, could handle cash transactions. (Exhibits 33, 36; Testimony of Appellant, Burke, Daley).

First 30 days as CSR II

5. As a CSR II, the Appellant spent about half her day issuing license plates. After the order and payment were received by the Special Plates Department, the order would be entered into the computer system, and plates would be created at the prisons through MassCor, which delivered plates weekly to the Quincy RMV headquarters. New plates were also issued in connection with vehicle registrations, and specialized plates were issued for different types of vehicles and in connection with charitable organizations. Although some service centers were able to handle license plate orders, the Special Plates Department handled special cases, as well as some direct orders. After the plates were delivered, the unit then mailed them out to customers. (Testimony of Appellant, Exhibits 16-29)

6. The Appellant also performed her cashier, or receiving teller, duties. She collected fees received for plates, collected cash received by other staff members, scanned checks to be deposited, dealt with any issues arising from the cash drawer, and reconciled the cash drawer. She needed to be trained on cash handling procedures, but was ultimately spending about half an hour per day on cashier duties. (Testimony of Appellant)

7. The Appellant also spent a large part of a typical day handling telephone calls and emails that came to her or that were forwarded to her by Ms. Burke. (Testimony of Appellant and Burke, Exhibits 16-29)

Designated Acting Program Coordinator III

8. On or about July 1, 2018, after the Appellant had been working in Special Plates for approximately 30 days, she was designated as Acting Program Coordinator III when her supervisor, Ms. Burke, was temporarily transferred to work with the implementation team for the new ATLAS software program that was being phased in to replace the old ALARS system at the RMV. The ATLAS program team was also located at RMV headquarters in Quincy. (Testimony of Appellant and Burke; Exhibits 5, 33-36)

9. During her time as an acting PC III, the Appellant did not handle personnel issues relating to the staff. Those issues were handled by Erin Sheehan, the Assistant Director of Title and Registration, or Ms. Burke. The Appellant did not approve requests for vacation leave or disciplinary issues, which she escalated to Ms. Sheehan. The Appellant also did not approve time and attendance reports on the HRCMS system and did not complete any EPRS (Employee Performance Review System) forms for the staff. (Testimony of Appellant)

10. Ms. Burke was "full-time in Atlas" and "full-time in Special Plates" while she was working on the Atlas program. The Appellant "took the phone calls" and "questions from the CSR Is." The Appellant "did everything she could do" but would often contact Ms. Burke when a decision needed to be made. According to Ms. Burke, she "guided Norma." Ms. Burke "did not want something to change in [her] department that [she] created." The Appellant "did not perform [Burke]'s duties while she [Burke] was working in Atlas." (Testimony of Burke)

Resumed CSR II duties

11. In November 2019, around the same time, Ms. Burke formally returned to her position as PC III in the Special Plates Department, although she had continued to perform many supervisory duties while on special assignment. On December 8, 2019, the Appellant's temporary title of Acting PC III was terminated, and she resumed her original title of CSR II, with its accompanying lower pay. (Exhibits 33-35; Testimony of Appellant, Burke)

Request to be reclassified as a PC III

12. On February 23, 2020, the Appellant filed a classification appeal with the MassDOT Human Resources Department, Classification and Compensation Unit, seeking the title of Program Coordinator II (PC II). She filed an Appeal Form and an Employee Questionnaire (Exhibits 4, 5, 7)

13. An audit interview was conducted on May 1, 2020 by Evelyn Smith, MassDOT Personnel Analyst. The interview was conducted by telephone due to the COVID-19 pandemic. Prior to the audit interview, the Appellant provided Ms. Smith with written answers to questions contained in an Interview Guide, and her supervisor Phyllis Burke provided written answers to a Manager's Questionnaire. (Exhibits 5, 6, 7)

14. In her Interview Guide, the Appellant listed her duties and percentage of time spent on each as follows: (a) Point of contact for information from upper management and when Phyllis is unreachable I am responsible for the Special Plate Department. (25%); (b) Assisting in proper operation of the department by delegating work to staff to support their specific functions (12%); (c) Assisting in overseeing employees in daily operation and coordinating that duties are being met within a specific time frame. (11%); (d) Manage coverage for the front desk. (2%); (e) Advises staff in answers to questions also answering clerks' issues for the customers. (10%); (f) Point of contact for other Departments and Branches inside and outside of the agency. (10%); (g) Balances cash drawer on a daily basis, locate over/short discrepancies, closeout customer service representatives at the end of the day, and scan check to BOA. (5%) (Exhibit 7).

15. On her Appeal Forms, the Appellant stated that her job duties include "Assist[ing] customers by responding to all emails and voice messages within a 24 hour period and provide information

to the general public and service centers via telephone or email concerning department registrations" She also stated that "[She] Accurately balances cash drawer on a daily basis; locate over/short discrepancies, closeout customer service representatives at the end of the day, prepare Special Plates office deposits, consolidates office for daily closing in a timely manner and scan checks to BOA." (Exhibit 7).

16. On July 9, 2020, Amy Lynch, Manager of Classification and Compensation for MassDOT Human Resources, wrote to the Appellant that a preliminary recommendation had been made to deny her appeal. Ms. Lynch explained that the Appellant's existing title of CSR II appropriately described the duties she performed on a daily basis. Ms. Lynch enclosed copies of the documents on which the recommendation was based, including the Appellant's Form 30, her EPRS (Employee Performance Review System) form, and Classification Specifications. The letter provided the Appellant with the right to submit a written rebuttal. MassDOT Personnel Analyst Evelyn Smith emailed the letter to the Appellant on July 13, 2020. (Exhibits 8, 9)

Request to be reclassified to CSR IV

17. On July 22, 2020, the Appellant emailed her rebuttal to Ms. Smith. Referencing the attachments to the preliminary recommendation, which included the Classification Specification for the Customer Service Representative series, the Appellant amended her appeal to include a request to be considered for the position of Customer Service Representative IV (CSR IV), as well as Program Coordinator II (PC II). She listed duties in support of her request to be reclassified to CSR IV. (Exhibits 8, 9)

18. Ms. Smith considered the Appellant's request to broaden her classification appeal to request reclassification to a CSR IV. Although the correct procedure would be to begin a new appeal, Ms. Smith decided not to require that, and she also reviewed the Appellant's appeal seeking a CSR IV classification. (Testimony of Smith)

19. On August 5, 2020, the Appellant emailed additional job duties to Ms. Smith and Ms. Lynch in support of her rebuttal. (Exhibit 9)

20. The Appellant also provided MassDOT human resources with several letters and emails in support of her rebuttal, from Erin Sheehan, RMV Assistant Director of Title and Registration (August 3, 2020); Phyllis Burke (August 6, 2020); Gretchen Daley, RMV Director of Title and Registration (August 13, 2020). (Exhibit 3)

Duties and Responsibilities after return of Phyllis Burke as PC III

21. Ms. Burke is the Appellant's direct supervisor and, other than the Appellant, she is the witness most familiar with the Appellant's duties.

22. Ms. Burke is also familiar with the level distinguishing duties of a CSR IV and was well prepared to address whether the Appellant performs those duties a majority of her time. (Testimony of Burke)

23. According to Ms. Burke, "if I am too busy to go out to the floor and tell my staff something, I'll call Norma and say, 'Norma, could you please just reiterate this for me to the staff' and she'll do it." Ms. Burke does not, however, consider that to be "interpreting, monitoring and implementing rules, regulations, policies and procedures for carrying out daily activities"; nor did she cite any other duties performed by the Appellant that fall into the first level distinguishing duty of a CSR IV. (Testimony of Burke)

24. According to Ms. Burke, after distributing the mail, the Appellant does check to see if the work gets done and any work that does not get done, she puts in the file cabinet for the next day. The Appellant does not, however, have any role in evaluating the quality of the work performed by the employees, which is the second level distinguishing duty of a CSR IV. (Testimony of Burke)

25. Although the Appellant will assist someone in getting online to perform training and help them get through the training, she does not perform a key part of the third level-distinguishing duty of a CSR IV: "monitoring and evaluating performance." (Testimony of Burke)

26. Based on Ms. Burke's observations, the Appellant also does not perform the 5th level-distinguishing duty of "adjusting her own activities and priorities according to changes in workload …" (Testimony of Burke)

27. The Appellant does not provide Ms. Burke with input regarding work plans, schedules and daily operations, the 6th level-distinguishing duty. (Testimony of Ms. Burke)

28. The only level-distinguishing duty that Ms. Burke could identify as one being performed by the Appellant was duty 7: Assisting in office support tasks such as tracking inventories, ordering supplies and handling deposits. (Testimony of Ms. Burke) After Ms. Burke returned as PC III of the unit, the Appellant assisted Ms. Burke with helping research and resolve issues that arose related to the inventory of plates. (Testimony of Ogilvie) At Ms. Burke's request, the Appellant assists with the plate inventory under the new Atlas system. The Appellant helped organize the plate storage room, so that plates that had not yet been inventoried were separated from inventoried plates. (Testimony of Appellant, Burke, Exhibit 9)

29. At Ms. Burke's request, the Appellant also handles a large number of emails and phone calls, solves problems such as delayed receipt of plates, inventory transfers, transfer of plates to a family member, renewals, reactivation of formerly issued vanity plates, changes in residency, and errors in ATLAS records. (Testimony of Appellant, Burke; Exhibits 5, 6, 7, 9, 16-29, 37)

30. The Appellant opens, sorts, logs and distributes the mail. (Testimony of Appellant, Burke; Exhibits 6, 15)

31. Ms. Burke does occasionally forward emails or voice mails to the Appellant for follow-up or ask her to "test" some items and the Appellant "does more than CSR Is." (Testimony of Burke)

32. When there is a problem with the copy machine or the phones, the Appellant puts in the request on behalf of Ms. Burke. (Testimony of Appellant)

33. The Appellant works extra hours for which she receives compensatory time. (Testimony of Appellant)

34. The record and the Appellant's EPRS review form for 2020 show she is a highly valued and hard-working employee. Of the nine areas of review, the Appellant was rated "exceeds" expectations in three: communication with outside agencies and RMV branches, adherence to the telephone schedule, and "promot[ing] the mission of MassDOT and deliver[ing] extraordinary customer service that both anticipates and responds to customers' needs." (Exhibits 3, 37)

35. On August 24, 2020 Ms. Lynch wrote to the Appellant to notify her that MassDOT had denied her appeal to be reclassified from CSR II to CSR IV or PC II. She informed the Appellant of her right to appeal to the Commonwealth's Human Resources Division (HRD). (Exhibit 10)

36. By email dated August 24, 2020, the Appellant appealed MassDOT's denial of her classification appeal to HRD. (Exhibit 11)

37. On September 16, 2020, HRD denied the Appellant's appeal. (Exhibit 12)

38. The duties of a Program Coordinator II are set out in Exhibit 31, the Classification Specification for the Program Coordinator series.

39. The series Summary describes the function of a Program Coordinator as follows:

> Incumbents of positions in this series coordinate and monitor assigned program activities; review and analyze data concerning agency programs; provide technical assistance and advice to agency personnel and others; respond to inquiries; maintain liaison with various agencies; and perform related work as required.
>
> The basic purpose of this work is to coordinate, monitor, develop and implement programs for an assigned agency.

(Exhibit 31)

40. The PC Classification Specification lists the following under "Examples of duties common to all levels of the Program Coordinator series":

- Coordinates and monitors assigned program activities to ensure effective operations and compliance with established standards.
- Reviews and analyzes data concerning assigned agency programs to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc. and to devise methods of accomplishing program objectives.
- Provides technical assistance and advice to agency personnel and others concerning assigned programs to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards.
- Responds to inquiries from agency staff and others to provide information concerning assigned agency programs.
- Maintains liaison with various private, local, state and federal agencies and others to exchange information and/or to resolve problems.
- Performs related duties such as attending meetings and conferences; maintaining records; and preparing reports.

(Exhibit 31)

41. Under "Differences in Levels in Series" the PC Classification Specification states that those in the following levels, and those in higher levels, perform the following duties:

> Program Coordinator II:
>
> - Provide on-the-job training and orientation for employees.
> - Develop and implement procedures and guidelines to accomplish assigned agency program objectives and goals.
> - Review reports, memoranda, etc. for completeness, accuracy and content.
> - Confer with management staff and other agency personnel in order to determine program requirements and availability of resources and to develop the criteria and standards for program evaluation.
> - Evaluate program activities in order to determine progress and effectiveness and to make recommendations concerning changes as needed.
>
> Program Coordinator III:
>
> - Develop and implement standards to be used in program monitoring and/or evaluation.
> - Oversee and monitor activities of the assigned unit.
> - Confer with management staff and others in order to provide information concerning program implementation, evaluation and monitoring and to define the purpose and scope of proposed programs.

(Exhibit 31)

42. Under "Supervision Received" the PC Classification Specification provides for those at each level, including PC III:

> Incumbents of positions at this level receive general supervision from employees of higher grade who provide guidance on policy and procedure, assign work and review performance for effectiveness and conformance to laws, rules, regulations, policy and procedures.

(Exhibit 31)

43. The PC Classification Specification provides under "Supervision Exercised" as to those at the PC III level:

> Program Coordinator III
>
> Incumbents of positions at this level exercise direct supervision (i.e., not through an intermediate level supervisor) over, assign work to and review the performance of 1-5 professional personnel; and indirect supervision (i.e., through an intermediate level supervisor) over 6-15 professional, administrative, technical and/or other personnel.

(Exhibit 31)

44. Under "Minimum Entrance Requirements," the PC Classification Specification provides for the PC II level:

> Applicants must have at least (A) three years of full-time, or equivalent part-time, professional, administrative or managerial experience in business administration, business management or public administration the major duties of which involved program management, program administration, program coordination, program planning and/or program analysis, or (B) any equivalent combination of the required experience and the substitutions below:

Substitutions:

> I. A Bachelor's degree with a major in business administration, business management or public administration may be substituted for a maximum of two years of the required experience.*
>
> II. A Graduate degree with a major in business administration, business management or public administration may be substituted for the required experience.*
>
> III. A Bachelor's or higher degree with a major other than in business administration, business management or public administration may be substituted for a maximum of one year of the required experience.*
>
> *Education toward such a degree will be prorated on the basis of the proportion of the requirements actually completed.

(Exhibit 31).

45. The Classification Specification for the Customer Service Representative Series provides under "Summary of Series":

> Employees in this series confer with agency customers and the general public by telephone, in person or in writing; assist agency customers and the public in applying for agency programs, services, licenses or permits; explain agency programs, services, procedures and fees; respond to inquiries; resolve complaints or refer them to appropriate staff; process applications and other documents; may enter application data into computers; establish and maintain coding and filing systems of case logs; may collect and record receipt of application fees; may prepare licenses or permits and may digitally image customers; provide information on certificates of titles, registrations, rebates, excise tax, sales tax, license and registration suspension, civil motor vehicle infractions, warrants, electronic toll and parking violations and other Registry of Motor Vehicle functions and procedures.

(Exhibit 30)

46. Under "Examples of Duties Common to All Levels in Series" the CSR Classification Specification provides:

- Interacts with customers to respond to inquiries and complaints.
- Issues licenses, identification cards and motor vehicle registrations.
- Communicates with internal and external contacts through a variety of means such as telephone, mail, e-mail, fax or in-person.
- Uses computer terminals, vision instruments, automatic testing devices and other equipment.
- Administers vision tests in accordance with agency policy.
- Operate computer equipment to create, retrieve, review, change or update driver/vehicle/business information.
- Ensure appropriate confidentiality and security of information.
- Reviews reports for compliance with state and federal guidelines.
- Collects fees (cash and checks) and performs credit card transactions.
- Reconciles receipts with revenue control documents.
- Operates computer terminals and photo imaging software.
- Schedules road examinations.
- Prepares forms and other documents related to licenses, registrations, identification cards and receipts for titles.
- Amends title and registration records.
- Maintains Registry of Motor Vehicle filing systems.
- Reviews customer documents in support of transactions for accuracy and veracity.
- Conducts research for additional information from third parties (other states, state agencies, etc.) to complete transactions.
- Assists other state and local agencies with Registry of Motor Vehicle information.
- Assists customers with problem resolution.
- Provides information to the public regarding Registry of Motor Vehicles guidelines, requirements and procedures in-person and on the phone.
- Greets customers, determines customer's purpose, assesses readiness, and directs them to the appropriate line.
- Directs customers to Kiosks and other automated services where appropriate.
- Assesses that customers have the correct forms/applications, supporting documents, and acceptable payment.
- Returns improper or incomplete forms or documents to the applicant explaining reasons for rejection and steps necessary to complete forms/applications.
- Provides checklists and assistance in completing forms/applications.
- Provides information to the public regarding Registry of Motor Vehicles guidelines, requirements and procedures in-person and on the phone.

(Exhibit 30)

47. Under "Differences Between Levels in Series" the CSR Classification Specification provides:

> Customer Service Representative II:
>
> - Provides technical assistance and guidance on tax exemption issues.
> - Authorizes or denies sales tax exemptions for motor vehicles at the time of registration, based on evaluation of documentation and knowledge of both Registry of Motor Vehicles and Department of Revenue rules.

- Receives revenue for licenses, registrations, titles, sales tax and other fees and maintains records and accounts of all financial transactions in ALARS/lmaging system.
- Reconciles financial receipts and prepares daily bank deposits and work reports for designated branch office.
- Makes periodic daily collections of revenue from the clerical personnel at the public counter and reconciles accounts.
- Opens/closes branch offices, as needed.
- Reconciles daily branch deposits.

Customer Service Representative III:

- Assist customers with reporting, eligibility and compliance requirements; appropriate processes to follow, information to process and actions to take in accordance with standard procedures.
- Inquires with customers, as needed, to determine appropriate service; explains additional information or action required when customer fails to meet license or operating requirements.
- Performs senior level or lead customer service activities by providing assistance, guidance and instruction to less experienced customer service personnel.
- Perform research, analysis and judgment to determine an appropriate course of action to provide the public with the full range of services available.
- Oversees office operations.
- Provides training and support to employees.
- Ensures accuracy of cash control.
- Incumbents at this level perform work that requires considerable independence in the exercise of judgment, in determining approaches and in the interpretation and application of policies, laws, standards and procedures.
- Creates reports and statistical tables.

Customer Service Representative IV:

- Interpret, monitor and implement rules, regulations, policies and procedures for carrying out daily activities.
- Ensure that completed work meets standards of quality and timeliness.
- Supervises subordinate personnel including delegating assignments, training, monitoring and evaluating performance.
- Maintains efficient workflow by evaluating production and revising processes and work assignments.
- Adjusts own activities and priorities according to changes in workload, team member absences, and to enable team members to take appropriate breaks.
- Provides input regarding work plans, schedules and daily operations.
- Assists in office support tasks such as tracking inventories, ordering supplies and handling deposits.
- Oversees operations at satellite branch offices.
- Assists Branch Manager with operations at major branch offices, filling in when the Branch Manager is not available.
- At this level, incumbents are expected to perform or be able to perform the duties described for Levels I, II and III; however, the primary focus is to provide program oversight, guidance and review of others' work.
- Communicate with appropriate MassDOT enterprise service areas to address workplace facility and security issues.

(Exhibit 30)

48. Supervision received by a CSR IV is described in the Classification Specification as:

> Customer Service Representative IV
>
> Incumbents of positions at this level receive general supervision from Branch Managers and other employees of a higher grade who provide procedural and policy guidance, assign work and review for effectiveness and compliance with laws, rules and regulations.

(Exhibit 30)

49. Supervision exercised by a CSR IV is described in the Classification Specification as:

> Incumbents exercise direct supervision over, assign work to, provide training for and review the performance of Customer Service Representatives and provide indirect supervision to employees of a lower grade. Incumbents may also participate in the interviewing process or make recommendations for new hires.

(Exhibit 30)

50. Under "Minimum Entrance Requirements," the CSR Classification Specification provides for the CSR IV level:

> Applicant must have at least (A) four years of full-time or equivalent part-time, experience in a position which included public contact/customer service experience dealing with the public in-person or by phone providing information about services/programs, explaining laws, rules, regulations/procedures or resolving problems. At this level, incumbents are expected to perform or be able to perform the duties described for Levels I, II and III; however, the primary focus is to provide program oversight, guidance and review of others' work. (B) One year of this experience must have involved cash handling and collecting money/making change. (C) Of which at least one year must have been in a supervisory capacity. (D) Any equivalent combination of the required experience and the substitutions below:

Substitutions:

> A Bachelor's or higher degree may be substituted for one (1) year of the required experience.
>
> NOTE: No Substitutions will be permitted for the required (C) experience.

(Exhibit 30).

LEGAL STANDARD

Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal

in writing to the personnel administrator and shall be entitled to a hearing upon such appeal . . . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it.

G.L. c. 30, § 49.

The Appellant has the burden of proving that she is improperly classified. To do so, she must show that she performs the duties of the Project Coordinator II or the Customer Service Representative IV title more than 50 percent of the time, on a regular basis. *Gaffey* v. *Dep't of Revenue*, 24 MCSR 380, 381 (2011); *Bhandari* v. *Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015) (finding that "in order to justify a reclassification, an employee must establish that [s]he is performing the duties encompassed within the higher level position a majority of the time . . . .")

That other employees may be misclassified "does not entitle the Appellant to the reclassification requested." *Gaffey* v. *Dept. of Revenue,* supra.

ANALYSIS

The Appellant is a hardworking employee who began working for the RMV as a CSR I in 2016. She takes pride in her work and is highly regarded by her supervisors. That hard work and initiative was recognized by the RMV when the Appellant was promoted to CSR II in 2018 after approximately two years of being hired. Approximately 30 days into that new position, while she was still being trained to perform cash handling duties which are part of the CSR II position, she was designated as an acting PC III because the PC III who served as the Supervisor of Special Plates began working on the ATLAS project.

As stated in the findings, the Appellant did not assume a supervisory role during this time period. She had no role in employee evaluations or discipline and, according to Ms. Burke, the Appellant would always touch base with her regarding any substantive decision that needed to be made. In short, the Appellant, during this time period, did not perform the one-year of supervisory responsibilities that are part of the minimum entrance requirements for the CSR IV position.

Even if the Appellant met the minimum entrance requirements, which she does not, the Appellant does not perform the vast majority of the CSR IV level-distinguishing duties. Ms. Burke, who highly values the Appellant's hard work and is supportive of the Appellant's reclassification request, offered informed and objective testimony showing that the Appellant's duties, at best, fall under only one of the level distinguishing duties of a CSR IV. Generally, the Appellant does <u>not</u>: *interpret*, monitor and implement rules, regulations, policies and procedures; ensure that completed work meets *standards of quality and timeliness*; supervise subordinate personnel including delegating assignments, training, monitoring and evaluating performance.

The Appellant also does not, now, nor has she ever, exercised direct supervision over, assigned work to, provided training for and reviewed the performance of Customer Service Representatives and provide indirect supervision to employees of a lower grade.

She does, however, assist in office support tasks such as tracking inventories, ordering supplies and handling deposits in her role related to the inventorying of plates under the new ATLAS system. Performing this duty, however, standing alone, does not meet the requirement that she spend a majority of her time performing the duties of a CSR IV, nor does it change the fact that the Appellant does not meet the MERs or supervisory responsibilities required to be a CSR IV.

CONCLUSION

For these reasons, the Appellant's appeal under Docket No. C-20-141 is hereby ***denied***.[2]

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on May 6, 2021.

Notice to:

Norma Quimby
[Address redacted]

Matthias P. Kriegel, Esq.
Erik F. Pike, Esq.
MassDOT
10 Park Plaza
Boston, MA 02116

* * * * * *

2. The Appellant, mid-way through this process, already abandoned her request for PC II and sought a different classification: CSR IV. I did not find it appropriate to conduct a separate analysis to determine whether she performed the level distinguishing duties of a CSR III, a classification not being sought by the Appellant. Nothing in this decision, however, prevents the Appellant from filing such a request and/or MassDOT, on its own initiative, determining whether such a classification is appropriate.

EDWIN A. RAMIREZ

v.

DEPARTMENT OF CORRECTION[1]

G1-19-073

May 6, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Correctional Officer-Untruthfulness-Friends and Family Policy-Failure to Disclose Incarcerated Relatives and Friends-Driving Record—Hearing Commissioner Cynthia A. Ittleman reversed the bypass of a candidate currently working at DMH's Worcester Recovery Center and Hospital for original appointment as a correctional officer, finding that he was not at fault for failing to disclose the incarceration of his sister and her partner and that he had not lied about being fired by Astra Zeneca. The Hearing Officer was persuaded by the Appellant's testimony that he was estranged from his sister and unaware of her incarceration and that he had taken a buyout from Astra Zeneca in connection with a reduction in force rather than having been fired.

DECISION

On March 25, 2019, the Appellant, Edwin Ramirez (Appellant or Mr. Ramirez), filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 2(b), contesting the decision of the Department of Correction (DOC) to bypass him for appointment to the position of Correction Officer I (CO I). A pre-hearing conference was held at the Commission on April 23, 2019. A full hearing was held at the same location on May 24, 2019.[2] The full hearing was digitally recorded and both parties received a CD of the proceeding.[3] On June 28, 2019, the Respondent submitted a post-hearing brief in the form of a proposed decision.

FINDINGS OF FACT

Twelve (12) Exhibits (Respondent Ex. 1-11 and Appellant Ex. 1) were entered into evidence at the hearing and one (1) document (Post-Hearing Exhibit 1) was submitted by the DOC after the hearing at my request. Based on the documents submitted and the testimony of the following witnesses:

For the DOC:

- Jonathan Thomas, Background Investigator, DOC
- Eugene Jalette, Supervising Identification Agent, DOC

For the Appellant:

- Edwin A. Ramirez, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Ramirez (Appellant or Mr. Ramirez) is Hispanic and speaks Spanish fluently. He was born in New Jersey and moved to Massachusetts when he was seven years old. Since then, he has lived in Worcester. He has several siblings and graduated from Doherty High School in 2005. He has full custody of his teenage child. (Appellant Testimony)

2. Mr. Ramirez currently works at the Department of Mental Health's Worcester Recovery Center and Hospital (WRCH), a locked and secure facility. He has been employed at WRCH since 2015 and his current title is Mental Health Worker 2. In this position, he works directly with patients in a variety of ways, including teaching activities of daily living, teaching patients skills such as respect, responsibility, and morals, and monitoring visits from the community. Many patients who are housed in the facility have come from the House of Corrections. (Appellant Testimony). Mr. Ramirez is trained in CPR, proper restraint protocols, de-escalation techniques, and updates his CPR and other trainings yearly. He creates personnel schedules and writes reports, such as responses to safety and health and reports of restraint, on a daily basis. As part of his employment responsibilities, he regularly transports patients. (Appellant Testimony).

3. Prior to working at WRCH, Mr. Ramirez worked at Devereaux School with children, adolescents and adults with disabilities, autism spectrum disorder, and mental health challenges. He also worked at Work Out World at the front desk and at IMobile US as a wireless phone sales consultant. (Ex. 7).

4. Mr. Ramirez's past employment also includes working for approximately three years at Astra Zeneca of North America, where he started in packaging and was promoted to other positions such as Production Supervisor. (Appellant Testimony, Ex. 8). In 2008, contrary to the DOC's assertion that the Appellant was fired by AstraZeneca, the company decided to significantly reduce its workforce and offered employees the opportunity for voluntary layoffs with severance packages, which Mr. Ramirez accepted. The Appellant volunteered to leave the company and received a severance package. (Appellant Testimony).

5. For many years, Mr. Ramirez was estranged from one of his siblings and did not have any contact with her because he disapproved of her romantic relationship. Because of this estrangement, he did not know that his sibling or his sibling's partner had been incarcerated or were currently incarcerated. The family member who knew about his sibling's incarceration did not share that in-

1. After April 23, 2019 Eugene Jalette at the MA Department of Corrections represented the Respondent. Mr. Jalette is also a witness in this matter.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

3. 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.

formation until after Mr. Ramirez applied to the DOC and after the DOC had conducted a home visit. (Appellant Testimony).

6. Mr. Ramirez applied for a position with DOC to be a Correction Officer (CO I) on November 25, 2018. He was ranked 47 on Certification No. 05868 dated October 22, 2018. (Ex. 2).

7. As part of the application package, and also on December 6, 2018, Mr. Ramirez signed an acknowledgement that all facts in his application were true and that he did not have an immediate relative, any family, a personal friend or an acquaintance who had been or was currently incarcerated. He also wrote that he had not been terminated from a former employment situation. (Ex. 4, 7).

8. One of the first steps in the hiring process at the DOC includes a pre-employment background investigation, which includes the following: review of criminal history; home interview; verification of education; consideration of language abilities, confirmation of employment; reference check; interview of neighbors; and review of other information throughout the process. (Jalette Testimony; PH Ex. 1).

9. Mr. Thomas, the investigator assigned to perform the pre-employment background investigation for Mr. Ramirez, was trained to do investigations in 2018. He has completed over a hundred background investigations and works very closely with his direct supervisor, Mr. Jalette. He discussed Mr. Ramirez's application with Mr. Jalette while compiling his investigation report (report). (Thomas Testimony).

10. Mr. Thomas conducted a home interview with Mr. Ramirez on December 6, 2018. Prior to the interview, Mr. Thomas had taken approximately eight or ten names from the list of Mr. Ramirez's Facebook friends and checked those names against state and county incarceration databases. (Ex.5; Thomas Testimony).

11. During the interview, Mr. Thomas asked Mr. Ramirez about his "Facebook friends" who Mr. Thomas had found to have been incarcerated. Mr. Ramirez explained he knew two of the individuals but did not know they had been incarcerated.[4] Mr. Ramirez stated that the third individual, "Mr. X," was a friend of a friend, that he did not have recent contact with him and did not know he had been incarcerated. (Appellant Testimony).

12. In the section of the report entitled "Home Visit/Applicant Interview," Mr. Thomas wrote "Mr. Ramirez was asked about [Mr. X] who appeared as a friend of the applicant on social media website [sic]. [Mr. X] is currently incarcerated… Mr. Ramirez denied knowing [Mr. X]." (Ex. 5).

13. The day after the home interview, on December 7, 2018, Mr. Ramirez reevaluated his connections with people on his Facebook page and removed several people, including Mr. X, from his friends list. He removed those people whom he did not know well and did not have recent contact with. (Appellant Testimony).

14. Mr. Thomas believed the action of removing Mr. X from the Facebook page to be "noteworthy." His report states that by removing Mr. X's name, Mr. Ramirez was trying to "hide his association" with Mr. X. (Ex. 5; Thomas Testimony).

15. In addition to reevaluating his Facebook friends, Mr. Ramirez also contacted his family about his sibling and her partner. He then learned that his sibling had been incarcerated and that the sibling's partner, of whom he did not approve and who was the reason for the estrangement, had also been incarcerated. (Ex.5 ; Thomas Testimony; Appellant Testimony). In that communication, the Appellant explained to Mr. Thomas that he had been estranged from his sibling for many years, which is why he did not know she or her partner had been incarcerated. Mr. Ramirez stated that he occasionally saw his sibling's partner every few weeks when the partner, whom the sibling was no longer seeing, picked up their children. (Ex. 5; Thomas Testimony; Appellant Testimony).

16. Mr. Thomas' report stated that Mr. Ramirez had no explanation for omitting information about his sibling and sibling's partner being incarcerated. (Ex. 5).

17. As part of his investigation, Mr. Thomas contacted AstraZeneca to inquire about Mr. Ramirez's employment.[5] On December 13, 2018, he received an employment verification form generated by AstraZeneca, which states "employment status" as "Terminated." (Ex. 8). Mr. Thomas did not contact the company or Mr. Ramirez after receiving this information. (Thomas Testimony).

18. As part of the investigation process, Mr. Thomas obtained Mr. Ramirez's criminal background information (CORI). Parts of the CORI report relevant to this matter are the Board of Probation information (BOP) and the Driver History. (Exs. 9, 11).

19. On Mr. Ramirez' Driver History there are multiple entries. These entries include driving infractions relating to a lack of inspection sticker (2017, 2013, 2012, 2007); failure to wear a seatbelt (2012, 2010); a crosswalk violation (2014); and registration not in possession (2010). Non-payment of child support in 2012 appeared on the BOP. Mr. Ramirez' license was suspended for not paying fines and costs. Three surchargeable accidents occurred—one in 2012, one in 2006, and one in 2004. The BOP lists three violations of driving after a suspended license, all of which were dismissed when Mr. Ramirez paid the fines that were the cause of the suspensions. (Exs. 9 and 11; Thomas Testimony).

20. The section of the report entitled "Drivers History/Drivers License Data states: "Applicant has an active Massachusetts state driver's license… Last incident on the applicant's MA driving history was failure to pay a fines [sic] date 10/27/2017. Previous to that incident the applicant was cited on 9/21/2017 [for] an inspec-

4. Mr. Thomas stated testified Mr. Ramirez's Facebook page was publicly available information.

5. At the hearing, the Respondent stressed that Mr. Ramirez did not list his employment at AstraZeneca. This, however, was not listed as an issue or contributing factor in the investigator's background report, nor was it listed as a reason for bypass in the non-consideration letter. (Ex. 2, 5).

tion sticker. The applicant has an extensive driving history dating back to 2002." (Exs. 5, 9 and 11).

21. The report also states that in 2007, Mr. Ramirez had one dismissed charge of "Operating After," and two charges of "Operating After" in 2008 and 2013, which were closed after Mr. Ramirez paid fines owed.[6] (Exs. 5, 9 and 11).

22. Mr. Thomas did not discuss the items on the BOP with Mr. Ramirez at the home interview or at any other time. (Appellant Testimony)

23. Mr. Ramirez has no record of discipline. His supervisor at WRCH recommended him highly, stating that he would rate him a 9 of 10 for integrity and honesty. (Ex. 5).

24. At the end of the report, Mr. Thomas listed the positive employment aspects as training in CPR and restraint training, at least four years of stable work history, and several positive reference statements. Negative employment aspects were listed as:

- Applicant has a poor driving history;
- Applicant was less than truthful on this application by failing to disclose an employment termination; and
- Applicant was less than truthful on his application by failing to disclose at least three (3) family, in-laws, acquaintances and/or personal friends that are currently or have been incarcerated in any Federal, State, or County jail/prison. (Ex. 5).

25. Mr. Jalette, the DOC Commissioner, and HR personnel reviewed Mr. Ramirez's file. (Jalette Testimony).

26. On March 7, 2019, Mr. Ramirez was informed that he was not considered for the position of Correction Officer I because of the results of the background investigation. The non-consideration letter stated,

> Failed background investigation due [to] your MA Board of Probation (BOP), poor driver history and for omissions of untruthfulness; specifically you have three adult arraignments for operating on a suspended license, your driver history report indicates various negative entries from 2002-2017 to include a license suspension for non-payment of child support; you failed to disclose a termination from AstraZeneca of N. America and you failed to disclose at least 3 people that may [have been] or are incarcerated in any jail or prison. (Ex. 2).

LEGAL STANDARD

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 (2001), citing *Cambridge* v. *Civil Serv. Comm'n*., 43 Mass. App. Ct. 300 (1997).

Section 1 of G.L. c. 31 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."

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003). 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)).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the Appellant. After the Appeals Court's decision in *Beverly*, the Supreme Judicial Court, in *Boston Police Department* v. *Civil Service Commission and another*, 483 Mass. 461, 469 (2019), clarified that it is Appointing Authority's "burden to establish such reasonable justification by a preponderance of the evidence." *Id*. at 469.

ANALYSIS

The DOC has not shown that its decision to bypass Mr. Ramirez was based on an adequate review of Mr. Ramirez' background and that the decision was reasonably justified by a preponderance of the evidence.

An appointing authority is justified in bypassing a candidate who does not meet the pertinent standard. *See, e.g.*, *LaChance* v. *Erickson*, 522 U.S. 262 (1998)(lying in a disciplinary investigation alone is grounds for termination); *Goldrick* v. *New Bedford*, 32 MCSR 91, 94 (2019); and *Wine* v. *City of Holyoke*, 31 MCSR 19 (2018). "Labeling a candidate as untruthful can be an inherent-

6. Based on the driver history report, I deem "Driving After" to mean driving after one's license has been suspended.

ly subjective determination that should be made only after a thorough, serious and uniform review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Dabene* v. *Boston Police Department*, 31 MCSR 143 (2018). *See Morley* v. *Boston Police Department*, 29 MCSR 456 (2016) (based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that a federal police officer and a disabled veteran who had been deployed on active duty overseas on four occasions, was untruthful).

Two of the three reasons for bypassing Mr. Ramirez were DOC's determination that Mr. Ramirez was untruthful. DOC stated he did not disclose "at least" three family, in-laws, acquaintances or personal friends that are currently or have been incarcerated. This is not supported by the record. Mr. Ramirez had been estranged from his sibling for years; and did not know she had been incarcerated because it was, in essence, a family secret. Mr. Ramirez told the investigator this information on his own initiative the day after his home interview. On that date, he contacted the investigator for the specific purpose of informing him about these incarcerations, about which he had just been informed. In all, Mr. Ramirez was credible in his testimony and gave reasonable and understandable explanations for why he did not know, and therefore did not disclose, that his sibling and sibling's partner had been incarcerated.

The third individual who had been incarcerated was an individual, Mr. X, found listed as a "friend" on Mr. Ramirez's Facebook page. Mr. Ramirez told Mr. Thomas he no longer knew Mr. X. At hearing, he explained that this person was a friend of a friend, someone he used to know but no longer had contact with. He informed Mr. Thomas that he did not know that Mr. X was incarcerated. Further, Mr. Ramirez's testimony about his reason for the deletion of this individual from his Facebook account was clear and specific. Mr. Thomas' interpretation that Mr. Ramirez was trying to "hide" his acquaintance with Mr. X by removing him from his list of friends is not reasonable or based in fact. Mr. Ramirez had just learned from the investigator that Mr. X had been incarcerated. Based on his credible testimony I understand that he decided, in good conscience, to reevaluate his list of friends and remove those with whom he was no longer close. Mr. Thomas assumed that the Appellant had a negative reason for the removal and erroneously noted in his report that there was "no explanation" for not disclosing Mr. X and the other two individuals who were incarcerated.

Mr. Thomas' conclusion that Mr. Ramirez was untruthful about Mr. X, and was "hiding" his acquaintance with him, was made without basis in fact. Additionally, I find the phrase "at least" in the assertion that Mr. Ramirez "did not disclose 'at least' three family members" to imply that the investigator believed Mr. Ramirez to have known more incarcerated people than three but the investigator could not name them. While seemingly inconsequential, this phrase has the effect of indicating that Mr. Ramirez knows more than three people who have been incarcerated and willingly withheld information. Nothing in the record supports this implication and the lack of clarity in the report and non-consideration letter caused by the words "at least" gives rise to the prospect of implicit bias towards Mr. Ramirez for some reason other than his experience and qualifications for the position of CO I.

DOC cited a second reason it believed Mr. Ramirez to be untruthful. Based on the documentation from AstraZeneca, Mr. Thomas understood the word "termination" to mean "fired" and decided that Mr. Ramirez lied on his application when he did not disclose that he had been terminated. Mr. Ramirez was not terminated from AstraZeneca, a fact to which he credibly testified at hearing. He voluntarily left the company with a severance package when the company was in the midst of layoffs in 2008 during the economic downturn. Mr. Thomas did not contact AstraZeneca for more information and did not talk to Mr. Ramirez about how or why he left the company after receiving this report, even though Mr. Thomas received the paperwork shortly after the home interview and only three days after Mr. Ramirez contacted him to give him recently-acquired knowledge about his sibling and sibling's partner having been incarcerated.

Mr. Ramirez was entitled to more than a paper review of his situation, especially as he told the investigator about the voluntary layoffs and severance package and, especially, because he disclosed information about his family members to the investigator promptly, within a day of learning that information. Instead of making a deliberate and reasoned assessment of all of the facts that should be thoroughly considered in a proper background investigation, it appears that DOC relied primarily on the paper record. Given the serious nature and severe consequences of disqualifying a candidate for untruthfulness, a more thorough and reasoned evaluation should have taken place.

Because the DOC's finding of untruthfulness is not supported by the record, the remaining issue is whether the DOC's use of driving records as a reason to bypass Mr. Ramirez for a position as CO I was valid.

As the commission has stated in *Stylien* v. *Boston Police Department*, an appointing authority must evaluate an appellant's driving history in the proper context. *Stylien* v. *Boston Police Department*, 31 MCSR 209, 210 (2018)(context of driving record includes consideration of hours and locations). "An appointing authority, as part of a reasonably thorough review, should at least afford the applicant with the opportunity to address the underlying issues, either with the background investigator or the interview panel." *Wine* v. *City of Holyoke*, 31 MCSR 19, 24 (2018). By affording a candidate the opportunity to address driving infractions head-on, an appointing authority will have an adequate basis on which to decide whether the infractions have any bearing on the candidate's fitness to perform the responsibilities of the position. *See, e.g. Gibbons* v. *City of Woburn*, 32 MCSR 14 (2019). "In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment." *Kodhimaj* v. *DOC*, 32 MCSR 377 (2019).

DOC's investigative report, the non-consideration letter, and testimony did not clarify why the driving record was "poor" or

"extensive." The report stated that the most recent record on the Appellant's MA driving history involved a failure to pay fines on 10/27/2017. Previous to that entry, the Appellant was cited on 9/21/2017 for lack of an inspection sticker. The charge against Mr. Ramirez in 2017 for operating after a license suspension was dismissed after he paid the pertinent fines and costs. The two other charges of operating after license suspension occurred five or more years prior to Mr. Ramirez's application and were closed in 2008 and 2013 after fines and costs were paid. DOC has not explained why these violations might impact Mr. Ramirez's ability to be a CO I. The DOC has indicated that its look-back policy when considering candidates' records is generally five (5) years. *See Teixeira* v. *Department of Correction*, 27 MCSR 471 (2014) and *Whelan* v. *Department of Correction* 28 MCSR 168 (2015). Further, violations such as nonpayment of fines for inspection stickers may be attributable to socioeconomic factors, and, accordingly, may have no bearing on whether an appellant can effectively serve in a public safety position. *See Dorn* v. *Boston Police Department*, 31 MCSR 375, 376 (2018).

The events on Mr. Ramirez's driver history that were not economic in nature were accidents. In March of 2012, six years before his application to the DOC, Mr. Ramirez was involved in a surchargeable accident and two other surchargeable accidents occurred earlier, in 2004 and 2006. The DOC investigative report did not mention these incidents and the record as a whole shows no information about these past events. In determining the driving record to be "poor," the DOC did not make efforts to explain or qualify why the entries on the driver history reflect that Mr. Ramirez could not be trusted with the care and custody of inmates.

The DOC has not shown by a preponderance of the evidence that it had adequate reasons for the bypass that are sufficiently supported by credible evidence. Therefore, basic merit principles compel that he be afforded the opportunity for a fair and proper reconsideration of the merits of his present fitness for employment with the DOC.

CONCLUSION

For all of the above reasons, Mr. Ramirez's appeal under Docket No. G1-19-073 is hereby ***allowed.***

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the state's Human Resources Division and/or the Department of Corrections in its delegated capacity to take the following actions:

1. Place the name of Edwin Ramirez at the top of any current or future certifications for the positions of CO I until such time as he has been appointed or bypassed, to ensure that he receives at least one additional consideration for appointment.

2. DOC may not rely on those bypass reasons found to be unsupported in this decision in future hiring cycles.

3. If Mr. Ramirez is appointed as a CO I, he shall be granted a retroactive civil service seniority date equivalent to those appointed from Certification No. 05868.

4. This retroactive date is for civil service purposes only and is not meant to provide Mr. Ramirez with any additional pay or benefits, including any creditable time toward retirement.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on May 6, 2021.

Notice to:

Edwin A. Ramirez
[Address redacted]

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* * * * * *

NICHOLAS RUSSO

v.

HUMAN RESOURCES DIVISION

B2-21-057

May 6, 2021
Christopher C. Bowman, Chairman

***Examination Appeal-E&E Credits-Fire Lieutenant Examination-Failure to Complete E&E Online Component*—**Another examination appeal contesting the refusal to award E&E credits was dismissed by the Commission after the candidate for promotion to Fire Lieutenant was unable to show he had completed the online E&E module or produce an email from HRD confirming the same.

ORDER OF DISMISSAL

On March 8, 2021, the Appellant, Nicholas Russo (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not award him any education and experience (E&E) credit for the Fire Lt. examination.

2. On April 27, 2021, I held a pre-hearing conference via videoconference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

a. On 11/21/20, the Appellant took the Fire Lt. Examination.

b. The deadline for completing the E&E component of the examination was 11/28/20.

c. Although the Appellant initially recalled completing the online E&E component and claiming 2 points for 25 years of service, he did not receive a confirmation email confirming that he completed the E&E online component of the examination. He also candidly acknowledged that it is possible that he did not complete this requirement.

d. The Appellant did submit supporting documentation to HRD to verify his 25 years of service.

e. HRD sent the Appellant an email confirming receipt of the documents.

f. On 1/19/21, the Appellant received his score.

g. He received a written score of 70.77 and an E&E score of 0.

h. His total score was a failing score due to the E&E score of 0.

i. The Appellant filed an appeal with HRD.

j. HRD denied the Appellant's appeal on 2/20/21.

k. The Appellant filed a timely appeal with the Commission on 3/8/21.

l. The eligible list for Everett Fire Lt. has been established.

m. The Appellant is not on the eligible list.

n. Seven candidates are on the eligible list.

STANDARD FOR SUMMARY DECISION

A summary decision may be issued under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case." *See, e.g*., *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31 § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "…[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD'".

ANALYSIS

The facts presented as part of this appeal are not new to the Commission. In summary, promotional examinations, such as the one in question here, consist of two (2) components: the traditional written examination and the E&E component. HRD provides detailed instructions via email regarding how and when to complete the online E&E component of the examination. Most importantly, applicants are told that, upon completion of the E&E component, the applicant will receive a confirmation email—and that the component is not complete unless and until the applicant receives this confirmation email.

Here, it is undisputed that the Appellant sat for the written component of the Fire Lieutenant examination on November 21, 2020. He had until November 28, 2020 to complete the online E&E component of the examination. The Appellant acknowledges that he never received a confirmation email from HRD stating that the E&E examination component was completed and he candidly acknowledges that he may have skipped this portion of the E/E module. HRD has no record of the Appellant completing the E&E component, but, rather, only receiving supporting documentation.

While I am not unsympathetic to the Appellant's plight here, it is undisputed that: 1) HRD has no record showing that the Appellant completed the E&E component of the examination; 2) the Appellant did not receive a confirmation email verifying that he completed the E&E component; and, thus, 3) he is unable to show that he followed the instructions and actually completed the E&E component of this examination. Thus, this is not a case in which there is a genuine factual dispute that would require an evidentiary hearing.

Consistent with a series of appeals regarding this same issue, in which applicants have been unable to show that they followed instructions and submitted the online E&E claim, intervention by the Commission is not warranted as the Appellant cannot show that he was harmed through no fault of his own.

For this reason, the Appellant's appeal under Docket No. B2-21-057 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

Nicholas Russo
[Address redacted]

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

BRIAN SYLVESTER

v.

DEPARTMENT OF CORRECTION

D-19-210

May 6, 2021
Paul M. Stein, Commissioner

Disciplinary Action-Five Day Suspension of Correctional Officer-Failure to Notify DOC of Absence From Work—DOC had just cause to suspend a correctional officer for five days for failing to notify MCI-Norfolk that he would be absent from work where his captain followed the proper procedures and the Appellant had a lengthy disciplinary history that included 10 incidents relating to attendance.

DECISION

The Appellant, Brian Sylvester, acting pursuant to G.L.c.1,§43, appealed to the Civil Service Commission (Commission), challenging the decision of the Respondent, the Massachusetts Department of Correction (DOC), to suspend him for five (5) days from his position of DOC Correction Officer I.[1] The Commission held a pre-hearing conference in Boston on October 29, 2019 and a full hearing on December 20, 2019 in Boston and on January 17, 2020 in Bridgewater, both of which were declared private and digitally recorded.[2] Both parties filed Proposed Decisions. For the reasons stated below, the appeal is denied.

FINDINGS OF FACT

Fourteen (14) exhibits were received in evidence by the Respondent and four (4) exhibits were received in evidence by the Appellant. Post-hearing proposed decisions were submitted. Based on the documents submitted and the testimony of the following witnesses:

For the Department of Correction:

- Captain Scott Plante, Department of Correction
- Captain Brian Purcell, Department of Correction
- Superintendent Stephen Kennedy, Department of Correction

For the Appellant:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq*., apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

2. CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

- Brian Sylvester, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Brian Sylvester, has been a Department of Correction (DOC) Correction Officer I (CO) since February 7, 2007 and is assigned to the 7AM to 3PM shift at MCI Norfolk. (*Testimony of Appellant; Testimony of Purcell*).

2. The Appellant's Disciplinary History with the DOC includes the following entries:

September 11, 2018	Three (3) Day Suspension	Failed to Provide Satisfactory Medical Evidence
June 27, 2018	Five (5) Day Suspension[3]	Arrest for Domestic Assault and Battery (AB) and AB Dangerous Weapon
September 30, 2016	One (1) Day Suspension	Failed to Provide Satisfactory Medical Evidence
May 10, 2016	Letter of Reprimand	Failed to Report to Work, Did Not Have Enough Benefit Time to Cover Absence, Unauthorized Leave
May 13, 2015	Letter of Reprimand	Absent from Work Illness w/ No Benefit Time
November 14, 2011	Letter of Reprimand	Tardiness
October 13, 2010	One (1) Day Suspension	Failed to Submit Satisfactory Medical Evidence
September 28, 2009	Letter of Reprimand	Failed to Provide Medical Documentation
August 31, 2009	One Day Suspension	Failed to Provide Medical Documentation
December 24, 2008	Letter of Reprimand	Failed to Provide Satisfactory Medical Documentation
November 21, 2008	Letter of Reprimand	Failed to Provide Satisfactory Medical Evidence

(*Respondent Exhibit 6*).

3. On September 23, 2018, Mr. Sylvester was scheduled to work his typical 7AM to 3PM shift at MCI Norfolk. He was expected to report for duty at 6:50AM. (*Testimony of Appellant; Testimony of Plante; Testimony of Purcell*).

4. Captain Scott Plante, a (15) fifteen-year veteran of the DOC, was the Shift Commander at MCI-Norfolk that morning. At 6:55 AM, Captain Plante advised Outer Control at MCI Norfolk to contact Mr. Sylvester via telephone since he had not arrived at work. Outer Control was unable to reach Mr. Sylvester. (*Testimony of Plante; Respondent Exhibit 9*).

5. By 8:30 AM, now one (1) hour and forty (40) minutes after roll call, Captain Plante gave Outer Control an order to try to make telephone contact again with Mr. Sylvester. The facility was unable to reach Mr. Sylvester and voice mail messages were left on his phone. (*Testimony of Plante; Respondent Exhibit 9*).

6. Captain Plante informed his supervisor, Deputy Superintendent Bennett, that Mr. Sylvester was a "No Call/No Show" for his shift that day. Deputy Bennett told Captain Plante to give Mr. Sylvester more time to contact the facility and to let her know if he had not done so in an hour. (*Testimony of Plante; Respondent Exhibit 9*).

7. At 9:30AM, Captain Plante informed Deputy Superintendent Bennett that Mr. Sylvester had still not contacted the facility. At that time, Deputy Superintendent Bennett authorized Captain Plante to contact the Braintree Police, the city in which the Appellant lived, to conduct a wellbeing check of Mr. Sylvester.[4] (*Testimony of Plante; Respondent Exhibit 9*).

8. Braintree Police Sergeant Cohoon informed Captain Plante at 11:30AM that he had made contact with Mr. Sylvester at his home and that he was safe. Sergeant Cohoon told Mr. Sylvester to contact the facility where he worked. The Braintree police sergeant's call did not constitute notification that Mr. Sylvester would be tardy or not reporting to work at all that day. Mr. Sylvester was required to contact the facility on his own. (*Testimony of Plante; Respondent Exhibit 9*).

9. The Department of Correction's Rule 18(a) specifies that an employee is expected to notify the facility in which he is assigned of any delayed arrival or anticipated absence at least one (1) hour prior to a scheudled shift. The Appellant's Collective Bargaining Agreement (CBA), as described by the witnesses, indicates that the employee must notify the DOC facility at the first available opportunity. (*Testimony of Plante; Testimony of Appellant; Testimony of Purcell; Testimony of Kennedy; Respondent Exhibit 12*).

10. Mr. Sylvester finally contacted MCI Norfolk at 1:02 PM, an hour and a half after Braintree police encountered the Appellant at his home at 11:30 AM. His eight (8) hour shift was set to end in two (2) hours. Mr. Sylvester spoke directly to Captain Plante and said that he would not be in for his shift. (*Testimony of Plante; Respondent Exhibit 9*).

11. When Mr. Sylvester spoke to Captain Plante at 1:02 PM that day, he did not state that he was sick. The DOC Incident Report makes no mention that Mr. Sylvester indicated he was calling in sick for the remainder of his shift. The Duty Roster was never changed to indicate a change of status to SL (sick leave). (*Testimony of Plante; Respondent Exhibits 9 & 10*)[5]

12. Mr. Sylvester's phone call at 1:02 PM is not a satisfactory notice of absence, either under Department Policy Rule 18(a) or

3. The Appellant testified that this discipline was reduced from five (5) days to three (3) days.

4. Just one year prior, an officer for the DOC had not reported for duty and was later found deceased in his vehicle. Additionally, another officer who worked at Cedar Junction did not report for duty and was found to have had passed away in his home. Such is the reason why Captain Plante requested a well-being check. (*Testimony of Plante*)

5. [See next page.]

the Appellant's CBA. All Correction Officers are aware that they are required to notify the facility of their expected absence for their shift. The DOC provides all employees with a "Blue Book" which entails the Rules and Responsibilities of the Department. This document is given to all recruits at their training and they are required to sign and acknowledge receipt. Rule 18(a) of this document requires all employees to be punctual for their regular hours of duty. This rule does not allow an absence for duty and/or tardy without permission or proper notification. (*Testimony of Plante; Respondent Exhibits 5, 11, 12*).

13. It is important for officers to call in before their shift if they are going to be absent or late, since the DOC needs to backfill the absence and hire others for overtime. They are expected to call one (1) hour before their shift or no later than the "first opportunity." The DOC needs notice ASAP to fill the vacancy. (*Testimony of Kennedy*).

14. If someone is in a motor vehicle accident or similarly incapacitated and unconscious, that can excuse the officer for non-notification. Falling asleep, however, "it is not a good excuse." If an employee oversleeps, he is to call the institution *as soon as he wakes up* and indicate when he will be in or that he is out sick. According to Captain Purcell, when asked at the Commission hearing if he could think of any reason why a delay of three (3) hours (after having been woken up) to notify the facility is justified, Captain Purcell could not think of one. (*Testimony of Purcell; Respondent Exhibits 7; Respondent Exhibit 12*).

15. At no time was Mr. Sylvester in the hospital on September 23, 2018. (*Testimony of Appellant*).

DOC Investigation Hearings and Discipline Imposed

16. On September 25, 2018, (then) Deputy Superintendent Stephen Kennedy requested a fact- finding hearing to be conducted relative to Mr. Sylvester's absence from work on September 23, 2018. (*Testimony of Kennedy; Respondent Exhibit 8*).

17. Stephen Kennedy is a twenty-eight (28) year veteran of the DOC, having been a CO, a Sergeant, Lieutenant, Director of Security, Deputy Superintendent and a Special Investigator assigned to Internal Affairs. At the time of this incident, Kennedy was the Deputy Superintendent of Operations at MCI Norfolk, wherein he was the second in command with oversight of the facility, the physical plant, security, operations, and food services. (*Testimony of Kennedy*).

18. The Appellant's fact-finding hearing was conducted on October 10, 2018 and October 11, 2018. Captain Brian Purcell presided. Captain Purcell is a thirty-one (31) year veteran of the DOC, rising through the ranks from Officer, to Sergeant in 2005, Lieutenant at MCI Norfolk, and Captain in 2018. (*Testimony of Purcell; Respondent Exhibit 7*).

19. Mr. Sylvester and his union representative, Officer Peter Hopgood, were present at the fact-finding hearing. During the hearing, Mr. Sylvester was asked why he failed to report for duty on the day in question. Mr. Sylvester indicated that he used his phone as his alarm clock and he forgot to put the phone on the charger and the battery died. He then stated that he woke up when the Braintree Police arrived for a wellness check and that the Braintree sergeant told him that he would notify MCI Norfolk that he was okay. Mr. Sylvester said that he put his phone on the charger and then fell back to sleep. He then stated that he realized he had not called and contacted the facility and told Deputy Kennedy that he was calling in sick for the rest of his shift.[6] Mr. Sylvester acknowledged to Captain Purcell at the fact-finding hearing that he knew it was wrong not to immediately notify the institution of his intentions. (*Respondent Exhibit 7*).

20. Captain Purcell found that Mr. Sylvester violated the Department Blue Book, specifically Section 18(a). *Testimony of Purcell; Respondent Exhibits 7; Respondent Exhibit 12*).

21. On November 19, 2018, MCI Norfolk Superintendent Brad Cowen accepted Captain Purcell's finding that Mr. Sylvester violated Section 18(a) of the Blue Book and issued a five (5) day suspension without pay to be served February 17 through 21, 2019. (*Respondent Exhibit 5*).

22. Mr. Sylvester's union, Massachusetts Correction Officers Federated Union (MCOFU), duly appealed the discipline of Mr. Sylvester to Step II and a hearing was held on January 15, 2019 before Deputy Commissioner Grant. Present at the hearing were the Appellant, his MCOFU Steward Peter Hopgood who spoke on Appellant's behalf, and (then) Deputy Superintendent Stephen Kennedy. By memorandum dated August 26, 2019 from Deputy Commissioner Grant to DOC Commissioner Mici, he concluded that *just cause* had been established and the discipline would be upheld. (*Respondent Exhibit 3*).

23. On September 17, 2019, DOC Commissioner Mici adopted the conclusion of Deputy Commissioner Grant and upheld the 5-day suspension of Mr. Sylvester for violation of DOC Rule 18(a), No Call/No Show. (*Respondent Exhibits 2, 12 & 14*).

24. Mr. Sylvester duly appealed the discipline to the Commission. (*Respondent Exhibit 1*).

Appellant's Civil Service Appeal

25. At the Commission hearing, Mr. Sylvester said he was not a No Call/No Show and it was just "an honest mistake." Mr. Sylvester admitted that he missed the beginning of his 7AM-3PM shift, that a Braintree police sergeant awakened him at 11:30 AM, and after the sergeant left, the Appellant fell back asleep. He admits he notified his employer of his absence well after the 11:30 police visit. He admits that he did not call in one (1) hour prior to his shift, as

5. The DOC disputes Mr. Sylvester's claim that he called in sick at 12:15PM. I credit the DOC's Incident Report and the testimony of Capt. Plante, and find that Mr. Sylvester did not contact the facility until 1:02PM and made no mention of his illness to Capt. Plante.

6. As indicated in my findings above, the DOC Incident Report makes no mention that Mr. Sylvester indicated he was calling in sick for the remainder of his shift. The Duty Roster was never changed to indicate a change of status to SL (sick leave). (*Testimony of Plante; Respondent Exhibits 9 & 10*)

is Department policy, but claims that he was within his CBA rights to "notif[y] the facility at the first available time that day . . . . I called in as soon as possible on the first day of absence." He also admits that he was never in the hospital on that date. (*Testimony of Appellant*).

26. Mr. Sylvester reiterated his claim that he should be excused from the absence because he provided a chiropractor note to the DOC purportedly indicating he was sick that day. However, when asked a direct question what physical complaint had caused him to allegedly call in sick for the rest of the shift and what complaint he had when he saw the chiropractor two days later.[7] Mr. Sylvester initially said that it was "confidential" and then, when pressed, he stated that he "did not remember" what caused him to call in sick for the remainder of the shift, but that he "got a note." (*Testimony of Appellant; Exhibit 15*).

27. An employee who is a No Call/No Show for his shift, and then brings in a sick note, is not necessarily exonerated from the duty to give prior notice to the DOC of his tardiness or absence. A sick note only substantiates an *authorized* medical absence.[8] Mr. Sylvester's absence had been deemed *unauthorized* by the DOC. He did not need a sick note and the DOC was not required to accept it. This was already an *unauthorized* absence because there was no notice. (*Testimony of Kennedy*).

28. The DOC looks to the totality of the circumstances surrounding any employee's failure to report to work or call in. There are true emergency situations, where an employee may have been in an accident, was having a crisis with a child, or was hospitalized. At the fact finding hearing, the employee is given the chance to explain the details and a sick note *may* corroborate the employee's testimony as to why they were absent or tardy and unable to give prompt notice. Had the DOC been presented with evidence of a "true emergency", which I find was not the case, the DOC would have taken that into consideration. (*Testimony of Kennedy*).

29. Superintendent Kennedy never considered Mr. Sylvester's discipline to be "harsh", or told Mr. Sylvester he could win the appeal on disparate treatment grounds, as Mr. Sylvester alleged. On the contrary, Kennedy never said anything of that sort and is aware of the Appellant's disciplinary history. What the Appellant alleges (i.e., encouragement to appeal) "would be the furthest from what my recommendation" would be if he (Kennedy) were the person imposing the discipline. (*Testimony of Kennedy*)

30. This discipline imposed by DOC in this case was based solely on Mr. Sylvester's failure to notify DOC promptly of his absence, i.e. a No Call/No Show. (*Testimony of Kennedy*).

APPLICABLE LEGAL STANDARD

G.L.c.31, §41-45 allows discipline of a tenured civil servant for "just cause" after due notice, a hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of the decision that states "fully and specifically the reasons therefor." G.L.c.31, §41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission "for the purpose of finding the facts anew." *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. As prescribed by G.L.c.31, §43, ¶2, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a preponderance of the evidence.

> "*If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights*; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority." (*Emphasis added*)

The Commission determines just cause for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm.* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488, *rev.den*., 426 Mass. 1104 (1997); *Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983)

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. *See also Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) (appointing authority must provide "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law" for discharge of public employee), citing *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) (justifica-

7. Mr. Sylvester provided the DOC with a Sick Leave Slip (Attachment A) from a chiropractor, dated September 25, 2018, which stated that he was unable to perform his duties on September 23, 2018. (Appellant Exhibit 15). Mr. Sylvester claims the DOC did not consider this Sick Leave Slip when it disciplined him for this matter. The DOC disputed this claim, pointing out that the medical documentation was included in the disciplinary file, but not introduced into evidence by DOC because the issue was the failure to call in, not the legitimacy of the medical excuse. Even if I were to credit the medical note, which I do not, that would not change my decision on the Section 18(a) violation.

8. Pursuant to DOC sick leave policy (103 DOC 209, Section 5), if an employee has accrued over 48 hours of sick time in one year, the employee is required to present a sick leave slip (Attachment A) upon the first day back to work after the absence. Section 6 notes that if an employee is over his 48 hours of unsubstantiated sick leave he is then responsible to provide satisfactory medical evidence within seven (7) days using the proper form (Illness Certification Form). (*Email from Respondent to Commission, dated December 23, 2018; Exhibit 13*)

tion for discharge of public employee requires proof by a preponderance of evidence of "proper cause" for removal made in good faith) It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "[only] separating employees whose inadequate performance cannot be corrected." G.L. c.31, §1.

Section 43 of G.L.c.31 also vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. *See, e.g., Police Comm'r* v. *Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority"). *See also Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006), quoting *Watertown* v. *Arria,* 16 Mass. App. Ct. 331, 334 (1983).

ANALYSIS

The preponderance of the evidence in this appeal establishes that the Department of Corrections had just cause to impose discipline upon Correction Officer Brian Sylvester for failure to notify the DOC of his absence for his shift at MCI Norfolk on September 23, 2018, in violation of Blue Book Rule 18(a). Mr. Sylvester was due to report for duty at 6:50 AM on September 23, 2018 for his 7 AM to 3 PM shift. DOC policy requires an employee to notify the facility he works one (1) hour before his shift is set to begin that he will be absent or tardy for his PM shift. Mr. Sylvester's CBA required that he notify DOC "as early as possible." He did neither.

Mr. Sylvester called into MCI Norfolk and spoke directly to Captain Plante at 1:02PM, six hours (6) and twelve (12) minutes after his shift began. The DOC determined Mr. Sylvester to be a No-Call/No-Show for his shift, even after receiving the phone call. The shift was 75% over. Even using the CBA standard of notifying the institution "as early as possible" there is no way that Mr. Sylvester notified the DOC as early as possible. Mr. Sylvester claims that his cell phone was dead; therefore, his cell phone alarm clock never went off. Such is an understandable predicament; however, even if Mr. Sylvester had overslept right through the entire morning and never, once, awaked until the Braintree police arrived (almost 5 hours after his shift began), he still did not contact the facility at 11:30AM once the police left his home. He admits that he went back to sleep. I do not credit the Appellant's testimony that he called at 12:15PM, nor would even that have been "as early as possible." [9]

Mr. Sylvester claims that he provided the DOC with adequate medical documentation to completely excuse his absence, even despite his lack of notification. Captain Plante, whose testimony I credit, rejected this excuse. When Mr. Sylvester called the facility to report that he would not be in for his shift, at no time during that conversation did Mr. Sylvester claim to be sick. Mr. Sylvester presented the DOC with a note from a chiropractor he went to see two days after his No Call/No Show. At the Commission hearing, Mr. Sylvester refused to state why he saw a chiropractor on September 25, 2018 or from what ailment he suffered on September 23, 2018, stating, initially, that it was confidential and then claiming he could not remember. If he were involved in an emergency situation or had been in the hospital, for instance, the DOC would have regarded this medical documentation as corroboration of such an emergency. Mr. Sylvester does not claim to have been hospitalized nor does the evidence presented show any type of emergency. The DOC considered the medical note the Appellant provided yet was unpersuaded (as am I) by its contents to change the conclusion of misconduct—that being a No-Call/No-Show on the date in question.

I find that the DOC's discipline was imposed for just cause upon adequate reasons and sufficiently supported by credible evidence. Specifically, the DOC proved that that Mr. Sylvester's was guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service by his inexcusable neglect to provide DOC with proper and prompt notice of his absence on September 23, 2018. *School Comm.* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488, *rev.den*., 426 Mass. 1104 (1997); *Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983). This absence was unauthorized. A sick note only substantiates an authorized absence. The chiropractor's note did not exonerate the Appellant's unjustified delay in providing proper notice to the DOC of his absence.

Having concluded that discipline was warranted, I have also considered whether the Commission should modify the discipline imposed. I conclude that a modification is not warranted.

As part of its review, the Commission must consider whether there is any evidence of political considerations, favoritism, or bias in a public employer's decisions. *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006). Here, I have found none. Captain Plante, Captain Purcell, Deputy Superintendent Kennedy, are all solid witnesses who acted in accordance with DOC rules and regulations. Mr. Sylvester. violated DOC rules and failed to notify the DOC that he would not be reporting to work. I find no evidence to support the Mr. Sylvester's allegations that (then) Deputy Superintendent Kennedy targeted the Appellant. (Then) Deputy Superintendent Kennedy did not impose the five (5) day suspension on Mr. Sylvester. Initially, the MCI Norfolk Superintendent, did and the decision was affirmed by Deputy Commissioner Grant and Commissioner Mici, who followed all procedures required under G.L. c. 31, Sections 41-45.

Nor did Mr. Sylvester present any reliable proof of disparate treatment. At the Commission hearing, he provided copies of purported comparative discipline of DOC employees who have been disci-

9. The credibility of live testimony lies with the hearing officer. *E.g.*, *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty* v. *Ret. Bd. of Medford*, 425 Mass. 130, 141 (1997). *See also Covell* v. *Dep't of Social Services*, 439 Mass. 766, 787 (2003) (assessment of conflicting testimony cannot be made by someone not present at the hearing).

plined for No Call/No Show from 2015-2018. The DOC objected to this document being entered into evidence, since the DOC had never seen this document before, it had not been authenticated, and the DOC could not assess whether the data within it were accurate or complete. I allowed the document into evidence as Exhibit 18 "for what it may be worth", noting its late submission. Upon further review of the document, it provides no comprehensive disciplinary history regarding the employee for each entry of No Call/No Show, and I have no way of determining if the discipline of that particular employee was actually disparate treatment, especially given the limited opportunity for scrutiny of the data by DOC. I have given no weight to this document as evidence of disparate treatment.

The Appellant's contention of disparate treatment, is also not persuasive in view of Mr. Sylvester's long disciplinary history with eleven (11) entries on it, ten (10) of which are related to attendance issues for which he had recently been disciplined with a three (3) day suspension. He previously also received two (2) day suspensions, a five (5) day suspension, and six (6) Letters of Reprimand.

Finally, the facts on which the DOC relied to impose a five (5) day suspension do not differ significantly from those I found on de novo review. As such, I find no basis on which the Commission would be warranted to modify the five (5) day suspension imposed in this case.

For these reasons, the appeal of the Appellant, Brian Sylvester, in Case No. D-19-210 is hereby **DENIED**.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

Brian Sylvester
[Address redacted]

Joseph S. Santoro, Esq.
Labor Relations Advisor
Department of Corrections
PO Box 946, Industries Drive
Norfolk, MA 02056

* * * * * *

JOHN TIVINIS

v.

CITY OF SOMERVILLE

G1-20-045

May 6, 2021
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Somerville Reserve Police Officer-Immaturity-Poor Interview-Nepotism—A candidate for original appointment as a permanent Somerville reserve police officer was not improperly bypassed where his interview and life experience showed a lack of maturity, an absence of adult responsibilities, and his interview was marked by weak responses to hypothetical questions. Chairman Christopher C. Bowman reviewed this case very carefully for any traces of nepotism, given that one of the candidates that bypassed the Appellant was a Somerville police captain's son, but found none.

DECISION

On March 16, 2020, the Appellant, John Tivinis (Mr. Tivinis or Appellant), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to bypass him for original appointment to the position of permanent reserve police officer in the City's Police Department (SPD). A pre-hearing conference was held remotely by video conference on May 12, 2020.[1] The full hearing was recorded via Webex and both parties received a link to access the recording.[2] Both parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Six (6) Joint Exhibits, forty-eight (48) Appellant Exhibits, and one (1) City Exhibit were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

Called by the Somerville Police Department:

- Skye Stewart
- Steven Carrabino, Deputy Chief
- David Fallon, Chief

Called by Appellant:

- John Tivinis, Appellant

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording sent to the parties should be used by a transcriptionist to transcribe the hearing.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Tivinis is twenty-five (25) years old and was raised in Middleton, MA. He graduated from Masconomet High School in Boxford, MA in 2013. Thereafter, he attended one (1) year of college at North Shore Community College. (Testimony of Appellant).

2. On December 4, 2019, HRD issued Certification No. 06794 to the City of Somerville, authorizing the City to appoint ten (10) reserve police officer candidates. (Joint Ex. 1).

3. Mr. Tivinis appeared 14th on this Certification. (City Exhibit 1).

4. The City requested an expansion of vacancies based on the number of candidates it anticipated sending to the Academy, along with the attrition rate of candidates entering the Academy. (City Exhibit 1).

5. On January 6th, 2019, HRD approved the City's request to expand the number of candidates for potential appointment from ten (10) to sixteen (16). (Stipulated Fact).

6. The City uses its reserve list to immediately fill spots in the police academy, and then hire graduated officers without further hiring process. Therefore, if the City intended to fill ten (10) academy spots using this Certification, it also had room on its reserve list for additional officers. (City Exhibit 1; Testimony of Chief Fallon).

7. Chief David Fallon (Fallon) wanted extra officers on the reserve list so that when the time came to fill seats in the academy, he did not have to wait for the hiring process to play out. (Testimony of Chief Fallon).

8. The City ultimately sent conditional offer letters to nine (9) candidates on Certification No. 06794. Of those nine candidates, seven (7) candidates were ranked below Mr. Tivinis. (Joint Exhibit 1; Joint Exhibit 6).

9. The City only sent nine (9) conditional offers because the panel felt that only nine (9) applicants were viable candidates for the position. (Testimony of Stewart; Testimony of Carrabino)

10. One of the candidates below Mr. Tivinis who was given a conditional offer is the son of a Somerville Police Captain. He was ranked 27th on the Certification. (Joint Exhibit 1; Testimony of Carrabino).

11. All candidates on Certification No. 06794, including Mr. Tivinis, who went through the City's hiring process were required to submit documentation to the City including an application, resume, credit scores, tax returns, verify residency through a residency check, and undergo a background investigation conducted by a detective of the SPD. (Testimony of Carrabino).

12. Following the background investigation, all candidates, including Mr. Tivinis, were interviewed by the same Interview Panel consisting of the following individuals: Skye Stewart (Stewart) (former Chief of Staff to the Appointing Authority Mayor Curtatone); Deputy Chief Stephen Carrabino (Carrabino) of the SPD; and the Deputy Director of Health and Human Services for the City of Somerville, Nancy Bacci. (Testimony of Stewart; Testimony of Carrabino).

13. Before becoming a deputy in the Somerville Police Department, Carrabino held the following positions in SPD: patrol officer, community police officer, detective, head of the domestic violence unit, head of the gang unit, liaison to the Mayor, commander, and as a captain was in charge of half the patrol operations in the City. He has been a deputy for the past six years. (Testimony of Carrabino).

14. Skye Stewart served as the Chief of Staff to Mayor Joseph Curtatone in the City of Somerville from June of 2016 until her departure in August of 2019 (due to her family move to Michigan). In this role, she was a senior advisor to the Mayor; managing his line of sight on several high priority projects and initiatives; serving as the direct liaison to different department heads including the public safety department heads, the HR director with whom she worked closely on hiring, collective bargaining, operational issues and financial issues, conducting strategic planning around staffing levels. In this role, she was also the direct supervisor for the Chief of Police, Fire Chief, Personnel Director, Finance Director, Director of Strategic Planning and Community Development, etc. As Chief of Staff, she would stay informed of upcoming certifications, promotional process timelines, and any potential bypasses in the civil service hiring processes. She also managed the municipal legislative process of getting the candidates before the City Council for confirmation to civil service positions after conditional hiring offer letters were issued. (Testimony of Stewart).

15. Prior to serving as Chief of Staff, Skye Stewart worked as an analyst in the City's SomerStat office in 2011, became budget manager for the City in 2014, then moved into the Director role in SomerStat in 2014. She was often involved in senior level hiring for directors of various Departments and other City employees and for her own staff in her role as Director. SomerStat is where all operational, performance data is managed in the City to help all departments better use data for decision-making. (Testimony of Stewart).

16. Stewart was contacted in the beginning of February 2020 by the then current Chief of Staff for the Mayor and asked if she had any availability and willingness to sit in on the Interview Panel for police reserve candidates on Certification No. 06794. The City Personnel Director who normally sat on these interview panels was on leave. (Testimony of Stewart).

17. Nancy Bacci, the Deputy Director of Health and Human Services for the City of Somerville was the third panelist for the City's interviews. She has participated in past hiring processes and interviews. She works closely with the police department in her role with the City. (Testimony of Stewart).

18. Prior to the interviews, all interview panelists were given access to electronic files of the various candidates. These files consisted of documents such as the candidates' full application, resume, transcript, tax returns, credit scores, military documentation, certifications, police records and background investigation reports. (Testimony of Stewart; Testimony of Carrabino).

19. The interview panel met to discuss the candidates on the day of the candidates' interviews. The panel reserved half an hour to discuss any concerns they had based on their individual review of the electronic file prior to each interview. (Testimony of Stewart; Testimony of Carrabino).

20. During the interviews, the panelists took turns asking questions. The general format for each interview was the same. The panel would meticulously go through each line of the multi-page application the candidate completed. Following that review, the panel walked the candidate through the findings of the background investigator's report. Finally, the candidate was then asked seventeen (17) standard interview questions, which included numerous hypothetical scenarios. Once this process was complete, every candidate was given the opportunity to ask any questions he or she had before the interview was complete. (Testimony of Carrabino; Testimony of Stewart; Joint Exhibits 2-5; Appellant Exhibits 1-48).

21. Every candidate interview was audio recorded, with the consent and knowledge of the candidates, by the City and has been submitted as evidence at the hearing of this matter. (Appellant's Exhibits 28-36, 48).

22. Once a candidate's interview was over, Jessica Pavao of the City's HR (Personnel) Department came into the room and gathered any documents the panelists had written on, and jotted down on a yellow piece of paper the top concerns the panel had with each individual candidate. She then assembled this yellow paper capturing the general concerns and any documents the panelists had taken notes on or highlighted, into an "interview packet" that the panel could refer to later when reviewing the candidates. (Testimony of Stewart; Appellant's Exhibits 19-27).

23. Following the final candidate interview, the panel met again to discuss and review every candidate. The panel made a unanimous decision as to which candidate would be bypassed and which candidate would be given a conditional offer of employment. (Testimony of Carrabino; Testimony of Stewart).

24. Following Mr. Tivinis' interview with the panel, he was notified by the Appointing Authority on March 3, 2020 that he would not be given a conditional offer of employment at that time. The bypass letter noted that panel was "concerned with your overall suitability for the position of Police Officer based on information you shared during your interview and your responses to several interview questions." (Joint Exhibit 6).

25. Ms. Stewart drafted every bypass letter and utilized this packet to do so. Stewart presented the bypass letters to the current-Chief of Staff, who in turn had the Mayor review those letters. The following day, Ms. Stewart received a phone call from the Chief of Staff indicating that the Mayor supported the letters and to move forward with the process. (Testimony of Stewart; Appellant's Exhibits 37-47; Joint Exhibit 6).

Panelists' Concerns with Appellant's Answer to School Discipline Questions

26. In Mr. Tivinis' application packet, he was asked: "Were you ever suspended or dismissed from a school or was any disciplinary action, including scholastic probation, ever taken against you during your scholastic career." Mr. Tivinis answered "yes" and provided an explanation of a physical altercation in high school that resulted in his suspension. (Joint Exhibit 2).

27. The panel interviewed Mr. Tivinis on February 9, 2020, for two hours and three minutes (2.03). Mr. Tivinis was asked about his educational history at length, including his disciplinary history. The panel asked Mr. Tivinis to speak to the significant number of absences and tardiness in his transcript, 39 tardies and 102 absences. In one particular class, Financial Management, he was tardy 23 times and absent 27 times. What concerned the panel was that he had "not served as ordered." (Testimony of Stewart; Testimony of Carrabino; Joint Exhibits 2, 3, 5).

28. Mr. Tivinis' punishment for being tardy was to pick up trash in the cafeteria on numerous occasions. Mr. Tivinis chose not to pick it up the trash when he felt he did not deserve the punishment because his father told him not to do it. His father had told him that the school has janitors to do that. He rationalized his failure to follow the school's orders by stating that other students, even the "straight A students," chose not to pick up the trash. He told the panel that he did not feel he deserved to pick up trash if he was only 30 seconds late or if he had been in the bathroom before homeroom and the teacher marked him late for school. In those circumstances, he did not believe he deserved punishment, so he did not comply. (Testimony of Stewart; Testimony of Carrabino; Joint Exhibit 5).

29. The crux of the panel's deep concern with this interview response was that Mr. Tivinis had clearly failed to learn from his experiences in high school relative to school discipline. The City noted that it was not the fact that Mr. Tivinis was disciplined—indeed other candidates had been disciplined in high school and the panelists understand that it is not unusual for students to have problems in high school. The panel's concern was that Mr. Tivinis both now, as an adult, and back then as a student, could not grasp why it was important for him to listen to authority and follow the school's orders. As a paramilitary organization, it is essential for a police officer follow orders, even those he does not feel like following, since a large part of being a police officer is responding to orders. (Testimony of Stewart; Testimony of Carrabino).

30. During the interview, Mr. Tivinis had not changed his attitude about his failure to follow a directive and accept the discipline. Instead, he continued to rationalize it by saying that his father agreed with him, that other students refused, and he did not receive further discipline because of his refusal to comply. (Joint Exhibit 5; Testimony of Stewart; Testimony of Carrabino).

Panelists' Concerns with Appellant's Employment History & Financial Responsibilities

31. In Mr. Tivinis' application, he indicated he worked ten (10) hours per week at his father's business, Fellsway Auto Repair, since 2013, when he graduated high school. (Joint Exhibit 2; Testimony of Appellant).

32. The information in the 2019 Somerville Police Department application conflicts with reports from the background investigation the Department undertook as part of the Appellant's candidacy. For example, Mr. Tivinis' girlfriend stated that he was a "workaholic" and another reference stated that Mr. Tivinis worked 12-hour days and sometimes worked on Saturdays. (Joint Exhibit 3).

33. During the interview, Mr. Tivinis was asked about these discrepancies and he stated that his hours varied based on when his father needed him and also that a lot of his time in the shop was spent working on his own dirt bikes and snow mobiles. (Joint Exhibit 5).

34. During the interview, Mr. Tivinis was asked why, at twenty-five (25) years old, he had never filed income taxes. He stated that he did not get paid for his work at his father's auto shop since he and his father had an agreement that the Appellant would care for his sick mother. Mr. Tivinis stated, "we're a privileged family and he just kind of took—he took care of us." (Joint Exhibit 5).

35. Mr. Tivinis has never worked a full-time job nor has he ever worked anywhere other than his father's business. (Joint Exhibit 5).

36. During the interview, Mr. Tivinis stated that he recently asked his father to be paid and his father said he would talk to his accountant. (Joint Exhibit 5).

37. At the time of the interview, Mr. Tivinis noted that his father puts money on his debit card and he uses that money to pay his credit card bills. He also stated that his mother goes to the bank and puts money into his account. At the time of the February 2020 interview, Mr. Tivinis did not personally pay for his rent, utilities, health insurance, streaming television, or car insurance. (Joint Exhibit 5).

38. Mr. Tivinis drove his father's vehicles until 2019 and his grandfather's Volvo, as well. He would use "whatever vehicle his father wasn't using." (Joint Exhibit 5).

39. Mr. Tivinis' father had purchased a jet ski in the Appellant's name and pays for the insurance, in addition to a $12,000 snowmobile. His parents had paid for his vacation to the Dominican Republic. His father has also given the Appellant money to purchase firearms. (Joint Exhibit 5).

40. The interview panel was concerned with the Appellant's employment history and financial history because, to them, it indicated a lack of maturity and life experience. He had never reported to a supervisor other than his father, he did not have set hours at which he needed to report to the shop, nor did he have the general life experience of working in a structured setting with continual responsibilities and accountability. (Testimony Stewart; Testimony of Carrabino).

41. Mr. Tivinis' admirable care for his mother when she was ill did not alleviate the panel's deep concerns that Mr. Tivinis has never managed his own money or that he has never worked for anyone other than his father, either prior to or since his mother's illness (which had been 5-7 years prior to his application).[3] The expectations of a police officers are to account for their time on patrol and to timely file and write reports and the panel was concerned he would not be up for that task given his life experience, thus far. (Testimony of Stewart; Testimony of Carrabino).

"Why Become a Police Officer" and "Role of Police Officer" Interview Questions

42. When asked why he wanted to become a police officer, Mr. Tivinis stated: "I want to become a Somerville Police Officer because I want to help the community. Um, I want to, you know… There's news on police officers, you know, becoming viral for helping people out and just being there for people and I, I want to be that guy. I want to help the community… I want to be a hero … I want to be that guy." (Joint Exhibit 5).

43. When asked what the role a police officer plays in the community, Mr. Tivinis responded, "I would say a hero … a good role model… people look at police officers as people to protect them. So you, you want to make sure you're there for the community. You want to make sure they're there for people, that … they see you as a ... hero ..." (Joint Exhibit 5).

44. Additionally, Mr. Tivinis was asked a question about his conflict resolution skills during the interview. He said he was skilled at talking to people and to "make them feel happy, make them feel calm." When pressed on how he calms people down, he repeated that he makes them "feel happy." (Testimony of Appellant).

45. The interview panel found that Mr. Tivinis' responses in multiple questions about being a "hero" and "making people happy" displayed a limited, superficial view of policing in the modern times. One panelist felt it was not reflective of a twenty-five year old's view. (Testimony of Carrabino). Mr. Tivinis' desire to "go viral" for being a hero simply did not reflect a full understanding of the role of a police officer. His repeated use of the term "hero" to try to articulate his thought process was concerning because there was nothing else in the response of any substance. It revealed he had a narrow view of what the role is. Deputy Carrabino was concerned with that response because police officers are typically not seen as heroes in reality and they do not make people happy with many of the actions they take. (Testimony of Stewart; Testimony of Carrabino).

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3. The Appellant testified at the hearing of this appeal that he took care of his mother in 2015; however, in his interview, he indicated that he took care of her from 2013-2014. (Testimony of Appellant and Joint Exhibit 5). He may well have cared for her in 2015, rather than 2013-2014, but Deputy Chief Carrabino testified accurately at the hearing that the Appellant told him in the interview that he cared for his mother in 2013-14. (Joint Exhibit 5 and Testimony of Carrabino).

Hypothetical School Shooter Scenario Interview Question

46. The panel asked Mr. Tivinis about a general hypothetical situation where he, as a police officer, is given an order that he does not agree with and could put his life in jeopardy. Mr. Tivinis was asked if he would comply with the order. (Testimony of Carrabino; Testimony of Stewart).

47. Mr. Tivinis' response fluctuated back and forth repeatedly. At first, he said that "it is your job and you have to do it… If you are getting paid, you should do whatever it takes." When pressed further by Carrabino, Mr. Tivinis went on to say that if he did not agree, he would talk to a superior officer by asking him questions first, but if it was his job, he would do it. He then qualified that response by saying that he would ask questions first, "like why do it this way when you could do it—maybe do it this way." He then said that he would have to do what a superior officer says. (Joint Exhibit 5).

48. Next, Deputy Chief Carrabino became very specific with the hypothetical, explaining a school shooting scenario like Columbine High School. At first the Appellant did not know what that was, but then had his recollection refreshed. Carrabino described that the Somerville Police policy, which he explained is outdated, recommends that the Department wait for four officers to arrive on scene before they go in the school. Carrabino told Mr. Tivinis that law enforcement has since learned that every second matters—seconds and minutes mean lives. Carrabino told the Appellant that in this hypothetical, they both arrive on scene and can hear an AK inside and Carrabino tells Tivinis that they have to go in—does he go in? (Joint Exhibit 5; Testimony of Carrabino).

49. The Appellant first asked about the policy and if it was a law. Carrabino made it clear that it is not a law, just a policy—"a broad outline," he stated. Mr. Tivinis' response deeply concerned the panel. He unequivocally stated, "If the policy says wait, I'd tell my supervisor—hey, that's not what the policy says. We should wait, we should wait. You know we should wait." Carrabino pressed him further and stressed that the Appellant was there with him, his supervisor, and again, the Appellant said that they should wait. Finally, Carrabino said, "It's me"—practically telegraphing to Mr. Tivinis to realize that he should indicate that he would go inside the school. Finally, Mr. Tivinis stated that he would go in and that he would not debate it with Carabinno, he would just do it. (Joint Exhibit 5; Testimony of Carrabino).

50. The City's representative admitted that this and other hypotheticals are difficult questions and panelists ask them, in part, to see how a candidate thinks through problems. The panel felt Mr. Tivinis' response indicated a lack of maturity and decisiveness since the panel had to go through the scenario multiple times. The panel felt he was not decisive and wanted an "out" and this was concerning. (Testimony of Stewart)

51. Deputy Chief Carrabino wanted "to see if a candidate can put life first." He felt Mr. Tivinis gave a poor answer because he could not grasp that he, as the supervisor, was there with him at the hypothetical school. Mr. Tivinis wanted to discuss it and, in an emergency situation, it is time to act. (Testimony of Carrabino).

52. All seven (7) other candidates whose name appeared lower than Mr. Tivinis on the Certification stated in their interview that they would immediately go into the school with Deputy Chief Carrabino. Two (2) of the candidates noted some concern about the policy but stated that they would take any concerns up with the supervisor *after* the emergency was over. None of them stated, as Mr. Tivinis did repeatedly, that they would wait for backup and discuss the policy first. (Appellant Exhibits 28-26).

Interview Question Regarding Gaining Cooperation of a Group

53. During the interview, Mr. Tivinis was asked to explain a time he had to gain the cooperation of a group over which he had little to no authority. Mr. Tivinis' response was "school groups." He stated that he would be in a group and he would take charge of the group and say, "Hey listen, I think we should do this. Like this would be a good idea. Um, what do you guys think. You know, we should… um, I, I really think this is a good idea and just ask them… for their reviews or opinions on things and I, I would take charge of that group stuff." He went on to say that he has good ideas and "they really liked my ideas… they had really good opinions…. And they helped me out with everything, too." The panel felt Mr. Tivinis' response was scattered, vague, and amorphous. The panel questioned whether he was describing an actual instance in which he gained cooperation of a group. (Joint Exhibit 5; Testimony of Carrabino; Testimony of Stewart).

54. Based on a review of the recordings of the seven (7) candidates who bypassed the Appellant, each responded to this question with instances when they gained the cooperation of a group they had little to no authority over. Their answers were related to a specific instance in their past where they assume a leadership role of their own volition. (Appellant's Exhibits 27-36).

Interview Question about Involvement in Confrontation

55. Mr. Tivinis was also asked in the interview about a time when he was involved in a confrontation and to describe the steps he took to remedy the situation. The Appellant's response did not make a lot of sense to the panel. The Appellant described a situation at his father's auto body shop with a disgruntled customer whose engine had blown out, blaming it on the auto body shop; however, the panel was not convinced Mr. Tivinis was the actual person being confronted, rather they felt his father was being confronted. Mr. Tivinis' role in the confrontation appeared to involve speaking calmly to the customer to try to get him to calm down and just talk, rather than yell and swear. He did not indicate any further steps he took to remedy the situation beyond that. The panel felt that, although Mr. Tivinis may have been involved, it sounded as though his father, as the owner of the business, handled the majority of the situation. (Joint Exhibit 5; Testimony of Stewart; Testimony of Carrabino).

56. All seven (7) candidates who bypassed the Appellant responded to this question in their own interview with a specific instance in which he/she was the only individual saddled with the responsibility of meeting the confrontation head on against someone else.

Their examples did not involve a group effort to de-escalate a confrontation, as the Appellant's example heavily involved his father. Each clearly indicated in their interview what steps they took to resolve the situation on their own and to ultimately de-escalate a heated exchange. (Appellant's Exhibits 28-36).

Interview Question Regarding "Unconscious Bias"

57. During his interview, Mr. Tivinis was asked about his "thoughts on unconscious bias and how it effects the work that police officers perform." Mr. Tivinis did not know what unconscious bias meant. The panel provided him with a quick definition. The fact that Mr. Tivinis was unaware of what the term meant was not held against him. (Joint Exhibit 5; Testimony of Stewart; Testimony of Carrabino).

58. Of the seven (7) candidates who bypassed Mr. Tivinis on the Certification, three (3) knew the term and, according to panelists, immediately answered the question in a coherent, appropriate, and informed manner without any definition. Four (4) candidates needed a quick definition—with one needing the definition twice—yet almost all immediately answered the question in a coherent, appropriate, and informed manner. (Appellant's Exhibits 28-36).

59. Even after being given the definition of unconscious bias, Mr. Tivinis was unable to discuss the issue in a coherent manner. He stated: "What—so maybe what you would do if you were a police officer but since you—you know, if… If you were a police officer, obviously you got to act like a police officer. If you were just a normal human being you would act differently from a police officer would because you're—you're law enforcement. You, you—you know, you got rules, regulations. You got all that. So, um, you got to follow through. You have to, um—you have to be professional, where if… You know if you're just a normal human being, you can kind of almost—not do whatever you want but act differently if you're not a police officer." (Joint Exhibit 5).

60. Deputy Chief Carrabino noted that "this is probably the most important issue in policing today." He was concerned that Mr. Tivinis could not understand the question even after it was explained to him. (Testimony of Carrabino). His struggle to answer this question was further proof that Mr. Tivinis did not have a clear sense of the roles, responsibilities, and issues police officers currently face. (Testimony of Carrabino; Testimony of Stewart).

61. The selected candidates below Mr. Tivinis on the Certification responded to the unconscious bias question as follows:

> Candidate 17 on the Certification)[4]: Most of the things that are happening now are people just saying things without knowing the facts. I'm against it just because before you start judging you should do your homework. Find out what's really going on before you start assuming or becoming part of that issue instead of the solution. I think if we all take a little bit of time and kind of do our homework, investigate, this world would be a safer place to live in. People are just so quick to judge sometimes and without finding out exactly what's going on. And yes it does effect a lot of police officers because you are sitting there trying to protect the City, but yeah sometimes you don't get the same respect back from the residents or because everyone is just focusing on what they hear, especially on the media.
>
> Candidate 20 on the Certification[5]: It's a real thing, people obviously will profile some people even though they don't intend to. Sometimes it just wraps their head on a certain person doing a certain thing, and it doesn't allow for any growth in the field. (Follow up question: How do you combat that?) Just try to be a better person and don't just instantly react. Most people I guess always see color. Just try your best not to see color and just see them as a person. (Follow up question: What if you're not aware of it because it is unconscious?) If it's unconscious I believe maybe in that moment you won't know what you're doing is wrong until afterwards, maybe ask an officer for feedback—how did I handle this, what could I have done better? Ask for some criticism. If you realize what you did was wrong, take responsibility for it and try to be a better person, especially a better cop.
>
> Candidate 22 on the Certification[6]: I think everybody would have them. And the effect it would have on police officers' work is sometimes they are in a situation where one of those unconscious bias are triggered, and it ultimately comes down to whether they want to react to it or not and the reasons why they would react on it. (Follow- up question: How would you combat unconscious bias?) I think just looking at it from a different perspective like although I feel a certain way and I'm not really sure why I'm feeling that way, just looking at it from a different perspective than my own will help me combat conscious, I mean unconscious bias, sorry.
>
> Candidate 25 on Certification:[7] I think depending on your upbringing there are obviously are going to be unconscious biases. Luckily in Somerville it is a very diverse population so I don't think it occurs as often here as it would for say 40-60 years ago. However, I do think that the unconscious biases can play a role in policing where they will kind of get focused on, if there's for say a sketch they can kind of get focused on that. I do know with new training they are trying to turn away from that, but I do think it just takes time and awareness to push away from your unconscious bias—it has to be brought to your attention for you to know it and take the steps to rectify that.
>
> Candidate 25 on the Certification:[8] I think as dealing with people as a police officer does, many, many different contacts you are going to have a tendency to cause someone in this position to form opinions. Not necessarily, I wouldn't say hateful opinions but just kind of generalizations… It could cloud their decision making. Cause them to make to decisions based on their bias and not the objective facts that are in front of them. (Follow-up question: How do you work on that) Keep things in perspective. Keep things as objective as possible. Treat people with respect at all times and it becomes an automatic thing. (Follow-up question:

4. In its proposed decision, the Respondent refers to this person as Candidate 19. At the hearing of this matter, the labels used for each candidate by all parties became confusing and inconsistent. For purposes of this Decision, the Commission will refer to the candidate by their ranking on the certified list. The Commission has tried, in the footnotes, to cross reference this label with numbers used by the Attorneys. The Appellant's attorney usually referenced the candidate by their placement on the Certification, although sometimes, the candidate was referred to by their listing on the Appellant's Exhibit list.

5. In its proposed decision, the Respondent refers to this person as Candidate 3.

6. In its proposed decision, the Respondent refers to this person as Candidate 8.

7. In its proposed decision, the Respondent refers to this person as Candidate 7.

8. In its proposed decision, the Respondent refers to this person as Candidate 27.

> What if you are not aware of it?) If someone is made aware of the existence of the theory of unconscious bias maybe it will make them take a look in the mirror and think about what is going on inside of themselves…you need to become aware of it… through education, asking tough questions.
>
> Candidate 27 on Certification:[9] I believe I actually touched on this earlier when I said that there's a knee jerk reaction. When you see something it goes right to your brain stem and a lot of times if you take a second to focus and really think about the situation then you can understand that what you thought initially might not actually be correct because of unconscious bias. And it effects most people so it's important to acknowledge that mostly everyone is affected by it and so we should take steps in our thought process to account for it.
>
> Candidate 31 on Certification:[10] That's definitely a thing. It's definitely, I feel like a lot of people do have an unconscious bias, um…I feel that if there's a lot of instances where officers might think that a person is going to escalate the situation very quickly and they will go in at a level where they think that person is going to be. It's like the saying "you can go in as lamb and come out as a lion, but you can't go in as a lamb and come out as a lamb." They are starting off at a point that they feel the other person is going to start out at, and that could be due to race or however they might think. And they start higher than the other person and they have no chance of going down, they just have to keep going up, which just escalates the situation much faster than if it was resolved at a lower, more levelheaded place.

(Appellant's Exhibits 28-36).

Certain Candidates' Background History

62. The candidate who appeared ranked #27 on the certification is the son of a Somerville police captain. He attends UMass Boston and currently majors in Criminal Justice and Spanish. He has held two part-time jobs and one seasonal full time job as a lifeguard while he attends school and currently lives with his parents. He is a 2017 graduate of Somerville High School and played hockey. He provided complete answers to all questions in the interview, especially the questions related to unconscious bias and the school shooter scenario, as compared to the Appellant's responses. (Testimony of Stewart; Appellant Exhibit 4, 13, 22, 31,).

63. The candidate who appeared ranked #31 on the certification attends Bunker Hill Community College and majors in Criminal Justice. He was twenty-one years old at the time of the interview and lives with his parents while he attends school. He does not pay his own bills. He has held part time jobs since graduating high school, as a supervisor for Somerville Recreation and at the front desk at Crunch Fitness, as a college student. He answered the question about unconscious bias and the school shooter scenario appropriately. (Appellant Exhibit 5, 14, 23, 32).

64. The candidate ranked no. 31 on the certification answered a question about two current issues involving police officers, noting that (1) excessive use of force and (2) racial profiling were two such issues. Ms. Stewart was asked on cross-examination about Candidate 31's interview and whether it bothered her that the Candidate said that sometimes excessive force is a misunderstanding by the public. Ms. Stewart testified that "the tape better explains it than my notes" and "listen to the tape—it's not necessarily what he is saying." (Appellant Exhibit 32; Testimony of Stewart).

65. A review of Candidate 31's full interview shows that, within that response about excessive use of force, Candidate 31 stated that it is "more just a misunderstanding by the community since a lot of the time police officers are following what they are told to do, how to handle certain situations in certain ways—and people just see that if somebody with any form of authority is using force on another person that it is excessive use of force but there's definitely cases where it is blatantly clear that is an excessive use of force … but a lot of the times its just people who don't know the trainings and the protocol people have to go through to make sure everybody else is safe…." (Appellant Exhibit 32).

66. Candidate ranked # 17 on the certification failed to list all of his prior employment history on his application, particularly those just after he graduated high school. He graduated high school in 2000 and began working part-time at Aldo Shoes at the Cambridge Side Galleria from 2001-2004. He indicated that he did not list this information on his packet because he focused on his most recent positions on the application and that was so long ago. The panel told him that he should have included that information so there were no gaps in his timeline. At the time of the interview, he was thirty-eight (38) years old. He is a divorced father of an eleven (11) year old girl. He currently works fifty (50) hours per week as the branch manager for Premier, and travels for this job to Canada—sometimes for five months out of the year, back and forth and from Canada. (Appellant's Exhibits 1, 10, 19, 28).

67. A large majority of the other bypassed candidates were not given a conditional offer of employment from the City, at least in in part, due to poor interview performance. (Appellant Exhibits 37-47; Joint Exhibit 6).

LEGAL STANDARD

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 Civil Service Commission intervention. *Cambridge* at 304.

9. In its proposed decision, the Respondent refers to this person as Candidate 31.

10. In its proposed decision, the Respondent refers to this person as Candidate 23.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010) citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly* citing *Cambridge* at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington and another* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

A core mission of the Civil Service Commission is to ensure that Appointing Authorities, as part of a fair and impartial hiring process, offer valid reasons for bypassing a candidate in favor of lower-ranked candidates. As part of that review, the Commission must consider whether there is any evidence of personal or political bias by the Appointing Authority.

As part of this appeal, I considered the sequence of events that resulted in additional candidates, included the son of a Police Captain, being considered for appointment, as I did in *Daniel O'Donnell* v. *City of Somerville*, G1-20-044 [33 MCSR 291 (2020)]. As referenced in the findings, the City first requested authorization to appoint ten (10) reserve candidates, which would limit the City's consideration to the first 21 candidates who signed the Certification as willing to accept appointment under the so-called 2N+1 formula. At least four candidates who were ultimately appointed by the City were <u>not</u> among the first 21 candidates on the Certification. Approximately four weeks later, the City requested authorization from HRD to appoint <u>16</u> (as opposed to 10) candidates from this Certification, thus, in theory, increasing the number of candidates that could potentially be considered from 21 to 33. As a result, the City considered additional, lower-ranked candidates on the Certification, including four other lower-ranked candidates who were ultimately appointed. However, the City only appointed a total of <u>9</u> reserve candidates, based on the interview panel's recommendation.

One of those candidates, ranked #27 on the certification, was twenty (20) years old at the time of the interview, still lived at home with his parents while he attends college, and is the son of a Somerville Police captain. I carefully considered whether Candidate 27's familial relationship played any role in his appointment. Candidate #27 had graduated high school in 2017 and his employment history was limited, although he had worked two part-time jobs and one full time, seasonal job as a lifeguard at for DCR, and is a criminal justice major in college. It is difficult to compare the life experiences of a twenty-year old to that of the twenty-five year old Appellant simply based on the age of the candidate. In this instance, however, the Appellant, at twenty-five, for the reasons discussed in more detail below, conveyed little in the way of life experiences and displayed a troubling degree of immaturity. In candidate #27's interview, he appeared to have a good grasp of the requirements of being a police officer and was easily conversant regarding some of the nuances and difficulties that may arise on the job. He was more decisive when he spoke, especially in response to questions about a school shooting, and he had a firm grasp on the concept of unconscious bias. In sum, even applying heightened scrutiny, I do not believe that the panel's decision to recommend Candidate #27 was the result of personal or political bias. As stated in O'Donnell, however, the Commission reserves the right to investigate whether the City acted within the confines of the civil service law, and, more specifically, the 2N+1 formula, based on its actions here. This potential issue, however, does not change my conclusion that the City had reasonable justification to bypass the Appellant for the reasons discussed below.

Ms. Stewart and Deputy Chief Carrabino were good witnesses. They had a command of the facts and were able to articulate both the positive and negative aspects of Mr. Tivinis' candidacy. They were accommodating during his interview, multiple times offering to take a break or to provide water, acknowledging how stressful the situation can be. Neither of them had any personal animus against the Appellant. Neither of them tried to paint Mr. Tivinis in a bad light and/or pile on with other reasons to justify their decision here. They noted that he did a good job filling in certain areas of the application and gave him the benefit of the doubt regarding various errors or omissions on his application after listening to Mr. Tivinis' explanation for the error, as the panel did for other applicants as well. The interview panelists were not predisposed to bypassing Mr. Tivinis nor did they develop any animus or bias against Mr. Tivinis that factored into their decision to bypass him for appointment.

Rather, the panelists testified credibly that they had serious concerns regarding many answers that Mr. Tivinis provided to numerous questions, including questions involving his life-experiences, his financial independence/history, and hypothetical questions meant to assess whether Mr. Tivinis fully appreciated the realistic roles and responsibilities of police officers. Mr. Tivinis' interview raised serious concerns about his maturity level as it relates to his overall suitability for the position of police officer. Mr. Tivinis is a twenty-five (25) year old man who is clearly devoted to his family. He obviously strives to make his father proud and is a devoted son who took care of his mother during a very trying time in her life and his. The interview panel acknowledged these truths. Mr. Tivinis graduated from high school in 2013 and has only ever worked at his father's business for roughly ten (10) hours per week, on average. He does not get paid for his time at the

autobody shop. Since he does not get paid, he has never filed tax returns. At twenty-five (25), he has never held a full-time job and has never adhered to a set schedule.

In his interview and application, he admits to working only ten (10) hours per week on average, yet his girlfriend told the investigator that he is a "workaholic" and another friend stated that he works every day, sometimes on Saturdays, and that he works twelve (12) hour days. The panel asked about this inconsistency and Mr. Tivinis struggled to account for his time and noted that much of his time at the autobody shop is devoted to working on his own snowmobile and dirt bikes. Mr. Tivinis has never managed his own finances; his father puts money on his debit card or his mother personally goes to the bank and puts money into his account and he uses that money to pay his credit card bills. At the time of the February 2020 interview, Mr. Tivinis did not pay for his own rent, utilities, health insurance, streaming television, or car insurance. The interview panel was concerned with the Appellant's employment history and financial history because, to them, it indicated a lack of maturity and life experience. This was a reasonable concern since police officers are required to adhere to a strict schedule, to report for duty on time, to work long hours, to keep detailed paperwork, and to report to superiors that are not family members.

Mr. Tivinis has applied for the difficult position of police officer. When asked why he wanted to be a police officer and what his understanding of the roles and responsibilities of an officer are, the Appellant indicated repeatedly that he wanted to be a hero and that he wanted to make people happy. The panel was not impressed with Mr. Tivinis' response and thought some of his interview responses portrayed an unrealistic view of policing. He referenced officers being on the news, or going viral, for helping people. The panel did not believe Mr. Tivinis had a realistic understanding of the job since being a police officer is often a difficult job where your actions make other people very unhappy. An officer is not seen as a hero on most days and one often encounters other people on their worst days. The panel felt this response was superficial and lacked any insight into the job requirements. The panel felt this response would be something a twelve-year old may give.

Although the answer to "why do you want to be a police officer" question itself was not the sole reason for bypass, it set the stage for Mr. Tivinis' additional responses to more detailed questions regarding (1) how he had showed leadership in the past by gaining the cooperation of a group and (2) how he has handled a confrontation in the past. When asked of a time where he was able to gain the cooperation of a group that he had little to no authority over, Mr. Tivinis was unable to provide a specific instance of when he gained cooperation of a group. He was vague with his response, referring to "school groups" in general. His response lacked any detail as to what class the groups met for, what the purpose of the groups were, or what the groups' project or goals were. He concluded his answer, devoid of any details, by saying that he felt he was effective in the situation and the group felt he had good ideas, that he helped the group and the group helped him. Additionally, Mr. Tivinis was asked to describe a time he was involved in a confrontation and what steps he took to remedy the situation. Mr. Tivinis described an incident at his father's autobody shop with an angry customer whose engine had blown out. Mr. Tivinis indicated to the interview panel that he spoke calmly to the customer to try to calm him down and stop screaming. Mr. Tivinis' description of the incident, which included his father as a key player in the scenario, did not satisfy the interview panel that Mr. Tivinis himself was the person who rectified the situation. To the panel, it appeared that his father was likely more involved in coming up with a solution with the customer than Mr. Tivinis himself. While Mr. Tivinis' response to these questions, standing alone, may not be a valid reason for bypass alone, I credit the City's witness testimony that they were not strong responses as compared to other candidates who bypassed him.

When discussing Mr. Tivinis' educational history during the interview, Mr. Tivinis indicated that he had been suspended from school for an altercation with another student. He had included this information is his application as well, which the panel appreciated. When asked a follow up question about other disciplinary actions in high school, Mr. Tivinis indicated that he was punished with detention for being late to school. His high school records confirmed disciplinary action and that he had 39 instances of tardiness and 102 absences. The panel was not concerned with the high school discipline itself. For this Appellant and all other candidates, the panel acknowledged that it is not uncommon for candidates to have had discipline in high school. What concerned the panel was Mr. Tivinis' attitude towards the discipline he received and his apparent failure to learn from those instances of discipline, even to this day. Mr. Tivinis was punished by having to pick up trash in the cafeteria and often chose not to follow an order to pick up trash during lunch, because his father told him he should not do it as the school district pays janitors for that. He rationalized his decision to disobey an order because other students chose not to do it. This response was justifiably concerning to the panel. A police department is a paramilitary organization and officers may be given orders with which they do not agree, orders that will likely put their lives on the line, yet they will be expected to follow those orders.

In that same vein of willingness to respond to orders, Mr. Tivinis was asked about a hypothetical school shooting scenario in which candidates are asked how they would respond if ordered to go into a school during an active shooting, complete with gunfire heard in the background, even if the requisite number of officers had not arrived on the scene per an outdated department policy. The City's witnesses acknowledge that this is a difficult question, meant to make the candidate think through the answer and ask any questions. All candidates who were ranked below Mr. Tivinis on the certification list and given conditional offers immediately stated they would go into the building as ordered by their superior officer. Two candidates noted that they would discuss any issues they had after the emergency situation was over. Unlike those candidates who bypassed him for appointment, Mr. Tivinis unequivocally stated that if the policy says wait, he would tell his supervisor to wait. He repeated several times that he would tell the supervisor that they should wait. Carrabino pressed him further and stressed to Mr. Tivinis that he was there with him, his supervisor, and

again, Mr. Tivinis said that they should wait. Finally, Carrabino said, "It's me"—practically telegraphing to Mr. Tivinis to realize that he should indicate that he would go inside the school. Finally, Mr. Tivinis stated that he would go in. Deputy Chief Carrabino wanted "to see if a candidate can put life first." The panel felt Mr. Tivinis' response indicated a lack of maturity and indecisiveness since the panel had to go through the scenario multiple times.

The final interview question that caused the City concern was Mr. Tivinis' response to the question about unconscious bias in law enforcement. Mr. Tivinis did not know what the definition of unconscious bias was. Even after the term was defined, Mr. Tivinis clearly did not know what the term meant, as evidenced by his answer. Each candidate was asked this question, and many (not all) needed to be given a definition of the term. This was not held against the candidates; however, where Mr. Tivinis differed from the selected candidates is that, once given the definition, he could not respond appropriately. In the estimation of the panel, all candidates who bypassed Mr. Tivinis were able to coherently, thoughtfully, and informatively respond to this question; most were able to expound on ways to try to combat unconscious bias, as well. Deputy Chief Carrabino testified that he felt this was the most pressing issue police officers face today. It is a reasonable concern for the City that Mr. Tivinis was unaware of the concept of unconscious bias and was unable to grasp it even after it was explained to him. It is perfectly reasonable for a police department to expect a candidate to be able to, at the very least, minimally reflect upon this issue. Mr. Tivinis was wholly unable to discuss this issue.

Police departments and other public safety agencies are properly entitled to, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one. *Connor* v. *Andover Police Department*, Case Number G2-16-159 [30 MCSR 439] (2017), citing, *Dorney* v. *Wakefield Police Dep't.,* 29 MCSR 405 (2016; *Cardona* v. *City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent and permissible in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers." *Flynn* v. *Civil Service Comm'n,* 15 Mass. App. Ct. 206, rev.den., 388 Mass.1105 (1983).

In his brief, the Appellant argues that the interview process failed to provide the necessary level of protection against arbitrary action and undue subjectivity that the Commission requires, further claiming that the decision was predetermined. The Appellant argues that the choice of the interview panelists, alone, raises substantial doubt as to the City's concern for creating a truly objective process. I disagree. The first interview panelist is a twenty (20) year veteran of the Somerville Police Department and has been the Deputy Chief of the Department for six (6) years. He has held many positions in the Department, including but not limited to patrol officer, detective, head of the domestic violence and gang units, liaison to the Mayor, commander, and Captain in charge of half the patrol operations in the City. He has taken part in previous hiring interview panels in previous hiring cycles. He is well versed in the hiring process. His experience in the field, his leadership roles, and his rise to Deputy Chief makes him a reasonable choice to judge an applicant for the role of police officer for the City he serves. Nancy Bacci, the Deputy Director of Health and Human Services for the City, was the second interview panelist. Although she did not testify at the hearing of this matter, she had been involved in prior interviews and prior hiring cycles several times in the past. She works closely with the police department in her role with the City; and based on the multitude of interviews reviewed, Ms. Bacci had command of the process and subject matter and came across as an impartial, informed interviewer.

Additionally, Skye Stewart, the final interview panelist, is a reasonable choice to sit for the interview panel and judge the viability of a candidate for the position of police officer. Although she has never been a law enforcement officer, she worked in the City's SomerStat office from 2011-2016, first as an analyst, then as the budget manager, and finally as its Director in 2014. She has vast experience in senior level hiring for directors of various Departments, other City employees, and her own staff. She had been the Chief of Staff to the Mayor of Somerville from 2016-2019, and in this role as senior advisor to the Mayor, she was the direct liaison for different department heads including, among others, the public safety department and the HR director, with whom she had worked closely with on hiring and collective bargaining issues. She was the supervisor of the Chief of Police.[11] Ms. Stewart wrote the bypass letters for this hiring round and provided those letters to the current-Chief of Staff for the Mayor. Those letters were presented by the Chief of Staff to the Mayor for his review. Ms. Stewart was notified the following day that the Mayor supported the letters and she was told to proceed.

Every interview was audio recorded. The Appellant was afforded a two hour and three minute (2.03) interview, and all of the finalist interviews have been reviewed in their entirety. The Appellant was asked multiple times if he needed to take a break, to use the restroom, or to have some water. The interviewers also acknowledged to the Appellant more than once how stressful the situation can be, sitting in front of three people asking questions and taking notes. The interviewers did not score each individual question, or rank the candidates; however, every candidate was asked the same exact questions. Each candidate was given the opportunity to go through every page of their applications as well as well as partake in a lengthy discussion about what their background investigation revealed. Within the application, the interviewers pointed out when information was incomplete or missing with every candidate. Most candidates had some part of their application that was incomplete or missing key information, although some candidates were praised for the work they did on the application.

11. Appellant argues that Ms. Stewart would only look to the Deputy Chief as her point of reference with regards to police procedure questions during the interviews, most specifically, the school shooter question. In her role as Chief of Staff, she had been involved in many discussions with the Department's command staff regarding the protocols for school lockdown drills and was well aware of the City's policies on the matter. The Deputy Chief, in the interview, was not her only point of reference.

The interview panelists concluded that the Appellant's answers to many interview questions, taken on their own but most especially taken as a whole, showed a distinct lack of maturity, a lack of life experience, and a lack of awareness of current police issues necessary for the role of police officer, as compared to the other seven (7) candidates to whom chose to make a conditional offer. Here, the evidence does not show any impermissible motivations by the decision-makers; the Appointing Authority maintains the discretion to assess how much weight is given to problematic answers by candidates.

In his brief, the Appellant lists certain items from various candidates' applications, without giving context to the information. From the evidence presented, the City compiled a lengthy application from every candidate, has undertaken a background investigation on each candidate, and has afforded each candidate a lengthy interview to discuss it all. The panel then discussed each candidate at length and came to a conclusion, either giving a candidate a conditional offer or bypassing the candidate. For instance, the Appellant claims that Candidate #17 on the Certification "lacked any employment after high school graduation for five years," likely in an effort to compare him to Mr. Tivinis. Although the candidate did not list all of the jobs he has held on the *application*, the *interview* of Candidate 17 revealed that he failed to list employment at four prior jobs—one such job began immediately after graduating from high school in 2000, which he held for four years, from 2000-2004, at Aldo Shoes. The panel was concerned that he did not list all employment history. The candidate explained that he did not think it was relevant to his career because it was so long ago and part time. This candidate was thirty- eight (38) years old at the time of the interview and was a divorced father of an eleven-year old girl. He had worked since high school has been employed as a branch manager for the same company for years, working fifty (50) hours per week on average, often travelling to and from Canada as part of his work responsibilities. After a review of all of the comprehensive information relative to this candidate, I do not find Candidate 17's work experience or life experience to be comparable to the Appellants.

The Appellant also points to Candidate #31 on the certification as evidence of bias in the hiring process, noting that this candidate is twenty-one (21) years old, is friendly with Candidate 27, still lived at home with his parents while he currently attends college, and had little work experience. In reviewing this candidate's lengthy application, his background investigation, and his interview, the City determined that this candidate was a better choice for the position than the Appellant, even given the age gap. This candidate attends college and is majoring in criminal justice. He has held a part-time job as a supervisor with Somerville Recreation and a desk job at a gym. In his interview, he was able to articulate what unconscious bias is and opined on ways to combat it. He was decisive in his decision to enter the school with his supervisor in the hypothetical school shooting. He was well spoken and had a firm grasp on the questions that were asked of him and was able to articulate his experiences at work in a supervisory role and his experiences as a leader in athletics. Additionally, he better handled the questions relative to (1) a confrontation he was involved in and how he remedied the situation and (2) a time where he had to gain the cooperation of a group he had no authority over.

The Appellant also points to one part of Candidate 31's answer to a question about two current issues facing law enforcement. Candidate 31 indicated that (1) excessive use of force and (2) racial profiling are two current issues. The Appellant argued that Candidate 31 stated that excessive force is just a "misunderstanding by the community." That, however, was not the end of Candidate 31's response. When asked about this answer on cross-examination, Skye Stewart noted that "the tape better explains it than my notes" and "listen to the tape—it's not necessarily what he is saying." Based on a review of Candidate 31's full interview, within that response about excessive use of force, Candidate 31 stated that it is "more just a misunderstanding by the community…. but there's definitely cases where it is blatantly clear that it is an excessive use of force …." This response is more appropriate and nuanced than argued by the Appellant. Candidate 31 did not appear to be advocating for excessive use of force, acknowledging that there are blatantly clear cases of excessive force.

In summary, the Appellant is a good person who performed poorly during a lengthy interview, particularly on some questions the interview panelists gave great weight to. Ultimately, his poor performance throughout many facets of the interview caused the interview panel to conclude that the City would be taking too much of a risk in granting him a conditional offer of employment at time. Nothing in this decision, however, should be construed as permanently disqualifying the Appellant from consideration as a Somerville police officer. The Appellant has ample time to improve this interview skills, learn more about the challenges facing the modern police force and show the City that he has the maturity and steadfastness to be issued a badge and all of the responsibilities that go with that. I would encourage him to do so.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-20-045 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

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* * * * * *

MICHELLE WETHERBEE

v.

HUMAN RESOURCES DIVISION

B2-20-154

May 6, 2021
Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Institutional Parole Officer-Failure to Complete Online Application—Chairman Christopher C. Bowman dismissed an appeal from an Institutional Parole Officer denied E&E credit on a promotional exam because she did not successfully process her E&E claim due to internet or software issues and then failed to react when not receiving a confirmatory email from HRD. The candidate did telephone HRD and was told that she should submit her E&E documentation by email, making this case quite different than the majority of such cases that involve candidates not submitting anything at all.

DECISION

On October 14, 2020, the Appellant, Michelle Wetherbee (Ms. Wetherbee or Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to give her no Education and Experience (E&E) credit for the Institutional Parole Officer C (IPO C) promotional examination, resulting in her receipt of a failing score on the 2020 Institutional Parole Officer exam and exclusion from the eligible list.

On November 17, 2020, I held a remote pre-hearing conference via WebEx. A full hearing was held remotely via WebEx on February 22, 2021.[1] A recording was made of the hearing via Webex. Both parties were provided with a link to access the recording, which the Commission has retained a copy of.[2] HRD and Ms. Wetherbee submitted post-hearing proposed decisions.

FINDINGS OF FACT

HRD submitted eighteen (18) documents (Resp. 1-18). Ms. Wetherbee submitted 1 document (App. Ex. 1). Based upon the documents entered into evidence, the testimony of:

Called by HRD:

- Gilbert Lafort, Director of Test Development for HRD;

Called by Ms. Wetherbee:

- Michelle Wetherbee;
- Colette Santa, Parole Board Member

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant has worked for approximately fourteen (14) years at the Parole Board. She has held positions as a Transitional Police Officer and Deputy Chief Transitional Officer. She now works as the Chief Transition Parole Officer. In these positions, she prepares case files for the Board of Probation, interviews inmates, and conducts risk assessments. (Appellant Testimony).

2. The Appellant is known as a dedicated employee and the Parole Board members value her work. She has made sure that the Parole Board has what they need in order to do their work. (Santa Testimony).

3. The Appellant's current civil service ranking is Transitional Parole Officer A/B (TPO A/B).[3]

4. The 2020 TPO C exam consisted of two (2) components: a written exam component, and the Education and Experience (E&E) component. The weight afforded to the written exam component is 60% and the E&E exam component is 40%. (Lafort Testimony).

5. The scheduled date of the 2020 Parole Officer C examination was originally May 16, 2020, but was rescheduled because of the COVID-19 pandemic. (Resp. Ex 2).

The posting for the Departmental Promotional Examination for Institutional Parole Officer C (TRO-C) (Poster) states the following:

> EDUCATION & EXPERIENCE (E&E): All candidates must complete the 2020 Institutional Parole Officer C E&E Claim application online. Instructions regarding this E&E Claim application will be emailed to candidates prior to the examination date and made available online. A confirmation email will be sent upon successful submission of an E&E Claim application.
>
> All claims and supporting documentation must be received within 7 calendar days following the examination. Please read the instructions for submitting claims and supporting documentation carefully. (Resp. Ex. 2).

6. The Poster further stated, "Supporting documentation for your claim must be either attached to your E&E Claim application or emailed to civilservice@mass.gov... E&E is an examination component, and therefore must be completed by the examinee. Failure to complete this component as instructed will result in a candidate not receiving any credit for E&E. Credit for E&E is applicable

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. When she became Chief of Transitional Services, the Appellant took a leave of absence from her TRO-A position to become the Chief of Transitional Services, a management position. The Appellant wished to take the exam in the event the management position was no longer open to her. (Appellant Testimony).

only to individuals who achieve a passing score on all other examination components, and will not be calculated for a candidate with a failing written examination score. Please be sure to read the instructions carefully." (Resp. Ex. 2).

7. The Appellant took the exam on August 6, 2020. (Stip. Facts; Resp. Ex. 1).

8. The deadline for completing the Education and Experience (E&E) portion of the exam, via NEOGOV, was August 13, 2020. (Stip. Facts).

9. Once HRD receives candidates' E&E submission from NEOGOV, HRD manually matches the supporting documentation with those scores. (Lafort Testimony).

10. HRD is notified when there are technical issues with the NEOGOV program. HRD staff will also often know if there is a technical problem with NEOGOV because they will receive a great deal of communication from many people trying to utilize the system. (Lafort Testimony).

11. During the summer of 2020, the Appellant's work was affected by the pandemic. Employment changes, technical difficulties, and closures of some offices were some of the immediate results of the public emergency. That summer, she was also studying for the Civil Service exam and taking classes for her Master's degree. (Appellant Testimony).

On July 16, 2020, HRD provided instructions to all applicants, including the Appellant, for submitting the E&E claim. The notice stated, in relevant part:

> RE: 2020 Education & Experience (E&E) Claim for 2020 Institutional Parole Officer C-E&E Claim Instructions Examination
>
> Dear Michelle Wetherbee:
>
> Please pay close attention to the following regarding the submission of your Education & Experience (E&E) Claim.
>
> The E&E claim application is separate from the Written Exam application you submitted to take the exam. THIS IS AN EXAMINATION COMPONENT: Complete your Online E&E Claim on your own and to the best of your ability. Accurate completion of the education and experience claim is a scored, weighted, examination component. In order to ensure that no one receives any type of unfair advantage in the claim process, be advised that we are unable to provide individualized assistance to any applicant.
>
> As stated in the exam poster, all E&E claims must be submitted ONLINE.
>
> **The Online E&E Claim is now available. To access this exam component:**
>
> 1. Click here to access the application
> 2. Carefully read all information in the posting;
> 3. Click "Apply";
> 4. Log in to your account;
> 5. Complete the online E&E claim as instructed.
> 6. If you have successfully completed and submitted the E&E claim application you will receive a confirmation email.
>
> **(AN APPLICATION IS NOT COMPLETE UNTIL YOU RECEIVE THIS CONFIRMATION EMAIL)**
>
> The claim application must be submitted online and no later than 11:59 pm on **Thursday, August 13, 2020.** Late applications will not be accepted. If you do not receive an automated confirmation email after you submit your claim, your E&E claim application is considered incomplete and will not be accepted.
>
> I**nformation on how to provide supporting documentation:**
>
> 1) Scan and attach documents to your online E&E claim application at time of submission.
>
> or
>
> 2) Email scanned documents to civilservice@mass.gov
>
> **Please note that E&E is an exam component, and therefore, you must complete the online E&E claim. Supporting documentation will NO LONGER be collected at the exam site. Information must be attached to your online application or emailed to civilservice@mass.gov**.
>
> Inquiries regarding completion of the claim will not be accepted or responded to. It is the responsibility of each candidate to carefully review and follow the instructions.

(Resp. Ex. 4, emphasis in original).

13. HRD sent the Appellant two (2) emails with a reminder to fill out E&E Claim on August 6, 2020 and August 12, 2020 (Resp. Ex. 6,7). These emails contained the same instructions about how to access and complete the E&E form. Further, the August 6 and August 12, 2020 emails stated,

> "Please note that E&E is an exam component, and therefore, you must complete the online E&E claim. Supporting documentation will NO LONGER be collected at the exam site. Information must be attached to your online application or emailed to civilservice@mass.gov . Inquiries regarding completion of the claim will not be accepted or responded to. It is the responsibility of each candidate to carefully review and follow the instructions."

14. As directed in the E&E Claim Description, the candidate may exit the claim at any time and the work will be saved, allowing the candidate to return and resume work where it was left off prior to the submission deadline. (Resp. Ex. 9).

15. The Appellant understood that the E&E component of the exam was to complete the module online and submit supporting documentation. (Appellant Testimony).

16. The E&E form stated,

> IT IS IMPORTANT THAT YOU READ ALL THE INSTRUCTIONS BEFORE COMPLETING THE ONLINE E&E CLAIM. FAILURE TO DO SO MAY RESULT IN A LOWER SCORE. YOU HAVE THE ABILITY TO SAVE THIS CLAIM AND RETURN TO IT TO MAKE AS MANY CHANGES AS NEEDED PRIOR TO **AUGUST 13, 2020 AT 11:59PM**. IF YOU CLICK THE SAVE AND SUBMIT BUTTON, YOU WILL NOT BE ABLE TO MAKE ANY REVISIONS TO YOUR CLAIM. IF YOU WOULD LIKE TO MAKE REVISIONS BEFORE THE AUGUST 13, 2020 DEADLINE, SEND AN EMAIL TO

> CIVILSERVICE@MASS.GOV WITH YOUR CHANGES. YOU HAVE THE ABILITY TO ACCESS YOUR SUBMITTED CLAIM AT ANYTIME BY SIMPLY LOGGING INTO YOUR ONLINE CIVIL SERVICE ACCOUNT. IF YOUR CLAIM AND SUPPORTING DOCUMENTATION IS NOT RECEIVED BY **11:59PM ON AUGUST 13, 2020**, IT WILL NOT BE CONSIDERED.
>
> THIS IS AN EXAMINATION COMPONENT: Complete your Online E&E Claim on your own and to the best of your ability. Accurate completion of the education and experience claim is a scored, weighted, examination component. In order to ensure that no one receives any type of unfair advantage in the claim process, be advised that we are unable to provide individualized assistance to any applicant.

17. The E&E form also stated, "PLEASE, NO PHONE CALLS NOR EMAIL INQUIRIES. YOU WILL NOT RECEIVE A RESPONSE."(Resp. Exhibit 9).

18. On August 10, 2020, the Appellant dropped off materials for a Parole Board member, Colleen Santa, who needed the materials for an upcoming Parole Board Hearing, at her home.[4] (Santa Testimony; Appellant Testimony). While there, she asked Ms. Santa to confirm some dates for her application.[5] (Appellant Testimony).

19. While at Ms. Santa' home, the Appellant attempted to complete her E&E claim. She logged into the program by using her username and password. (Appellant Testimony).

20. The Appellant completed the E&E claims questions online. When she had completed the questions, she pressed "submit." After hitting the "submit" button, the browser "froze" and she saw only a spinning circle. (Appellant Testimony; Santa Testimony).

21. The Appellant tried, with the help of Ms. Santa, to remedy the problem. They checked the Internet connection and refreshed the browser. (Santa Testimony, Appellant Testimony). The Appellant turned her machine off and on again, and when she re-accessed the E&E claim, there was nothing on it. She completed the form again, pressed "submit," and the browser "froze" again, with the spinning circle again on her screen. (Appellant Testimony; Santa Testimony).

22. The Appellant left Ms. Santa's home and continued her work day without resolving the technical difficulty. (Appellant Testimony).

23. Either on the afternoon of August 10, 2020 or the next day, August, 11, 2020, the Appellant called HRD. She called twice and on the third attempt, spoke to someone who told her to submit supporting documentation through email.[6]

24. The Appellant submitted her supporting documentation to the email address provided. The Appellant believed that her application had been submitted successfully because she believed that she followed the instructions given to her during the phone call. (Appellant Testimony).

25. The Appellant did not receive an email stating that her E&E application was complete and did not attempt to access the E&E application after August 10, 2020. (Appellant Testimony).

26. On August 10, 2020, HRD did not receive an influx of communication about NEOGOV not being accessible. On the last day of the application period, August 13, 2020, HR received 32 online E&E applications. (Lafort Testimony).

27. On September 15, 2020, the Appellant received her exam results, notifying her that she did not pass the examination. Her E&E claim was not scored because of "failure to complete online education and experience claim." (Stip. Facts; Ex. 10).

28. The Appellant contacted HRD to inquire about receipt of her transcripts and the documentation in September 2020 and in the beginning of October, 2020. (Ex. 11, 14). HRD responded to her inquiries by explaining that she had not submitted her E&E claim. (Ex. 15).

29. The Appellant filed an appeal with HRD on September 17, 2020. (Stip. Facts). In her communication, she explained that she was instructed to email another copy of the E& E paperwork with her original email to HRD. (Ex. 16).

30. HRD denied the Appellant's appeal on October 9, 2020 and the Appellant's name did not appear on the October 15, 2020 eligible list for the position. (Stip. Facts).

LEGAL STANDARD

Generals Laws c. 31, § 2(b) authorizes appeals to the Commission from persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, in relevant part, as follows:

> "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists.

4. Although the Appellant was still working within institutions preparing materials for hearings, Ms. Santa was working from home. (Santa Testimony; App. Testimony).

5. The former Chief of Transitional Services, Ms. Santa had moved into the Parole Board position around the same time as the Appellant moved into the position of Chief of Transitional Services.

6. During the COVID-19 pandemic, when HR staff were working from home pursuant to Executive Orders, the four telephone lines were transferred into one line. (Lafort Testimony).

Section 22 of G.L. c. 31 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

Section 24 of G.L. c. 31 allows for review by the Commission of exam appeals. Pursuant to § 24, "…[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that "… under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD.' G.L. c. 31, § 22(1)."

ANALYSIS

It is undisputed that Ms. Wetherbee, and all applicants who took this most recent IPO-C examination, had until August 13, 2020 to file an E&E Claim with HRD. With the exception of supporting documentation, all applicants were to have completed the E&E portion of the examination *online*.

Ms. Wetherbee did not finish completing the E&E exam. While I do not doubt that she called HRD and received information about submitting supporting documentation via email, the instructions for completing the online module were clear. The instructions included notifying candidates about the final step of receiving an email to confirm submission. While all of her E&E information was entered into the online system, it was not "submitted" to HRD. Although Ms. Wetherbee subsequently provided HRD with all of the written documentation to support her E&E claim via email, her failure to complete the E&E process online resulted in her failing the promotional examination.

Ms. Wetherbee asks that the Commission view her omission to submit the E&E portion of the examination as attributable to the COVID-19 pandemic, including the changes in staffing, responsibilities, and work locations that were a result of the public emergency. In her position as Chief Transitional Parole Officer, the Appellant experienced frustrations and delays during this time.

I am not unsympathetic to Ms. Wetherbee's argument here. However, in order to find that Ms. Wetherbee is an aggrieved person, I must find that she was harmed through no fault of her own, which is not the case here. The Commission has reviewed similar examination circumstances in the past, and has determined in situations such as these that the appellants are not aggrieved persons. See, *e.g. Pavone* v. *HRD*, 28 MCSR 611 (2015). To find otherwise would run contrary to the Commission's recognition of HRD's authority to determine the requirements for competitive civil service examinations.

The total time for submission of E&E claim ran from July 16, 2020 to August 13, 2020, a total of twenty-eight days. Even after Ms. Wetherbee attempted submission of her E&E claim, she had three days to continue to try to submit the claim. Further, instructions on the e-mail notifications of August 6, 2020 and August 12, 2020 stated, "If you do not receive an automated confirmation email after you submit your claim, your E&E claim application is considered incomplete and will not be accepted." These instructions adequately notified Ms. Wetherbee that the E&E component would not be complete until she received an email stating that it was received.

Ms. Wetherbee's testimony at hearing, as well as the testimony from Parole Board Member Santa, demonstrate that Ms. Wetherbee is a conscientious, diligent worker who did her utmost to keep the Parole Board operating as it should, even during a public emergency. Nothing in the record, however, shows that Ms. Wetherbee was prevented from submitting her claim prior to August 10, 2020 or was prevented from attempting to submit her E&E claim after that date. While the public emergency has affected employment conditions, daily activities, and stress levels for everyone, the circumstances of the exam, including the E&E portion, were fair and within the purview of HRD's authority to establish exam components and weights pursuant to G.L. c. 31 § 24.

Ultimately, HRD is vested with broad authority pursuant to MGL c. 31 § 22 to determine the passing requirements of exams. Here, HRD determined that submission of the online E&E Claim is a requirement to passing the IPO C/D promotional examination. I am not persuaded that the Commission should afford Ms. Wetherbee relief based upon her testimony that she did not know her E&E Claim was not submitted and received incorrect information from HRD. In light of the sufficient notice of the importance of the confirmation email, it is reasonable to expect that Ms. Wetherbee would have continued to pursue a part of the examination that she had trouble submitting.

CONCLUSION

Ms. Wetherbee's appeal under CSC Docket No. B2-20-152 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on May 6, 2021.

Notice to:

Michelle Wetherbee
[Address redacted]

Melissa Thomson, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

* * * * * *

JAMES A. AMATO

v.

HUMAN RESOURCES DIVISION

B2-21-044

May 21, 2021
Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Fire Lieutenant Exam-Failure to Proof Receipt of Confirmation Email—An appellant who had sat for the Fire Lieutenant exam acknowledged that he had never received a confirmation email from HRD stating that his E&E component was completed and so his appeal was dismissed.

ORDER OF DISMISSAL

On February 25, 2021, the Appellant, James A. Amato (Appellant), a firefighter in the City of Lawrence (City), filed an appeal with the Civil Service Commission, contesting the decision of the state's Human Resources Division (HRD) not to award him any education and experience points on a recent promotional examination for fire lieutenant.

2. On March 30, 2021, I held a remote pre-hearing conference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. The Appellant is a firefighter in the City of Lawrence.

B. On November 21, 2020, the Appellant took the promotional examination for Fire Lieutenant.

C. The deadline for completing the Education and Experience (E&E) portion of the examination was November 28, 2020.

D. On January 19, 2021, HRD informed the Appellant that he had received a written score of 77.69; a 0 on the E/E portion for failing to complete the E/E portion; and a failing overall score.

E. The Appellant filed a timely appeal with HRD, arguing that he had completed the E&E portion of the examination.

F. Having no record of the Appellant completing the E/E portion of the examination, HRD denied the Appellant's appeal on February 24, 2021.

G. The Appellant filed a timely appeal of HRD's determination on February 25, 2021.

4. As part of the pre-hearing conference, I asked the Appellant if he had a confirmation email from HRD indicating that he completed the online E/E portion of the examination. The Appellant produced the confirmation for applying for the examination and an auto-reply email from HRD when he submitted the supporting documentation. He was unable to produce a confirmation email showing that he completed the online E/E portion of the examination. I informed the Appellant that, absent such verification, it is likely that he would be unable to prevail in his appeal, consistent with numerous prior Commission decisions.

5. At my request, HRD agreed to work with the Appellant to determine if he ever initiated the E/E online application, after which the Appellant had 10 days to inform the Commission whether he wishes to move forward with his appeal with the Commission.

6. On April 7, 2021, HRD informed the Commission that an HRD representative, the Appellant and counsel for HRD met remotely to determine whether the Appellant had initiated his E&E claim. According to HRD: "In logging into his account, we determined that Mr. Amato had not initiated his E&E claim. We discussed it, and Mr. Amato had submitted and paid for his application to take the exam but had not initiated or completed his E&E claim, not realizing it was a separate requirement that opened later."

7. The Appellant did not notify the Commission if he wished to move forward with the appeal.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case." *See, e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*,

"No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31 § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "…[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that "… under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine

the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD'".

ANALYSIS

The facts presented as part of this appeal are not new to the Commission. In summary, promotional examinations, such as the one in question here, consist of two (2) components: the traditional written examination and the E&E component. HRD provides detailed instructions via email regarding how and when to complete the online E&E component of the examination. Most importantly, applicants are told that, upon completion of the E&E component, the applicant will receive a confirmation email—and that the component is not complete unless and until the applicant receives this confirmation email.

Here, it is undisputed that the Appellant sat for the written component of the fire lieutenant examination on November 21, 2020. He had until November 28, 2020 to complete the online E&E component of the examination. The Appellant acknowledges that he never received a confirmation email from HRD stating that the E&E examination component was completed and HRD has no record of the Appellant completing the E&E component, but, rather, only receiving supporting documentation.

While I am not unsympathetic to the Appellant's plight here, it is undisputed that: 1) HRD has no record showing that the Appellant completed the E&E component of the examination; 2) the Appellant did not receive a confirmation email verifying that he completed the E&E component; and, thus, 3) he is unable to show that he followed the instructions and actually completed the E&E component of this examination. Thus, this is not a case in which there is a genuine factual dispute that would require an evidentiary hearing.

Consistent with a series of appeals regarding this same issue, in which applicants have been unable to show that they followed instructions and submitted the online E&E claim, intervention by the Commission is not warranted as the Appellant cannot show that he was harmed through no fault of his own.

For this reason, the Appellant's appeal under Docket No. B2-21-044 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2021.

Notice to:

James A. Amato
[Address redacted]

Emily Sabo, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

BRIAN COULOMBE

v.

TOWN OF WARE

D1-20-089

May 21, 2021
Christopher C. Bowman, Chairman

***Disciplinary Action-Discharge of Firefighter-Lying About Age On Initial Application*—**In a highly unusual discharge appeal, Chairman Christopher C. Bowman affirmed the decision of the Ware Fire Chief to terminate a firefighter originally hired in 2004 but found out later to have lied about his age when taking the exam. When he was 18, the Appellant had stated his age as being 19 in order to sit for the exam open only to those 19 and older. At the time he applied, the Appellant's father was the Fire Chief and his mother a Fire Captain. Chairman Bowman delayed by a month the effective date of the decision, thereby giving the parties time to consider a resolution short of termination.

DECISION

On June 3, 2020, the Appellant, Brian Coulombe (Mr. Coulombe or Appellant), pursuant to G.L. c. 31, §§ 42 and 43, filed this appeal with the Civil Service Commission (Commission), contesting the decision of Provisional Fire Chief, Christopher Gagnon, to terminate him from employment with the Town of Ware (Town) as a Lieutenant for the Town of Ware's Fire Department (Department). A pre-hearing conference was held remotely by video conference on January 28, 2019.[1] A full hearing was held via video conference over a two (2) day period, on October 28, 2020 and November 20, 2020. As no written notice was received from either party, the hearing was declared private. The full hearing was recorded via Webex and both parties received a link to the recording, which the Commission has maintained a copy of.[2] Both parties submitted post-hearing proposed decisions.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this recording should be used to transcribe the hearing.

FINDINGS OF FACT

One (1) Appellant Exhibit and eleven (11) Respondent Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

Called by the Ware Fire Department:

- Regina Caggiano, Director of Civil Service Unit at HRD
- Christopher Gagnon, Ware Provisional Fire Chief
- Stewart Beckley, Ware Town Manager
- Eric Daigle

Called by the Appellant:

- Thomas Coulombe, Appellant's Father; Former Fire Chief; Now-Lieutenant, Ware Fire Department
- Brian Coulombe, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. The Appellant, Brian Coulombe (Appellant or Mr. Coulombe) was born in June 1985,[3] as evidenced by his birth certificate, driver's license, and by his own admission. (Testimony of Coulombe; Respondent Exhibit 2, R0060 and R0061).

2. Mr. Coulombe is a lifelong resident of Ware, MA and graduated from Quabbin Regional High School in Barre, MA in 2003. (Testimony of Coulombe).

3. As a seventeen (17) year-old senior in high school, Mr. Coulombe worked part-time for the Ware Fire Department (Department) as a call firefighter. It was through his service as a call firefighter that he was sent to the Massachusetts Fire Academy for part time firefighters. Prior to becoming a call firefighter, he previously held a work-study internship with the Department. He also earned his EMT certificate. (Testimony of Coulombe).

4. It was part of the culture at the firehouse that call firefighters would seek to be hired full time. Chief Christopher Gagnon remembers discussions that Mr. Coulombe was looking to get on the Department full time. (Testimony of Gagnon).

5. Mr. Coulombe's father, Thomas Coulombe, was the Chief of the Ware Fire Department during the Appellant's internship and when he held the part-time call firefighter position, the latter position being one he held for over two (2) years, from 2003 to 2005. (Testimony of Coulombe).

Sign-Up Process for Appellant's Civil Service Exam

6. Regina Caggiano (Caggiano) testified at the hearing of this matter. She has been the Director of the Civil Service Unit of HRD since 2018. She began her career with HRD in 1997, then moved over to the Civil Service Unit in 1998. She was promoted to Assistant Director in 2000, and in that role, she oversaw the certification and appointment division and was aware of the administration and development of the entry level firefighter exam at all relevant times. (Testimony of Caggiano).

7. HRD made an announcement for the April 2004 entry level firefighter examination and sent a multitude of exam posters to as many municipalities as possible to be posted at various locations throughout the municipalities, to include libraries, fire stations, and other municipal buildings. The exam poster was also posted online. The exam poster provided all necessary information for prospective applicants, to include the minimum entrance requirements, age requirements, accommodations, waivers, and the website address for the application itself.

8. This particular exam poster indicated that the test date was on April 24, 2004, the final date to apply for the exam was March 5, 2004, and that the minimum age qualification was nineteen (19) years old by the final date to apply. (Testimony of Caggiano; Testimony of Coulombe; Respondent Exhibit 7).

9. At the age of 18, Mr. Coulombe applied online on the HRD website to take the civil service entry level firefighter examination. HRD records indicate that he provided a date of birth of June 1984. (Respondent Exhibit 8; Respondent Exhibit 2, R0060-61).

10. Specifically, Mr. Coulombe applied for this exam on or about November 24, 2003. Mr. Coulombe was still only 18 years old on the final date to apply, March 5, 2004, as well. (Respondent Exhibits 2, R0060-61; 7 and 8).

11. At the time Mr. Coulombe applied for the civil service examination in November 2003, Mr. Coulombe was aware that there were two (2) positions for firefighter available for original appointment. (Testimony of Coulombe; Respondent Exhibit 2, R0066).

12. The civil service entry level firefighter examination is held every two years, on even numbered years. Since the examination was to be held in 2004, the next available examination for Mr. Coulombe, if he did not qualify for the 2004 examination, would have been in 2006. (Testimony of Caggiano).

13. In 2003, when Mr. Coulombe applied for the exam online, the data that he provided in the application was collected and was fed into HRD's mainframe system, ELYPSIS. The scan date, which is when his applicant data was fed into ELPYSIS, was November 23, 2003, as evidenced by the Application Scanning Information (ASI) sheet. This sheet is a picture of what ELYPSIS maintained.[4] (Testimony of Caggiano; Respondent Exhibit 8).

14. Mr. Coulombe used his parents' credit card to pay for the examination. (Testimony of Coulombe; Respondent Exhibit 11). HRD provided a spreadsheet of the payment for this exam

3. The Commission has kept the Appellant's full date of birth confidential, for privacy reasons.

4. [See next page.]

which affirms that Kathleen Coulombe's credit card was used. (Respondent Exhibit 11, R0276).

15. Mr. Coulombe testified that he entered his parents' email address as the email contact during payment. (Testimony of Coulombe; Respondent Exhibit 11, R0276).

16. Mr. Coulombe told an investigator for the Town of Ware that his father did not know that he was going to be taking the Civil Service examination. (Respondent Exhibit 2, R0026).

17. The HRD ASI sheet revealed a particular serial number, that being #500, which is a code that indicates a web-based application. Only web-based applications could use a credit card for payment, as opposed to a written, bubble-sheet application which required an applicant to pay using a money order. This was the first year HRD had both online and hand-written mail-in applications. (Testimony of Caggiano; Respondent Exhibit 8, R0266; Respondent Exhibit 11, R0276).

18. If an applicant entered a birthdate that made them ineligible (too young, or too old) for the exam, HRD's computer system would immediately reject the application and "kick it out as an error." (Testimony of Caggiano).

19. HRD's computerized system accepted Mr. Coulombe's application. (Testimony of Caggiano).

20. The application was accepted because the birthdate provided, June 1984, would have deemed him eligible. (Respondent Exhibit 8). This birthday was off by exactly one year. (Testimony of Beckley, Daigle, Gagnon). Mr. Coulombe's actual birthday is June 1985. (Testimony of Coulombe; Respondent Exhibit 2, R0060-61).

Appellant's April 24, 2004 Civil Service Exam

21. On the day of the April 24, 2004 examination, all applicants were checked in by a staff member of HRD to verify the person's name and picture, to be sure it was the same person who applied. HRD did not verify birthdates. At all times relevant to this case, the entry of a birthdate on an application for the exam was done on the "honor system." (Testimony of Caggiano). Mr. Coulombe brought identification with him, which was likely his driver's license. (Testimony of Coulombe).

22. On April 24, 2004, Mr. Coulombe took the civil service examination. At the time of the examination, he was still only 18 years old. (Testimony of Coulombe; Respondent Exhibit 2, R0060-61).

23. HRD has on file another Application Scan Sheet (ASI) for when Mr. Coulombe took the Lieutenant's Civil Service Exam in 2011. This 2011 ASI indicates that he entered his birthday as June 1985 on the online application, which is an accurate birthdate.[5] (Respondent's Exhibit 2, R0042; Respondent Exhibit 8, R00267; Testimony of Caggiano).

24. Typical mistakes HRD encounters with regards to online applications for civil service exams range from applicants accidentally entering a first name in the spot delegated for a last name to issues regarding residency preference or verifying a veteran's preference. Mistaken entry of a birthdate is not a typical mistake, as Director Caggiano testified she had never seen one instance of this type of mistake. (Testimony of Caggiano).

25. Mr. Coulombe passed the 2004 entry level firefighter civil service examination and was notified as much thereafter. (Respondent Exhibit 2, R0044; Testimony of Coulombe).

26. Thereafter, Mr. Coulombe applied for a permanent position as a firefighter with the Ware Fire Department on January 24, 2005. (Testimony of Coulombe; Respondent Exhibit 2, R0051-57).

27. His mother, who had been the longtime Captain of the call firefighters, filled out the application for him. Within that application, Mr. Coulombe's date of birth is listed as June 1985. (Testimony of Coulombe; Respondent Exhibit 2, R0051-57).

28. At the same time, Mr. Coulombe also applied for non-civil service fire departments in Southbridge, MA and Yarmouth, MA. Mr. Coulombe knew the minimum age requirement for a position in both Southbridge and Yarmouth was eighteen (18) years old. (Testimony of Coulombe).

29. Because his father, Thomas Coulombe, was Chief of the Ware Fire Department when Mr. Coulombe applied for the position of entry level firefighter, Chief Coulombe sought advice from counsel regarding his involvement in his son's candidacy. Chief Coulombe recused himself from the interview process and an outside panel of interviewers was utilized. (Respondent Exhibit 2, R0066-67).

30. Mr. Coulombe recalls that his father was not involved in the interview process because he remembers that his father was the Chief at the time of the interview. (Testimony of Coulombe).

31. As a result of the interview and after having passed the physical ability test (PAT), Mr. Coulombe received an offer of employment from the Ware Fire Department. Mr. Coulombe is not aware of any background investigation performed relative to his candidacy. On June 17, 2004, the Ware Fire Department submitted an authorization form to HRD upon appointment of Mr. Coulombe and one other candidate to the position of firefighter. (Testimony of Mr. Coulombe; Respondent Exhibit 2, R0071-72).

32. Later in his career, four new lieutenant positions were created and Mr. Coulombe was promoted to Lieutenant in 2013, after tak-

4. HRD was unable to provide the Town with the Appellant's actual application because it was on an old server and the system has since been deactivated. ELYPSIS still exists at HRD, which is why the ASI sheet has been able to be produced.

5. Mr. Coulombe has two accounts with HRD. His first account had all of his demographic information, to include his social security number and a birthdate of June __ 1984. The second HRD account has the same name and social security number as his first account established in 2003, but a birthday of June __ 1985. This second account was established in 2011 when he applied for the Lieutenant's Civil Service Promotional Exam. (Testimony of Caggiano).

ing the examination three (3) times. There were no interviews for the lieutenant position. Lieutenant is the next rank higher than his original position. (Testimony of Coulombe; Respondent Exhibit R0080).

33. During his employment with the Department, Mr. Coulombe had no prior disciplinary history within the Department. (Testimony of Coulombe; Testimony of Gagnon).

Appointing Authority Investigation into Appellant

34. Stuart Beckley (Mr. Beckley) has been the Ware Town Manager for eight and a half (8.5) years. Prior to that position, he had been the City Planner for the town of Easthampton, MA for twenty-three (23) years. His current position as Town Manager involves many human resource duties, to include, among other things, hiring within the town and negotiating with bargaining units. (Testimony of Beckley).

35. In mid-late 2018, Mr. Beckley was notified by a recently elected Selectman, Keith Kruckas, that there was a concern that Mr. Coulombe had not been eligible to take the Civil Service examination for entry level firefighter when he did in 2004 because he was not nineteen (19) years old at all relevant times, under the statute. Mr. Beckley understood that a contact at the fire station reported this to Selectman Kruckas. (Testimony of Beckley).

36. Upon receipt of this information from Selectman Kruckas, Mr. Beckley contacted HRD to ascertain whether HRD had any information relative to the concerning allegation. HRD provided Mr. Beckley copies of the ASI, showing a June 1984 birthday for the April 24, 2004 examination. HRD also provided a spreadsheet relative to Mr. Coulombe's payment for the exam. When Mr. Beckley found an incorrect birthdate listed for Mr. Coulombe on the ASI sheet, it gave credence to the rumor he had heard. (Testimony of Beckley; Respondent's Exhibit 5, R0247-257 and Exhibit 11, R0276).

37. In or around February 2019, the Board of Selectman authorized the Town of Ware to hire an outside investigative agency, the Daigle Law Group (DLG), to investigate whether Mr. Coulombe and/or his father (then-Chief Coulombe) were involved in any misconduct relative to Mr. Coulombe's original appointment to the position of entry level firefighter. (Testimony of Beckley; Testimony of Daigle).

38. Eric Daigle testified at the hearing of this appeal. He is the principal of Daigle Law Group, LLC and he received his juris doctor degree from Quinnipiac Law School. His company is based out of Southington, CT and they primarily conduct workplace investigations. In his capacity as a workplace investigator, he is a fact finder and makes conclusions as to whether violations occurred. (Testimony of Daigle).

39. As part of his investigation, Mr. Daigle interviewed Deputy Fire Chief Edward Wloch on March 14, 2019. Deputy Chief Wloch has been employed by the Ware Fire Department since 1989, and full time since 1996. When asked if he was aware of the issue surrounding the allegation that Mr. Coulombe may have falsified his age, Wloch stated that it is "probably the worst kept secret in the Town of Ware." According to Mr. Wloch, "the worst part was, everybody likes the kid but he just kept bragging about the fact that his dad's got all the pull in the world. He got him to take the test because we knew there were going to be openings coming up in the fire department. He got a waiver for him to take the test early…" Deputy Chief Wloch indicated that "everybody assumed he had some sort of waiver…" When asked further how anyone came to know about the issue of date of birth specifically, Deputy Chief Wloch responded that "the kid bragged about it to everybody… Oh my dad's got pull. He knows what he's doing."[6] (Respondent Exhibit 2, Attachment F, R0148-151).

40. Following a thorough investigation, which included six (6) interviews, including, among others, Mr. Coulombe, Chief Thomas Coulombe, Selectman Kruckas, Town Manager Beckley, and Deputy Chief Wloch, the independent investigator found the following facts:

- Mr. Coulombe applied for the original civil service examination on November 24, 2003 and took the exam on April 24, 2004. (Respondent's Exhibit 2, R0032-0036; Testimony of Daigle).
- On April 24, 2004, the Appellant was not 19 years old. (Respondent's Exhibit 2, R0032-0036; Testimony of Daigle).
- On April 24, 2004, at the age of 18, the Appellant took and passed the civil service examination to become eligible for appointment as firefighter. (Respondent's Exhibit 2, R0032-0036; Testimony of Daigle).
- The HRD ASI document, with a scan date of "2003-11-24," cites the Appellant's date of birth as "6-__-84" which is not his correct date of birth. The correct date of birth is June __ 1985. (Respondent's Exhibit 2, R0032-0036, R0071-0072; Testimony of Daigle).
- On April 28, 2005, Mr. Coulombe was one of two individuals appointed as a firefighter to work for the Town. (Respondent's Exhibit 2, R0032-0036, R0071-0072; Testimony of Daigle).
- Thomas Coulombe was the Department Chief from 2001 or 2002 and was the Chief at the time of Mr. Coulombe's appointment in 2005. (Respondent's Exhibit 2, R0032-0036, R0071-0072; Testimony of Daigle).

41. Mr. Daigle noted that Mr. Coulombe, during this interview, was able to recall many specific details about the civil service hiring process yet had no recollection as to whether his father was the Chief when he was hired in 2005. Mr. Daigle also found unbelievable that Mr. Coulombe told him that he did not know what the minimum age to become a firefighter was when he applied in 2003, nor does he currently know what the minimum age requirement is—even though he was now a sixteen (16) year veteran of the Department and a Lieutenant at the time of the Daigle interview. (Testimony of Daigle; Respondent Exhibit 2, R0167-0176).

42. Mr. Daigle also concluded that the timing of the test was relevant to Mr. Coulombe's motive to lie about his birthdate, since he

6. Deputy Chief Wloch did not testify at the Commission hearing. The transcript from the Daigle investigative interview was entered into evidence as Respondent Exhibit 2, Attachment F, R0148-0152).

would have to wait until 2006 to take the test if he could not take it in 2004. The timing was key because it was a two (2) year process. (Testimony of Daigle).

43. The Daigle investigative report concluded that there was sufficient evidence that Mr. Coulombe was untruthful in his July 2, 2019 interview with Mr. Daigle during the workplace investigation. (Testimony of Daigle; Respondent Exhibit 2, R0035-36).

Local Level Hearing Before Provisional Chief Christopher Gagnon

44. Christopher Gagnon (Chief Gagnon) is the current Provisional Fire Chief for the Town. He was recommended for appointment by Town Manager Beckley and appointed to that position by a vote of the Board of Selectmen effective December 22, 2019, following the retirement of Deputy Chief Edward Wloch and the demotion of Thomas Coulombe to lieutenant. (Respondent Exhibit 4, R0246; Testimony of Gagnon and Beckley).

45. Mr. Beckley immediately signed the paperwork that was supposed to go to HRD following the appointment of Chief Gagnon by the Board of Selectmen, but inadvertently failed to mail the document to HRD. When this error came to his attention, Mr. Beckley immediately caused new paperwork to be completed and submitted it to the HRD for immediate approval. (Testimony of Beckley; Respondent Exhibit 4, R0246).

46. Prior to his appointment to Provisional Fire Chief, Christopher Gagnon was appointed to the position of full-time fire lieutenant in or around 2009. He began his service with the Ware Fire Department as a provisional firefighter in or around 1991 then as a full-time firefighter in 1992. Chief Gagnon is currently the appointing authority for all firefighting staff in the Ware Fire Department. (Testimony of Gagnon, Beckley; Respondent Exhibit 4, R0246;). See also, G.L. c. 48, § 42.

47. Chief Gagnon heard of the birthdate issue in the late fall of 2019, around the time that the Board of Selectman held a hearing that resulted in Chief Thomas Coulombe's demotion. (Testimony of Gagnon).

48. After fully reviewing the unredacted Daigle investigative report, Chief Gagnon was concerned. It appeared Mr. Coulombe was not old enough to apply for and sit for the entry level firefighter exam. It was a statutory requirement that an applicant be nineteen (19) years old on the last day to apply for the exam and it did not appear that there was any other explanation for why the Appellant took the exam other than his lying on his application. (Testimony of Gagnon).

49. Chief Gagnon read the finding of untruthfulness and agreed, after reading Mr. Coulombe's investigative interview transcript, that he appeared to be evasive during the interview. Chief Gagnon explained that if someone did not do anything wrong, that person would not have been as evasive about it. He also believed Mr. Coulombe full well knew at the time of the 2019 interview with Mr. Daigle that his father had been the Fire Chief when he applied for the exam and when he was hired; he felt the Appellant's claim in the investigative interview that he did could not recall this was not true. (Respondent's Exhibit 2, R0176; Testimony of Gagnon).

50. Chief Gagnon did not want to believe the findings to be true because he had known the Appellant for years, since he was a child, and knew him to be a good firefighter and EMT. The Chief thought about the situation for some time, but eventually realized that he had to take the personal side out of it. It became inescapable for him, after he read the report several times, that the evidence was strong that the Appellant had lied and intentionally provided an incorrect birthdate on the exam. He believed that this type of conduct was potentially terminable. (Respondent's Exhibit 2, R0004-R0230; Testimony of Gagnon).

51. Town Manager Beckley also testified to how difficult the situation was and how he and Chief Gagnon were so conflicted. They were trying to balance Mr. Coulombe's career and length of experience with the level of dishonesty and lack of ethics. (Testimony of Beckley).

Appellant's Appointing Authority Hearing

52. The Notice, dated May 12, 2020, which explained the Appellant's rights to an Appointing Authority hearing under G.L. c. 31, §41 provided three (3) bases for possible discipline of the Appellant, up to termination, as follows : 1) his ineligibility for his original appointment and any promotions that flowed from it based on his ineligibility to apply for and take the exam, 2) the Appellant's untruthfulness during his interview with Mr. Daigle, and 3) his violation of the obligation of candidates and existing employees to be truthful and candid by providing a false date of birth on his application for the April 24, 2004 civil service exam. (Respondent's Exhibit No. 2, R0004-R0005; Testimony of Gagnon).

53. Chief Gagnon delivered the Notice directly to the Appellant and told him that if he had any exculpatory information to bring it to him. Chief Gagnon was hoping for Mr. Coulombe to present anything he had to try to disprove the allegations. (Testimony of Gagnon).

54. The Appellant chose to be represented by his Union, the International Association of Firefighters, Local 1851, ("Local 1851") at the hearing and the then Union President, David Edgar, attended the hearing with him and on his behalf. The Appellant did not ask to present witnesses and did not provide any documentary evidence at the hearing. (Respondents Exhibits 1 and 3, R-232-0244; Testimony of Gagnon and Appellant).

55. Per the agreement of all the attendees the hearing was audio recorded. (Respondent's Exhibit 1 and Exhibit 3; Testimony of Gagnon and Appellant).

56. During the hearing, the Mr. Coulombe did not provide any material information, nor did he offer any explanation or additional witnesses. He indicated that he first learned about the allegations against him in December of 2018. Chief Gagnon asked whether the Appellant did anything to try to straighten the situation out from the time he learned about it to the time of the Notice

and the Appellant said no. (Respondent's Exhibit 1 and Exhibit 3; Testimony of Gagnon and Appellant).

57. At the hearing, the Mr. Coulombe did not present any comparator information. (Respondent's Exhibit 1; Testimony of Gagnon and Appellant).

58. At the hearing, the Mr. Coulombe explained that he felt that the investigation involving his birthdate was a byproduct for the Town's going after his father's job. Chief Gagnon indicated at the hearing before the Commission that while it was true that the investigations with Thomas Coulombe and the Appellant ran concurrently, it did not take away from the fact that the Mr. Coulombe was ineligible to take the exam and provided no explanation to explain how it happened or why it should be excused. (Testimony of Gagnon).

59. Chief Gagnon also strongly considered the fact that the Appellant knew about the allegations against him for quite some time and did not contact HRD or anyone else to try to fix it. He thought that someone that did not do anything wrong would have more likely been proactive to try to remedy the situation. The Chief expected him to naturally want to contact HRD and ask questions since he had known about this allegation by the Town for a long time. The Chief stated, "I'd be all over it. I'd be shaking a lot of trees to get to the bottom of what is going on." (Respondent's Exhibit 3, R0232-234; Testimony of Gagnon).

60. Although Chief Gagnon could not say with 100% certainty whether the Appellant lied on his exam application, he believed that the evidence demonstrated that "it was highly likely that there was intent to make it happen." Chief Gagnon testified that there clearly was an element of possible intent because he had something to gain (a spot on the eligible list) from this bad decision. (Respondent's Exhibit 3, R0232-R0234; Testimony of Gagnon).

61. Chief Gagnon did not think demotion was an appropriate discipline in this case. The only discipline appropriate was to terminate Mr. Coulombe, since a simple demotion would still put Mr. Coulombe in a position that he legally would not have the right to hold, "plus the deception on the application sealed the deal." (Testimony of Gagnon).

62. On May 22, 2020, the Appellant was sent a "Notice of Appointing Authority's Decision to Terminate," outlining the basis for termination. His termination was effective May 28, 2020. (Respondent's Exhibit 3; Testimony of Gagnon).

Comparator Cited by Appellant

63. At the Commission hearing the Appellant, for the first time, alleged that termination was excessive because another firefighter, Firefighter A, had not been disciplined in 2005 by his father, who was Chief at that time, for an allegation of voter fraud and possible residency issues. (Testimony of Coulombe).

64. There was a requirement that all full-time firefighters live in the town of Ware. Chief Thomas Coulombe questioned the residency of Firefighter A after it was reported to him that the firefighter had registered to vote in the neighboring town of Hardwick and voted in Hardwick's annual town meeting. (Testimony Beckley; Testimony of Gagnon).

65. It was alleged that Firefighter A had voted on an issue at a Hardwick town meeting, which raised concerns for two reasons. First, the Town of Ware had a residency requirement for its firefighters and if he lived in Hardwick and voted in Hardwick then Firefighter A would be violating the residency requirement. Second, it raised a question about whether Firefighter A was engaged in any kind of voter fraud. Mr. Beckley, who assisted then-Chief Thomas Coulombe on this issue, was focused on the residency and the respective Town Clerks of Ware and Hardwick looked into the voter fraud issue. (Testimony of Beckley).

66. The Town of Ware determined that Firefighter A did reside in Ware. He had a lease for his primary residence there and his family had property in Hardwick. To Mr. Beckley's knowledge neither the Ware Town Clerk, Nancy Talbot, nor the Hardwick Town Clerk pursued the voter fraud allegations. (Testimony of Beckley).

67. Former Chief Thomas Coulombe testified at the hearing and explained that Firefighter A had signed a document under the pains and penalties of perjury that he was a resident of Hardwick. Chief Coulombe indicated that the town "folded" on this case and never supported the Chief in his recommendation that the town discipline Firefighter A.[7] Chief Coulombe indicated that there was never a hearing on this issue and Firefighter A never got to give his side of the story. (Testimony of Coulombe).

68. Chief Gagnon was not aware of the facts involving Firefighter A's residency issue. He was not in a management position at the time. (Testimony of Gagnon).

69. Mr. Beckley did not inform Chief Gagnon of the issue when he was considering the Appellant termination. Mr. Beckley viewed these issues as having significant differences. First, the issue with Mr. Coulombe involved whether he was eligible to even be on the list that resulted in his original appointment and whether he could legally be hired in the first place. With respect to Firefighter A's residency issues, a candidate is not ineligible to take the exam and be on the list if they do not reside in Ware.[8] As for the possible residency issue with Firefighter A, then-Chief Coulombe ultimately concluded that Firefighter A was a resident of Ware. There was never any conclusion about whether Firefighter A engaged in voter fraud.[9] Firefighter A was not disciplined and, according to Mr.

7. Chief Coulombe recommended that, after a hearing, he, as the appointing authority for the Department would at least suspend Firefighter A, and quite possibly terminate him from employment.

8. The law does not prohibit firefighters from living outside communities when they apply for exam but does require firefighters to establish residency within a 10-mile radius of the hiring community within 9 months of hire.

9. Former Chief Coulombe testified before the Commission relative to Firefighter A. He claims that the town "folded" on the case, which resulted in no discipline for Firefighter A. Chief Coulombe indicated that he spoke with Mr. Beckley and that he would recommend at least a suspension for Firefighter A, possibly a termination.

Beckley, Thomas Coulombe never communicated any discipline or recommended that Firefighter A receive any discipline in the matter. (Testimony Beckley).

LEGAL STANDARD

G.L. c. 31, §43 provides:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of the evidence establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm.* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). *See also Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited.

ANALYSIS

G.L. c. 31, s. 58 states in part: "No person shall be eligible to take an examination for original appointment to the position of firefighter or police officer in a city or town if the applicant will not have reached 19 years of age on or before the final date for the filing of applications for the examination, as so stated…." The preponderance of the evidence has established that Mr. Coulombe was required to be 19 years old by March 5, 2004, the final date for filing the application examination, in order to be eligible to sit for the exam. Mr. Coulombe's birth certificate and his driver's license, and by his own admission, prove that Mr. Coulombe was born on June __ 1985. There is no dispute that Mr. Coulombe was only 18 years old on March 5, 2004. There is no dispute that Mr. Coulombe was still only 18 years old when he sat for and took the firefighter civil service examination on April 24, 2004.

There had been a rumor for years that Mr. Coulombe had not been old enough to become a Ware firefighter when he sat for his 2004 civil service examination. As one witness interview transcript put it, it was the worst kept secret in town. No action was taken by the Town on these rumors, as they were just that, rumors, until a new Selectman had been elected and he began to look into the allegation in 2018, after having been told of the allegation by an unnamed source in the fire station. Thereafter, the Town Manager sought information from HRD relative to Mr. Coulombe's application for the 2004 examination and HRD provided a document that immediately gave credence to these rumors. Indeed, Mr. Coulombe's record had an incorrect birthdate, making him exactly one year older, on his HRD ASI scan sheet. The Town hired an outside, independent investigator, Eric Daigle, to look further into the matter to determine how an incorrect birthdate appeared on HRD's records for Mr. Coulombe. I credit the town for hiring an outside, independent investigator, so as to remove any hint of bias, since both Mr. Coulombe and his father, the Chief, were going to be investigated for any possible involvement.

The preponderance of the evidence supports the conclusion that Mr. Coulombe provided an incorrect birthdate on his civil service exam application. First, Ms. Caggiano testified that the Application Scanning Information sheet is a document that *only* contains information an applicant provided to HRD in their online application. HRD did not generate this information, it was generated solely from what an applicant had provided. I credit Director Caggiano's testimony, as she has deep institutional knowledge of the civil service examination application and administration process, both today and how the sign-up process has evolved over the years. Ms. Caggiano had never experienced any mistakes by applicants with regards to entering their birthdate wrong. The evidence simply does not support a conclusion that HRD's computer system malfunctioned or that HRD failed in its duty to identify that he provided an incorrect birthdate As Director Caggiano testified, applicants are trusted that they will provide truthful information on their exam applications, which, at a minimum, would be expected of anyone applying for a position of trust and great authority within the Commonwealth, such as firefighter or police officer. HRD's ASI sheet indicates that Mr. Coulombe's birthdate is listed as June __ 1984 because Mr. Coulombe, who filled out the 2003 application online, entered that birthdate into the system.

Further, the evidence proves that Mr. Coulombe had a clear motive to misrepresent his birthdate. He was embedded in the Ware Fire Department, beginning his career when was still in high school, at just seventeen (17) years old, first as a work study intern and then as a call firefighter. He already had obtained his EMT certification and it was the culture at the station for call firefighters to aspire to become full-time firefighters when positions opened up. Then that chance arose around the time he was graduating high school, with the advent of two (2) entry level firefighter positions became available at the Department. The only problem was that Mr. Coulombe was not eligible under the GL c. 31, s 58 to take the upcoming civil service examination, due to the minimum age requirement. At the time, he was already working as a call firefighter, his father was the Chief, his mother was a Captain, he had just graduated high school, and he was preparing for a career in the field. Mr. Coulombe had applied not only to the Ware Fire

Department, but also two (2) non-civil service fire departments, so he was clearly looking to break into fire service and immediately begin his career. Having worked in the Department and having two parents entrenched in the system, he would have had the opportunity to know potential timelines for job openings and, given the timing of the civil service exams, he would have missed the opportunity to apply for the two open positions in 2005 if he did not sit for the 2004 exam. So, he would certainly have a motive to enter an incorrect birthdate on the application which would have made him eligible for the exam. Had he entered a birthdate that made him ineligible, either too young or too old to take the exam, the system at HRD would have automatically rejected the application, thus the need to enter an eligible, yet fraudulent, birthdate.

Mr. Coulombe was notified by the Department in late 2018 that it was investigating an allegation that he was not eligible for the 2004 exam. Even with this allegation hanging over him for almost two years, he never once tried to clear his name by contacting HRD to ascertain what the issue was. Chief Gagnon noted that this was difficult for him to understand when he evaluated the evidence, since he felt that if someone had made an allegation against him for something that he did not do, he would have contacted HRD to get to the bottom of what happened.

Mr. Coulombe claimed to be 100 percent certain that he signed up for this exam on his own, with no help from others, although he used his parents' credit card to complete the transaction and entered his parents' email address as the point of email contact. Additionally, his mother filled out the lengthy 2005 Ware Fire Department application by hand for Mr. Coulombe, after he passed the 2004 civil service examination. Mr. Coulombe testified that he was did not know what the minimum age requirement was for the Ware Fire Department, even after all those years living with the Chief and a Captain at the Department, nor does he admit to knowing now what the age requirement is, even though he has been on the job for 16 years and has achieved the rank of lieutenant. I do not credit Mr. Coulombe's testimony that he did not know what the age requirement for Ware was at the time he applied for the exam, nor do I believe that he does not know the age requirement now, because he was able to detail with specificity what the age requirement was for other non-civil service departments he signed up for, that being eighteen (18) years old for Southbridge and Yarmouth, MA. Mr. Coulombe did not apply for any other civil service department other than Ware, most likely because the age requirement was nineteen (19) years old, and his father was not the Chief of the other fire department.

In addition to knowing what the age requirement was for Southbridge and Yarmouth, Mr. Coulombe was also aware that he had to apply for the exam on HRD's website, that he had to sit for the exam, that an eligible list would be generated, that for most departments the applicant needed to be an EMT and that many were looking for paramedics. When pressed as to how he knew all of those details but did not know the age requirement for his own current employer, he backtracked and said that he actually could not be sure that the other two departments had a minimum age of 18 years. HRD had posted the requirements on its website, the same website Mr. Coulombe used to apply for the exam. HRD had also widely also circulated the exam poster around the Commonwealth with the requirements for the position, many of which Mr. Coulombe was able to detail for the Commission. Mr. Coulombe had obviously done his homework and prepared himself for this career with his prior on-call firefighting role so it is difficult to imagine that he overlooked the statutory age requirement. It is just not credible.

Other discrepancies in Mr. Coulombe's testimony also stretch his credibility with the Commission. In his interview with Mr. Daigle during the internal investigation in 2019, Mr. Coulombe told Mr. Daigle that he did not recall if his father was the Chief when he became a firefighter in 2005. This statement is wholly inconsistent with his testimony before the Commission that, during his candidacy for the position of permanent firefighter in 2005, he recalled that he was interviewed by persons other than his father, due to the conflict of interest because *his father was the Chief*. How would Mr. Coulombe recall that his father recused himself from an interview because he was the Chief, yet he told Mr. Daigle that he could not recall whether his father was the Chief when he was sworn for that same position soon after the interview. Mr. Coulombe also testified that he recalls that his father was his boss, the Chief, two years prior to his swearing in for a permanent position, when he was a call firefighter during the years 2003-2005. Mr. Coulombe clearly attempted to downplay his father's leadership position during the 2019 Daigle interview, since it is highly unlikely that someone of his father's stature was not aware of the age requirement and would not pass along that key fact to his son.

I did not find that the decision to terminate the Appellant was based on political considerations, favoritism, or bias. At all times during the independent investigation and during the disciplinary hearing held before Chief Gagnon, Mr. Coulombe was given the benefit of the doubt by both Chief Gagnon and the Town Manager, Stuart Beckley. I credit both of their testimony. The Chief and the Town Manager weighed Mr. Coulombe's experience and his lengthy career with the lack of honesty and breach of ethics. When an initial inquiry uncovered that there might be some merit to the allegation, it resulted in a well-founded decision to investigate further. Chief Gagnon had known Mr. Coulombe since he was a kid and worked with him throughout Mr. Coulombe's entire career. He wanted to believe that there was nothing to the rumors. The last thing he wanted to do was terminate an employee and he wanted to find fault with the investigation.

Ultimately, Chief Gagnon had to put his personal interest aside and do what was right for the system and the Department. The weight of the evidence, combined with the untruthfulness of Mr. Coulombe, tipped the scale where it became obvious to the Chief what had to be done. Demotion was not an option because Mr. Coulombe had never been eligible for initial appointment. He could not be demoted from lieutenant to firefighter when he had not been legally appointed in the first place. By a preponderance of the evidence, the Town has proven that Mr. Coulombe was statutorily ineligible for any position as a firefighter in the Town of Ware because he did not meet the minimum age requirement to

apply or sit for the exam, in violation of G.L. c. 31, s. 58, with no legitimate excuse. Even with no improper motive, the fact remains that he would not have been on the eligible civil service list had he not taken the exam.

In summary, I have found that the Appellant engaged in substantial misconduct which adversely affected the public interest. Having reached that conclusion, I must determine whether the level of discipline (termination) against the Appellant was warranted.

As stated by the SJC in *Falmouth* v. *Civ. Serv. Comm'n*, 447 Mass. 814, 823-825 (2006):

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], s. § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to 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. citing Watertown* v. *Arria*,16 Mass. App. Ct. 331, 334 (1983).
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> "Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing *Police Comm'r of Boston* v. *Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—'to guard against political considerations, favoritism and bias in governmental employment decisions." *Id*. (citations omitted).
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> "Unless the commission's findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the [appointing authority] on the basis of essentially similar fact finding without an adequate explanation." *Id*. at 572. (citations omitted).

First, my findings do not differ significantly from those of the Fire Chief. Second, as referenced above, I do not believe the Fire Chief's decision here was influenced by political considerations, favoritism or bias.

Finally, I considered whether the incident involving Firefighter A is a comparable incident that should mitigate against termination. The Appellant did not present any comparator information at his pre-deprivation hearing and presented it for the first time to the Commission. Even taking the allegations of voter fraud as legitimate in the light most favorable to Mr. Coulombe, I do not find Firefighter A's case to be comparable. If Firefighter A had indeed registered to vote in a town in which he did not reside, that did not have the same inescapable nexus to his employment that Mr. Coulombe's misconduct did. Mr. Coulombe's decision to fraudulently misrepresent his age trampled on the rights of at least one other applicant for the firefighter position in violation of the basic merit principles required of the civil service appointment process. Mr. Coulombe was not eligible, under the law, for appointment; therefore, he must be terminated from that position. The Commission has previously upheld the termination of civil service firefighters who lied about their residency preference when initially hired by the municipality, which is analogous to this case. *Sean Layton & Ryan Layton* v. *City of Somerville,* G1-10-292, G1-10-293 [23 MCSR 767] (2010); *Investigation Regarding: Residency Preference of Certain Pittsfield Firefighters*, I-18-210 [32 MCSR 230 (2019)] (investigation by Commission, resulting in resignation of two employees who did not meet residency preference as had been claimed).

Lastly, the Appellant argued that his termination should be overturned under G.L. c. 31, s. 42 because G.L. c. 31, s. 41 requires the decision to terminate come from the appointing authority and Chief Gagnon had not been properly appointed as a Provisional Fire Chief when he terminated the Appellant on May 22, 2020. This claim for relief lacks merit. G.L. c. 48, s. 42, states: "Towns accepting the provisions of this section…. which have accepted corresponding provisions of earlier laws may establish a fire department. The Chief shall be appointed by the selectmen…and shall appoint a deputy chief and such officers and firemen as he may think necessary, and may remove the same at any time for cause and after a hearing." Chief Christopher Gagnon was appointed the Provisional Fire Chief for the Town of Ware effective December 22, 2019 by a vote of the Board of Selectmen for the Town. The paperwork for the provisional promotion was immediately signed by the Town Manager but was inadvertently not filed with HRD until July 28, 2020.

G.L. c 31, s. 42 allows the Commission to restore an employee without loss of compensation if the appointing authority has failed to follow the Section 41 requirements and that the rights of said person have been prejudiced. Here, the evidence is clear that Chief Gagnon had been appointed in December 2019 as the Provisional Chief by the Board of Selectman. It was the Board's clear intent that Chief Gagnon serve in this role, but for an error transmitting the document to HRD by the Town Manager, that paperwork would have been submitted to HRD. Once the Town learned of the omission to file, the Town immediately remedied the situation. Further, the statute requires the Appellant to have been prejudiced by the error. Here, the Appellant was afforded all the procedural notice he was due and he was given the opportunity for a full hearing and to be represented by counsel. He was not prejudiced in any way by the failure to file the paperwork.

For all of these reasons, the Appellant's appeal under Docket No. D1-20-089 is ***denied.***

FUTURE EFFECTIVE DATE OF DECISION

For all the reasons discussed in the analysis, Commission intervention is not warranted here. However, given Brian Coulombe's decade and a half of service to the Town, it is appropriate for the Commission to provide the parties with additional time to consider a resolution short of termination that is in the public's best interest. The Commission has previously provided counsel for both parties

with a roadmap for a possible resolution and we encourage them to engage in good faith discussions in this regard. To facilitate such efforts, the effective date of this decision is June 21, 2021.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2021.

Notice to:

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* * * * * *

MATTHEW M. JOYCE

v.

HUMAN RESOURCES DIVISION

B2-20-176

May 21, 2021
Christopher C. Bowman, Chairman

Examination Appeal-Firefighter Entry Level Physical Abilities Test-Appeal Asking to Retake Test Due to Injury—An appeal from a candidate for appointment as a firefighter was dismissed by the Commission on HRD's summary decision motion where the Appellant received a very low score on the Firefighter Entry Level Physical Abilities Test because of an injury sustained during military service. No relief was warranted where the Appellant had voluntarily failed to disclose the injury and had signed documents on the date of the exam indicating he was capable of completing it.

DECISION ON MOTION FOR SUMMARY DECISION

On December 4, 2020, the Appellant, Matthew M. Joyce (Appellant), filed an appeal with the Civil Service Commission (Commission), seeking an order from the Commission allowing him to re-take the Entry Level Physical Abilities Test (ELPAT) portion of the firefighter examination.

2. On January 19, 2021, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant and counsel for the state's Human Resources Division (HRD).

3. As part of the pre-hearing conference, the parties agreed to the following unless indicated otherwise:

A. The Appellant served in the United States Marine Corps (Marines).

B. According to the Appellant, while he was on active military duty between June 1, 2019 and June 14, 2020, he injured his shoulder.

C. After being released from active military duty, the Appellant consulted with a physician, discussed the possibility of surgery, and ultimately opted for physical therapy.

D. The Appellant applied with HRD to take the 2020/2021 firefighter examination, which consists of two parts: a written examination and an ELPAT, each of which is weighted 50%.

E. The Appellant had taken the ELPAT as part of a previous firefighter examination cycle.

F. As part of this examination cycle, the Appellant attended an ELPAT preview offered by HRD.

G. Prior to taking the examination, the Appellant signed an HRD authorization form, indicating that it he did not have any medical conditions that would prevent him from taking the ELPAT.

H. According to HRD, individuals with medical conditions/injuries can ask to take the ELPAT at a later date.

I. At no time prior until taking this appeal, did the Appellant request a retake from HRD based on emergency or medical reasons.

J. According to the Appellant's written submission to the Commission: "Due to the firefighter exam being available just once every two years, and the unfortunate affects [sic] COVID-19 has made to the schedule of exams, I made the decision not to disclose my injury and give the ELPAT my best shot. I was afraid to risk disclosing an injury that may take months to heal, and miss my chance at becoming a firefighter for another two years."

K. Also according to the Appellant's written submission to the Commission: "During the exam just after 3/7 events I was unable to continue, and was afraid if I had it would make my injury worse."

L. There is no pass/fail score for the ELPAT. Based on the information provided by the Appellant, he would receive an ELPAT score of 43, which will be weighted 50% toward his final score.

M. On January 13, 2021, the Appellant took the written portion of the examination.

N. If he receives a total (ELPAT + written) score of 70 or more, the Appellant, who is a disabled veteran, will appear on the eligible list for firefighter above all veterans and non-veterans.

4. As part of the pre-hearing conference, the Appellant argued that the Commission should issue an order giving him an opportunity to re-take the ELPAT portion after completing another round of physical therapy.

5. Based on the facts here, and assuming all of the evidence in the light most favorable to the Appellant, I informed the Appellant that it was unlikely that he could show that he was an aggrieved person (harmed through no fault of his own) and/or that it would be fair and impartial to other exam applicants for the Appellant to be given the opportunity to re-take the ELPAT.

6. The Appellant indicated that he wanted to move forward with his appeal.

7. As discussed at the prehearing, HRD submitted a motion for summary decision. The Appellant did not submit an opposition.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case." *See, e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations … ".

ANALYSIS

Based on the undisputed facts, and for the reasons cited by HRD in their motion for summary decision, the Appellant's appeal is dismissed. As argued by HRD, the Appellant, on the day of the examination, signed documents indicating that he was capable of completing the examination; he made no disclosure of his injury; and, after being unable to complete the examination, he left the site without notifying testing administrators. The relief requested by the Appellant is not warranted as he was not harmed through no fault of his own and the ELPAT was administered in a fair, uniform manner.

The Appellant's appeal under Docket No. B2-20-176 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2021.

Notice to:

Matthew M. Joyce
[Address redacted]

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

JONATHAN MEDEIROS

v.

HUMAN RESOURCES DIVISION

B2-21-054

May 21, 2021
Christopher C. Bowman, Chairman

***Examination Appeal-E&E Credits-Fire Lieutenant Exam-HazMat Technician Course-Mootness*—**The Commission dismissed an appeal from a Fall River firefighter challenging HRD's refusal to grant him credit for a HazMat training course because HRD had concluded after the pre-hearing conference that to do so would not change his position on the list. But given that HRD had denied the credit on the dubious basis that the Appellant had received only a certificate of completion rather than a "certification" for the 305 hour course, the Commission encouraged HRD to determine before the next examination cycle whether such a distinction is a meaningful one.

ORDER OF DISMISSAL

On March 6, 2021, the Appellant, Jonathan Medeiros (Appellant), a Fire Lieutenant in the Fall River Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting a determination by the state's Human Resources Division (HRD) to deny him education and experience credit for a certain "certification" for which he believes he should be awarded additional E/E points.

2. On April 13, 2021, I held a remote pre-hearing conference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. On November 21, 2020, the Appellant took the Fire Captain examination.

B. He received a written score of 87.14 and an E/E score of 101.15 for a total score of 90.

C. He is currently tied for 4th on the current eligible list for Fall River Fire Captain.

D. The Appellant was denied 0.5 E/E points for a HazMat technician course.

E. If awarded this 0.5 E/E points, his total score would be increase by 0.1 points (0.5 x 0.2)

4. According to the Appellant, Fall River goes down to the one hundredth decimal point of examination scores to break ties of individuals on the eligible list.

5. As of the pre-hearing conference, it was unknown if an additional 0.1 points would result in a change in the Appellant's ranking, even if broken down to the one-hundredth decimal point.

6. In regard to the substantive issue, HRD stated that the Appellant was not awarded the E/E point for the HazMat technician course, in part because the supporting documents showed only a "certificate of completion" as opposed to a "certification."

7. During the pre-hearing conference, the Appellant provided me with access to his profile on the "Pro Board Certification Registry" which lists the HazMat Technician course as "certified", similar to the other courses for which HRD granted E/E points to the Appellant. Further, the "Certificate of Completion" indicates that the course required 305 hours of class time (which the Appellant verified that he completed).

8. For all of the above reasons, I ordered HRD to: a) determine whether a 0.1 point increase in the Appellant's total score would change his ranking vis-à-vis other candidates on the eligible list, when broken down to the one-hundredth decimal point; and b) determine whether, based on the "Pro Board Certification Registry" information, the Appellant should be considered "certified" in this course and awarded the 0.5 E&E points.

9. On April 22, 2021, HRD, after review, notified the Commission that, even if the Appellant were awarded the 0.5 E&E points, his ranking would not change vis-à-vis other candidates on the eligible list, even when broken down to the one-hundredth decimal point.

10. In regard to the second request, HRD replied: "The Appellant failed to provide the proper documentation and information at the time that he was required to complete his online claims. HRD cannot confirm that the Appellant is "pro-board certified" as he claimed, as HRD had no such information at the time of the scoring this exam nor does it accept the photograph that the Appellant provided at the investigative conference. HRD does not have access to the 'Pro Board Registry.' HRD already provided the Appellant in its instructions what it would accept for proof of certification in this area. The Appellant failed to comply."

ANALYSIS/CONCLUSION

Based solely on the fact that the outcome of this appeal would have no impact on the Appellant's rank, either in terms of his rank on the eligible list based on whole numbers or in terms of the tie-breaking method used by Fall River, this appeal is dismissed on futility grounds.

"A case is moot when there is no longer any need for the relief sought, *see Ott* v. *Boston Edison Co*., 413 Mass. 680, 682-683 (1992), or "when the party claiming to be aggrieved ceases to have a personal stake in its outcome." *Commissioner of Correction* v. *McCabe*, 410 Mass. 847, 850 (1991), quoting *Attorney Gen.* v. *Commissioner of Ins*., 403 Mass. 370, 380 (1988). See *Mullholland* v. *State Racing Comm'n*, 295 Mass. 286, 289 (1936) (case is moot when "the situation is such that the relief sought is no longer available or of any use to the plaintiffs and a decision by the court will not be applicable to existing rights")."

Minasian v. *PNC Bank*, --- Mass. App. Ct. --- (March 1, 2021) (unpublished Rule 23.0 disposition)

"A case is moot when the parties no longer have a stake in the determination of the issues presented, *First Natl. Bank of Boston* v. *Haufler*, 377 Mass. 209, 211 (1979), when the dispute has become hypothetical, or when it does not involve an actual controversy, *Sullivan* v. *Secretary of the Commonwealth*, 233 Mass. 543, 546 (1919). *See Wolf* v. *Commissioner of Pub. Welfare*, 367 Mass. 293, 298 (1975)."

Town of Hingham v. *Patch*, 82 Mass. App. Ct. 1103 n.3, 969 N.E.2d 748 (Mass. App. 2012) (unpublished Rule 1:28 decision).

Murphy v. *Hunt*, 455 U.S. 478, 481 (1982) (in general, "a case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome").

"A case becomes moot 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (emphasis added.) *Campbell-Ewald Co.* v. *Gomez*, 136 S.Ct. 663, 669 (2016), quoting *Knox* v. *Service Employees*, 132 S.Ct. 2277, 2287 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Id, quoting *Chafin* v. *Chafin*, 133 S.Ct. 1017, 1023 (2013).

Silva v. *Todisco Servs., Inc*., docket no. 1684CV02778-BLS2 (Mass. Super. Ct. March 6, 2018)

To ensure clarity, however, HRD's determination that a "certificate of completion" is somehow distinguishable from proof of "certification" appears, in this instance, to defy logic and commonsense. Prior to the next examination cycle, I would encourage HRD to determine, based on the *facts*, whether this 305-hour course qualified for the applicable E&E points and whether a "certificate of completion" and a "certification" reflects a distinction without a difference.

For these reasons, the Appellant's appeal under Docket No. B2-21-054 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 21, 2021.

Notice to:

Jonathan Medeiros
[Address redacted]

Patrick Butler, Esq.
Human Resources Division
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Boston, MA 02114

* * * * * *

KYLE MILTIMORE, REBECCA BOUTIN and DAVID KENNEDY

v.

WESTFIELD FIRE COMMISSION

D1-19-270 (Miltimore)
D1-19-271 (Boutin)
D1-19-272 (Kennedy)

May 21, 2021
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge of Three Westfield Firefighters-Modification of Penalty-Biased Investigation-Insubordination-Conduct Unbecoming-Untruthfulness-Disparate Treatment—The Commission reinstated three firefighters discharged by the Westfield Fire Commission for insubordination and untruthfulness. The decision concludes that the City's investigation into their actions surrounding the current Chief's predatory sexual conduct was deeply biased and led to disparate punitive treatment whereby the putative predator was elevated to the Department's top slot and they were fired. The Commission also launched an investigation into the actions necessary to ensure a safe working environment for the Appellants that included mandatory actions to be taken by the Westfield Fire Commission, including appropriate investigation and disciplinary action against the Fire Chief and development of a sexual harassment training program. Only a single charge against one of the Appellants was sustained by the Commission that related to a false statement about the imminent arrest of the Fire Chief for rape, although one Commissioner issued a concurrence arguing that the 30-day suspension agreed to by the other Commission members was excessive.

SUMMARY OF DECISION

The Westfield Fire Commission terminated the Appellants (two Firefighters and a Fire Captain) based primarily on the conclusions contained in a report prepared by an outside investigator.

Upon appeal to the Civil Service Commission, following seven days of evidentiary hearings and after considering the sworn testimony of seventeen witnesses, the Commission voted to overturn the termination of the two firefighters and modify the discipline of the Fire Captain, concluding that:

> 1) The investigative report is riddled with examples of unsubstantiated "beliefs" instead of establishing "facts" along with inappropriate disparaging personality assessments which show that the investigation was tainted with bias and personal animus against the Appellants that discredit the conclusions of the investigator as they relate to the Appellants;
>
> 2) A fair and impartial review of the facts, together with the totality of the credible evidence, exonerate the Appellants of any wrongdoing, with the exception of one charge against the Fire Captain for making a false and damaging statement regarding the then-Deputy Fire Chief, which warrants a thirty-day suspension;
>
> 3) Undisputed acts of misconduct, along with allegations of other serious misconduct by the then-Deputy Fire Chief, have been largely ignored, glossed over or sanctioned by the Westfield Fire Commissioners, who voted to *promote* the Deputy Fire Chief to Fire Chief shortly after the termination of the Appellants, reinforcing the appropriateness of modifying the penalty of the Fire Captain and warranting the initiation of an investigation under Section 72 of the civil service law.

In sum, and for the reasons detailed in this decision, the appeals of Firefighters Kennedy and Miltimore are allowed and the decision of the Fire Commission is vacated; the appeal of Captain Boutin is allowed in part and the decision of the Westfield Fire Commission is modified from termination to a 30-day suspension; and, pursuant to Section 72 of the civil service law, the Westfield Fire Commission is ordered to conduct an independent review regarding the allegations of misconduct regarding the incumbent Fire Chief.

DECISION

On December 27, 2019, the Appellants, Kyle Miltimore (Miltimore or Firefighter Miltimore), Rebecca Boutin (Boutin or Captain Boutin) and David Kennedy (Kennedy or Firefighter Kennedy) (Appellants), pursuant to G.L. c. 31, § 43, filed appeals with the Civil Service Commission (Commission), contesting the decision of the Westfield Fire Commission (Fire Commission or Appointing Authority) to terminate their employment with the Westfield Fire Department. On January 22, 2020, a pre-hearing conference was held at the Springfield State Building in Springfield, MA. By agreement of the parties, the appeals were consolidated. A full hearing was held remotely via Webex videoconference[1] over seven (7) days between May 18, 2020 and September 1, 2020.[2] A stenographer produced the official record of the proceedings by agreement of the parties. The hearing was private and witnesses were sequestered. Following the close of the hearing, both parties submitted proposed decisions on December 7, 2020.

FINDINGS OF FACT

The following exhibits were entered into evidence electronically at the hearing: Respondent Exhibits 1-12, Appellants Exhibits 1-18, Joint Exhibits 1-8, Appellants' Chalk, Commission Exhibits

1. This proceeding was among the first evidentiary hearings conducted remotely after the Commission adopted emergency procedures in March 2020 in response to the pandemic. Counsel for both parties and their staff are to be commended for their Herculean efforts and high degree of professionalism that allowed this matter to proceed smoothly.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regs. §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

1-2 and Post-Hearing Exhibits 1-6. Based upon the documents admitted into evidence, the stipulated facts, and the testimony of:

Called by the Fire Commission:

- Andrew Hart, Deputy Chief, Westfield Fire Department
- Seth Ellis, Deputy Chief, Westfield Fire Department
- Charles Warren, Captain, Westfield Fire Department
- Keith Supinski, Captain, Westfield Fire Department
- Christine Humason, Firefighter, Westfield Fire Department
- Christopher Bard, Mechanic, Westfield Fire Department
- Christopher Genereux, Firefighter, Westfield Fire Department
- Niles Lavalley, Firefighter, Westfield Fire Department
- Jennifer Daley, Firefighter, Westfield Fire Department
- Jeffrey Siegel, Fire Commissioner, Westfield Fire Department
- Michael McNalley, Detective, Massachusetts State Police
- Dawn McDonald, Esq., Investigator

Called by the Appellants:

- Fire Captain Rebecca Boutin, Appellant
- Firefighter David Kennedy, Appellant
- Firefighter Kyle Miltimore, Appellant
- Firefighter Lee Kozikowski, Firefighter, Westfield Fire Department
- Christopher Dolan, Trooper, Massachusetts State Police

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence, I make the following findings of facts:

BACKGROUND

1. Located in Hampden County approximately eleven (11) miles west of Springfield, the City of Westfield (City) has a population of approximately 41,000. (https://www.census.gov/quickfacts/fact/table/westfieldcitymassachusetts/PST045219)

2. The three (3)-member Westfield Fire Commission (Fire Commission), appointed by the City's Mayor, is the civil service appointing authority for the Westfield Fire Department. Siegel, Tr. Day 5, p. 71

3. As the appointing authority, the Fire Commission is responsible for making appointments, promotions and disciplinary decisions for all civil service employees in the Fire Department, from Fire Chief down to Firefighter. Siegel, Tr. Day 5, p. 71.

4. Appellant Rebecca Boutin joined the Fire Department as a firefighter/paramedic in 1999 and was promoted to Fire Captain in 2010. She served in that position until her termination in 2019. Captain Boutin also served on a regional technical rescue team as a training and safety trainer. Boutin, Tr. Day 6, p. 203.

5. Appellant David Kennedy joined the Fire Department on a temporary basis in 1989. He became a full-time firefighter in Westfield in 1992 and eventually became certified as an EMT and paramedic. He served as a firefighter/paramedic until his termination in 2019. Kennedy, Tr. Day 5, p. 94.

6. Appellant Kyle Miltimore joined the Westfield Fire Department in April 2012 as a firefighter/paramedic. He served in that position until his termination in 2019. Miltimore, Tr. Day 6, pp. 98-99.

7. Firefighter Miltimore was also employed by the on-call, part-time Fire Department in Southampton, MA from 2009 until 2015. He started off as a firefighter and was promoted to Deputy Fire Chief. While employed in Southampton, Miltimore became concerned that employees were not keeping proper logs regarding the distribution of narcotics. He reported those concerns to the Medical Director of Cooley Dickinson Hospital and began taking pictures of the logs in question. Shortly thereafter, Miltimore took a 3-month leave of absence from Southampton because he "just didn't feel supported by the Fire Chief." During this time, the Town's ambulance license was suspended due to a state investigation. Miltimore was later notified by the Town that he may be subject to disciplinary action. Miltimore and Southampton subsequently entered into a confidential separation agreement. Miltimore, Tr. Day 6, pp.136 - 142.

8. The Westfield Fire Department divides its firefighters into four (4) groups of firefighters, known as A Group, B Group, C Group, and D Group. Supinski, Tr. Day 2, p. 233-234.

9. Boutin, Kennedy and Miltimore were assigned to C Group. Ex. R1

10. Patrick Egloff (Egloff) was the Deputy Chief of C Group at all times relevant to this appeal. Ex. R1.

11. In a report that will be referenced later in these findings, an outside investigator made the following conclusions about Egloff:

> "Egloff is generally liked by most of the department. Words used to describe him were 'hard working', 'good, honest family man' and 'knowledgeable' about the job. Egloff cares very much about the job and considers his co-workers to be his family …
>
> …
>
> However, even those who like Egloff and respect him said that he is 'volatile,' 'bombastic', … 'has anger management problems', and likes to joke around and be one of the guys, until the joke is on him.
>
> …
>
> I heard several stories about him attacking a soda machine that ate his money, kicking in the door to the building, tried to flip over a van when he got locked out as a joke, and many other stories, the theme of which was, that Egloff cannot take a joke and over reacts, sometimes by violently attacking inanimate objects and always by screaming. As a result, many of the people who

> like him and have no axe to grind with him do not believe he would make a good Chief …" Ex. R1, p.22.

12. Miltimore has observed Egloff pulling Captain Boutin's hair "multiple times." Miltimore specifically recalled two (2) such incidents as follows:

> "So, I can recall a couple incidents. One was in the hallway near the kitchen. She was standing there talking to a few individuals, it was around breakfast time, and he walked up from behind her and grabbed onto her ponytail and yanked her head back and he was pressing his hips into her back, and she yelled stop, don't pull on my hair, my neck hurts, and he stopped and laughed and walked away. Another incident is very similar in the kitchen area. In fact, it was right around breakfast time, he walked in, did it in front of a group of people."

Miltimore, Tr. Day 6, p. 105

The 2016 St. Patrick's Day Parade and Egloff's conduct regarding Ms. N

13. In March 2016, several members of the Department marched in uniform, representing the City of Westfield in the City of Holyoke's annual St. Patrick's Day Parade. (Supinski, Tr. Day 2, pp. 260-261; Ellis, Tr. Day 3, p. 38).

14. After the parade, several marchers from the Department as well as employees of Noble Hospital in Westfield, MA, joined together and celebrated at local Holyoke and Westfield bars. Many of these individuals became intoxicated, including Deputy Chief Egloff. (Humason, Tr. Day 2, pp. 71-72, 142; Bard, Tr. Day 2, pp. 204-205).

15. Transportation from bar to bar was provided by Chris Bard, the mechanic for the Department, in his personal truck. (Bard, Tr. Day 2, p. 202).

16. While Westfield Firefighter Niles Lavalley was sitting on the sidewalk outside the Clover Bar on High Street and Lyman Street in Holyoke, a nurse (Ms. N) from Noble hospital approached Lavalley and told him that Egloff had inappropriately touched her breast. Lavalley approached Egloff and told Egloff to "knock it off." (Lavalley, Tr. Day 3, pp. 57, 73)

17. Later that day, while at the Waterfront Tavern in Holyoke, Ms. N approached Lavalley again and told Lavalley that Egloff had inappropriately touched her between her legs. Lavalley physically grabbed Egloff and told him to "cut the shit out." (Lavalley, Tr. Day 3, pp. 58, 73)

18. Firefighter Chrissy Humason was standing next to Ms. N and Egloff outside the Clover Bar on the day of the parade. Humason, who describes herself as Ms. N's best friend, saw Ms. N look at Egloff and say to Egloff, "Do that again and I'll knock you the fuck out." Humason heard Egloff say "sorry" to Ms. N and then saw Egloff walk away. After Egloff walked away, Ms. N told Humason that Egloff had just "palmed" her. Humason, Tr. Day 2, pp. 74, 76.

19. Seth Ellis is a Deputy Fire Chief in the Westfield Fire Department and he was at the St. Patrick's Day Parade in Holyoke in 2016. Ellis saw Ms. N throughout the day and observed that Ms. N was "very outgoing, very happy" throughout the day. Toward the end of the day, however, Ellis and Ms. N were in the same vehicle being driven back to their own vehicles. Ellis observed that Ms. N was "obviously upset … she was visibly agitated." Sometime after the parade, Ellis asked Humason why Ms. N was upset while they were in the car. Humason told Ellis that there had been an "incident." Ellis, Tr. Day 3, pp. 10-12.

20. Shortly after the St. Patrick's Day Parade in 2016, Humason told Captain Boutin that Egloff had "cupped" Ms. N after the parade that day. Boutin, Tr. Day 6, p. 204. During this same conversation, Humason also told Boutin that Egloff had touched her (Humason) "on the ass" on the day of the parade. Boutin, Tr. Day 6, p. 204.[3]

21. Sometime after the parade, Egloff told Humason that he wanted to apologize to Ms. N and did so in Humason's presence. Humason, Tr. Day 2, pp. 173-174.

22. Humason later told Boutin that Egloff and Ms. N had spoken, and there was no longer an issue between them. Boutin, Tr. Day 6, p. 205.

The January 2018 Revelations of 2016 Parade Events Concerning Ms. S

23. Lee Kozikowski is a Westfield Firefighter who, like the Appellants, was assigned to C Group. In January 2018, almost two (2) years after the 2016 St. Patrick's Day Parade, Kozikowski was on an ambulance run at Noble Hospital. While on the ambulance run, Kozikowski had a conversation with Ms. N. in the Noble Emergency Room. Kozikowski, Tr. Day 1, p. 190. Sometime during the conversation with Ms. N, another Noble Hospital employee, Ms. S, joined the conversation. Ms. S was among the Noble Hospital employees who had joined Westfield Fire Department employees at the 2016 parade, going to bars and travelling in Chris Bard's truck. In regard to the conversation between Kozikowski and Ms. N, there were statements made about the well-known comments by then-President Trump about "grabbing women by the pussy." Kozikowski, Tr. Day 1, pp. 190-191. Kozikowski commented to Ms. N that this had happened to her, a reference to Egloff and the 2016 St. Patrick's Day Parade. Kozikowski, Tr. Day 1, p. 191.

24. Ms. S then said: "No one ever talks about what happened to me." Ms. S told Kozikowski that Egloff "went down her [Ms. S's] pants and touched her vagina." Kozikowski, Tr. Day 1, p. 191. Ms. S told Kozikowski that she pushed Egloff away and he then "went up her shirt and attempted to touch her breasts" and she pushed him away again. During this conversation, Ms. S did not tell Kozikowski where these alleged acts occurred on the day of

3. Humason adamantly denies that Egloff touched her inappropriately on the day of the parade. Humason, Tr. Day 2, p. 89. As referenced in future findings, it is highly relevant whether Humason made this allegation to Boutin. Humason is also a key witness in regard to conversations that she had with alleged victims. Because Humason's identity is critical to this appeal and because Humason denies that she was a victim of inappropriate touching that day, I have not used a pseudonym for Firefighter Humason.

the parade (i.e.—at a bar, in a truck, car, etc.). Kozikowski, Tr. Day 1, p. 191.

25. While driving in the ambulance on the way back to the Westfield Fire Department that day, Kozikowski discussed the allegations made by Ms. S with his partner, Brian McEwan. Kozikowski, Tr. Day 1, p. 200, 201. McEwan, Tr. Day 3, p. 136.

26. When he returned to the Fire Department that day, Kozikowski told many people at work about his conversation with Ms. S. Kozikowski, Tr. Day 1, pp. 191-192. This included his Captain on that shift that day, Keith Supinski, who had asked Kozikowski what was going on. Kozikowski. Tr. Day 1, pp. 198; Supinski, Tr. Day 2, p. 246. Supinski specifically recalls Kozikowski stating that Ms. S. had been "digitally raped" by Egloff on the way to the Waterfront during the St. Patrick's Day Parade. Supinski, Tr. Day 2, p. 248. Supinski recalls telling Kozikowski that the allegation was "a lie" because he (Supinski) was in the truck that day. (Supinski, Tr. Day 2, p. 248) Supinski did not report the matter to anyone above him. (Supinski, Tr. Day 2, p. 257).

27. Among those who discovered the information about Ms. S were the Appellants: Kyle Miltimore, David Kennedy and Captain Boutin. Boutin learned about it from either Kozikowski or Miltimore. (Boutin, Tr. Day 6, pp. 204-205).

28. Miltimore heard of Ms. S's statements from Kozikowski. (Miltimore, Tr. Day 6, p. 100.

29. Kennedy also heard of Ms. S's statements from Kozikowski. Kennedy specifically recalls Kozikowski telling him that Ms. S told him that Egloff had "reached down her pants and inside her and up her shirt." Kennedy, Tr. Day 5, pp. 100-101.

30. Shortly after hearing this information from Kozikowski, Kennedy, while on an ambulance run at Noble Hospital, spoke directly to Ms. S. Ms. S "proceeded to relate the same incident, same description that … Lee had told … she was kind of crying." Kennedy, Tr. Day 6, p. 9.

31. Jennifer Daley has been a firefighter/paramedic for the Westfield Fire Department for the past twenty (20) years . Sometime shortly after Kozikowski's conversation with Ms. S., Firefighter Daley spoke directly with Ms. S at Noble Hospital. During that conversation, Ms. S "just said something that it happened to her too and couldn't figure why everybody was focused on [Ms. N]." Ms. S specifically told Firefighter Daley that "Eggy [Egloff] had groped her" at the 2016 St. Patrick's Day Parade. Daley, Tr. Day 3, p.156, 162.

32. At or around the same time that Ms. S. made the above-referenced allegations against Egloff, Miltimore had been counseled by Egloff for calling in sick the night before a civil service examination, after being denied the night off. Ex. R1, p.8. Also around this time, Egloff had counseled Boutin regarding not following the chain of command and/or keeping Egloff in the loop regarding two different matters. Ex. R1, p.6. Egloff had also counseled another firefighter (Chris Genereux) about allegedly being disruptive during a training session. Genereux, Tr. Day 2, p. 6.

The State Police Investigation

33. Sometime shortly after Ms. S made the allegations against Egloff to Firefighter Kozikowski, Appellants Kennedy and Miltimore, along with Kozikowski and Firefighter Genereux met at Miltimore's house. Kozikowski, Tr. Day 1, p. 194; Genereux, Tr. Day 2., p. 19. At the meeting, they discussed a number of their own concerns with Egloff as well as what they had heard from Ms. N and Ms. S regarding Egloff's behavior at the St. Patrick's parade in 2016. Kozikowski, Tr. Day 1, p. 195; Genereux, Day 2, p. 16-17, 24; Kennedy, Tr. Day 6, pp.16-17, 65; Miltimore, Tr. Day 6, pp. 104-106.

34. At the meeting, attendees discussed what possible courses of action they had, but did not make a decision as to what to do. Kozikowski, Tr. Day 1, p. 195. At the meeting, firefighter Chris Genereux told the others that he had learned from another woman in a local town that Egloff had stalked and harassed her. Genereux, Tr. Day 2, p. 54. It was a topic that the woman raised with Genereux when he was performing work at her house. Genereux, Tr. Day 2, p. 55.

35. Before and after the meeting at Miltimore's house, David Kennedy had a series of text exchanges with Ms. S. Those texts provide as follows:

1/30/2018 11:14 a.m.	D.K.: "Hey [Ms. S] this is David from Westfield fire. Hope it's OK that I got your number and it's OK to text. We're discussing some things today at Kyle's house at 2 PM and wanted to know if you'd like to join us if you want to text me back or call either one is OK no pressure just wanted to extend the invitation. But we'd love for you to join us.
1:23 p.m.	Ms. S: Hey Dave I'm really sorry I can't make it today. Dads wound care nurse never showed so I have to take care of that and nap at some point for work tonight. I hope you guys come up with a plan. I hope you have a good day. And sorry again.
_____	D.K.: No problem at all, I understand. Hope your dad is doing better. Just want to make sure that you're still on board if we go forward.
_____	Ms. S: Yes just keep me in the loop.
_____	D.K.: Will do!
7:30 p.m.	D.K.: Hey. So we met today and discuss some things about going forward but we thought it best to speak to you in person what time do you get out in the morning tomorrow? Or before you go into work tomorrow?
_____ 7:20 a.m.	D.K.: Hey. We have 4-5 guys who are willing to go forward with you to personnel, Also a lawyer willing to meet and discuss your options. Just keeping you in the loop as you requested, but I need a response so I can let these people know if we're going over alone or with you? Ex. A9

Lee Kozikowski also had a series of text exchanges with Ms. S. These occurred on February 1, 2018 through February 8, 2018. They provide as follow:

2/1/2018: 1:41 p.m. L.K.: Hey Ms. S it's Lee. Give me a call, we have a lot to talk about. It's all good, no Worries.

8:33 p.m. Ms. S: Hi Lee I'm so sorry I haven't gotten back to you sooner. Today was crazy! So how are things going?

8:35 p.m. L.K.: No problem, I assumed you sleep during the day anyway for work. I just want you to know with everything that's going on that I believe you and I support you. If you need anything at all or to just talk please let me know.

8:36 p.m. Ms. S: Ok thank you. We will talk more tomorrow.

8:36 p.m. L.K.: Ok call me if you want

8:37 p.m. Ms. S: I will tomorrow!

8:37 p.m. L.K.: Sounds good

2/2/18 Ms. S: Sorry making dinner

6:21 p.m. But I talked to Ms. N and state police were going to call her.

6:22 p.m. Ms. S: This is turning into a huge thing. It makes me completely uncomfortable. But we can talk about it.

6:26 p.m. L.K.: I don't want to make you uncomfortable, just calling to make sure you're ok with what's going on. What he did to you is absolutely inexcusable. I really just wanna touch base with you and make sure you know no matter what that I'm on your side. I think once a bunch of us heard exactly what Egloff actually did to you we realized how serious of an act it was. You shouldn't have had to go through that and dealt with it in silence.

6:33 p.m. Ms. S: It's not that I'm holding onto any kind of emotional baggage with this situation at all. It just kind of took me by surprise that after 3 years people were talking about it again. I thought that it would just kind of go away. I know [boyfriend] was pissed about it but and I had decided to just move on from it. So what is going to happen now? This guy Egloff what happens to him? I mean he shouldn't be in a role of authority at all but I don't think he should lose his job or anything of that nature. But he definitely shouldn't drink around the opposite sex lol. But then again none of us should in that case lol

6:51 p.m. L.K.: Well it's definitely not up to me to decide what his job status should be and I definitely don't want to be in charge of deciding that. All you can do is tell the truth and just remember this was done to you and he needs to deal with the consequences of his actions. I totally understand you trying to wish it away. I think the situation came up again because there's a number of people questioning his decision making and ability to lead. What he did shows terrifying judgement, drunk or not. I've been drunk around women I know well and have a history with and I would NEVER even think of doing those things. You didn't ask for any of this and I understand you being uncomfortable in the situation. I'm sorry for that. And I'm sorry he treated you and Ms. N that way. After you told me what he did I couldn't stop thinking about it personally, I was dumb founded.

6:59 p.m. Ms. S: I too wouldn't want the job of figuring all this mess out. When it happened it seemed uncomfortable and messy but as time went by it became just something else to move on from. I know I joke a lot so I can not make somethings so serious but this has bothered me for a long time. [Boyfriend] called me out on it last night saying that I haven't truly gotten over it and that he just wants me to be ok. I'm fine I don't know how many times or how many ways I can say it. I just don't ever want anything like this to ever happen to another female. It's stupid and really and in someways life altering. How ever [Ms. N] and I are very well rounded and go with the flow people so that's how we get through.

7:01 p.m. L.K: I know you guys are and you're good people. Nobody should take advantage of you. I'm sorry this happened to you.

7:02 p.m. Ms. S: Thanks Lee. I will talk to whoever you need me too. But I'd rather not talk to Egloff if that's ok. Never really met him except that day.

7:06 p.m. Ms. S: Lee could you keep the fact that [boyfriend] and I talked between us. I just don't want people talking about it.

7:08 p.m. L.K.: I wouldn't ask you to talk to him. You need to do what makes you ok is all. You deserve better and hope talking to the police helps. Just so you know where I'm coming from: I'm certainly not on Egloff's side at all. I'm only on the side of whatever helps you and Ms. N.

7:09 p.m. L.K.: No worries, I won't tell people your business.

7:13 p.m. Ms. S: Thank you. This is a really unfortunate incident. I can't tell you how much I truly appreciate the support that all of you guys have shown to both Ms. N and I. I don't think that we could have talked or gotten through this the way we have without you guys. Westfield fire will always be family regardless of some drunk ass.

7:16 p.m. L.K.: Good, we are not who he showed he can be. We joke all the time but what he did is no joke and we are a family.

7:18 p.m. Ms. S.: I completely agree! Thank you for talking to me about this. Do you know what's going to happen or if he even knows this is going on? Egloff that is.

7:19 p.m. Ms. S.: And what did you guys talk about when you had the meetings?

7:20 p.m. L.K.: Have no idea what going to happen or if he knows at this point. I assume they'll talk to him about it when they think it's appropriate.

7:21 p.m. Ms. S.: Oh ok. Just wasn't sure at all.

7:22 p.m. L.K.: I went to 1 meeting on Tuesday and we talked about how appalled we were to hear what happened to you. We were hoping to go to city hall with you to tell your story. We were hoping to move quickly so the city couldn't try to cover it up. Beyond that I think it got pushed to the state police because Kyle was asking his friend about it and I assume it took on a life of it's own now. I haven't been contacts by state police yet, not sure if I will be.

7:25 p.m. Ms. S: I know the Chief called Ms. N and told her that she didn't have any details but someone from the state police was going to be calling her and filling a report. No one had contacted me at all. I'd rather not go in front of a ton of people and talk about it. That would be mortifying. But I would do it for you guys.

7:26 p.m. Ms. S.: I truly hope that this was a isolated incident and that he hasn't done it before us.

7:28 p.m. Ms. S.: But promise me this doesn't change our relationship in anyway. The banter is needed.

7:33 p.m. L.K.: Hahaha you and I are friends, that's the big difference for me. He doesn't even know you, he crossed every line. The fd chief called Ms. N

7:38 p.m.	Ms. S: Yes.
	Ms. N?
	Yes
7:39 p.m.	Ms. S: Okay good I would be more upset if you changed around me lol
7:45 p.m.	L.K.: Hah no way! As long as you're ok with it obviously Mary is the chief but who knows lol
7:46 p.m.	Ms. S.: Ok she said Beth something.
2/5/2018 10:47 a.m.	Ms. S.: I just missed a call from a state trooper
2/7/2018 1:59 a.m.	L.K.: Hey did you decide to go today?
2/8/2018 7:17 p.m.	L.K.: Just teaching (sic) out to see how you're doing"

Resp. Ex. 1B, pp. 4-19.

36. After the meeting at Kyle Miltimore's house, Miltimore decided to seek advice from a friend he attended church with. Miltimore, Tr. Day 6, pp. 108.

37. That friend was Massachusetts State Trooper Christopher Dolan. Miltimore, Tr. Day 6 p. 108.

38. On February 1, 2018, Miltimore called Dolan looking for advice, and informed him what he had been told about Egloff's behavior at the parade. Miltimore, Tr. Day. 6, pp. 108-109. Dolan told Miltimore that Miltimore had a duty to act. Miltimore, Tr. Day 6, p. 108.

39. Shortly thereafter, Miltimore received a call from Trooper Michael McNally who asked to interview him. McNally and another Trooper, Jeffrey Burke (State Police investigators), met with Miltimore. Miltimore, Tr. Day 6, p. 110.

40. When McNally received the call from Dolan, Dolan told him it involved sexual assault allegations; a high-ranking individual in the WFD; and that the victims expressed concern about coming forward and didn't know where to turn. McNally, Tr. Day 4, p 17. McNally told Dolan "we could look into such a thing because there was a political nature to it." McNally, Tr. Day 4, p. 17. McNally then called his supervisor, Captain Wilcox, who assigned the case to McNally and Burke. McNally, Tr. Day 4, p. 18.

41. Miltimore met with McNally and Burke on February 1, 2018 at an ambulance company where he worked part time. McNally, Tr. Day 4, p. 120, Miltimore, Tr. Day 6, p. 109-110. McNally and Burke were investigators working for the Hampden County District Attorney's office. McNally, Tr. Day 4, pp. 6-7.

42. There is an audiotape of the 48-minute interview. During the interview, Miltimore told the State Police investigators the following:

A. He (Miltmore) was not involved in the St. Patrick's Day Parade and he was not a witness to what may have occurred between Egloff and any alleged victims.

B. Firefighter Kennedy had told Miltimore that he (Kennedy) had spoken to Ms S at Noble Hospital and that Ms. S. told Kennedy that she had been sexually assaulted by Egloff at the St. Patrick's Day Parade in 2016; that Ms. S reported to Kennedy that she had been "pinned down" by Egloff; and that Ms. S. had told him (Egloff) to stop.

C. Other females, including Ms. N and Firefighter Humason, had reported being assaulted by Egloff.

D. The alleged victims had been talked out of coming forward because they are scared.

E. He (Miltimore) reported this to his Captain (Captain Boutin) and, after touching base with some of the alleged victims, Boutin had confirmed to him that "something happened".

F. He (Miltimore) "felt the need to stick up for" the alleged victims.

G. Miltimore, without attribution to anyone, then stated that he had heard that Ms. S. "was pinned down in the back of Chris Bard's truck; he (Egloff) stuck his hand up Ms. S's dress and inside of her and exposed her breasts while she was screaming."

H. He (Miltimore) was "sick" about what he had heard; he was losing sleep over it; and he wanted to make sure the alleged victims had a chance to be heard.

I. Firefighters Rick Paul and Nyles Lavallee witnessed some of what happened.

J. He (Miltimore) was nervous about going to Westfield Police since Chris Bard's brother is a lieutenant with the Westfield Police Department.

K. Miltimore, without attribution, then stated that he had heard that Egloff, while "grabbing Ms. N's crotch", stated, "you think you have power with this? I'm the Deputy Chief and I've got more power than you." Miltimore then added, "She [Ms. N] pushed away, he went back at it a second time and did it again."

L. Egloff has been "retaliatory" to many employees, threatening to swap shifts.

M. Egloff sat in his seat while at training as a prank and said, "I dare you to move me." When Miltimore said "no"; Egloff threatened to move Miltimore to another group. In response, Miltimore said to Egloff: "You can threaten me; I can threaten you right back. If you move me to another group, there's gonna be more problems than that."

N. Egloff "wrote him up" for calling out sick when other firefighters had done the same thing. In response, Miltimore told Egloff that he [Miltimore] had "called the Attorney General's Office."

O. Egloff has treated him and other firefighters "like crap" and now he realizes that Egloff was treating women outside the Department the same way.

P. Miltimore provided the investigators with contact information for Ms. N, Ms. S., Firefighter Humason, Chris Bard, Dave Kennedy, Nyles Lavallee, Rick Paul, Patrick Egloff, Lee Kozikowski and Captain Boutin.

Q. Miltimore recounted an alleged incident, allegedly witnessed by Lee Kozikowski, in which the Egloff made crude remarks about being under the [female] Fire Chief's desk. (Res. Ex. 11B)

43. The State Police investigators wrote out a written statement for Miltimore to sign. (Resp. Ex. 11D)

44. The State Police investigators told Miltimore that they would need to gather more information before determining whether to pursue criminal charges; that it appears that they are within the window of the statute of limitation for the alleged crimes; but that it would be important to obtain corroborating witnesses and victims. (Resp. Ex. 11B)

45. Trooper McNally then called Boutin and asked her to come in for an interview. McNally, Tr. Day 4, p. 85.

46. There is an audio/video tape of Boutin's February 1, 2018 interview with McNally and Burke. (Resp. Ex. 11C)

47. Boutin met with McNally and Burke at 4:37 P.M. on February 1st at the District Attorney's Office. The following transpired during the recorded portion of the 27-minute interview:

A. The recorded portion of the interview starts with investigators referencing that a conversation took place before the recording started.

B. Investigators ask Boutin about her "earliest memory" regarding "sexually inappropriate activity in the Department involving one person".

C. Boutin asks investigators if they are talking about the St. Patrick's Day Parade.

D. Investigators respond by saying "tell us about the St. Patrick's Day Parade."

E. Boutin says: "I was not there."

F. Investigators then say: "What did you hear" about the St. Patrick's Day Parade?

G. Boutin then says that she heard that multiple women were groped by Egloff "in their private parts" and that some of the women had told this directly to Boutin.

H. Boutin told investigators that Firefighter Humason had told Boutin that she had been groped by Egloff at the parade; that she "told him off" and "that was the end of it."

I. Investigators then asked Boutin if she had heard about "any other" alleged victims.

J. Boutin responds by saying "I was told by [Ms. N] that she got it worse"; that she (Ms. N) was groped at the parade and that Firefighter Niles Lavalley had to intervene.

K. Boutin told investigators that she had been told that Ms. N "took care of it at the time."

L. Investigators than asked Boutin: "Have you spoken to them recently or encouraged them to come forward?"

M. Boutin responds by saying: "Yes, [but] as a woman it's so hard to do that." Boutin then explained that she and other firefighters had tried to encourage Ms. N to come forward but that Ms. N was fearful of this impacting her job and that Ms. N "doesn't want to be involved in this."

N. Investigators then asked Boutin about other alleged victims. Boutin replied by telling investigators that she had only heard "second hand rumors" about what happened with Ms. S.; that Egloff had possibly gotten more aggressive with Ms. S, including reaching under her clothes on the day of the parade.

O. Boutin then told investigators about Egloff's alleged behavior at work, specifically referencing the following incidents:

a. An incident that happened a "couple days ago" while in a training class. When the instructor talked about doing role playing, Egloff said: "Can we all wear leather and do our best sexual positions?"

b. An incident in which she overhead Egloff on the phone telling someone he was going to take his lunch break at the college to "check out the girls."

c. Numerous incidents in which Egloff screamed at her, including screaming such things as: "Who the fuck do you think you are? You're not in charge here. I'm in fucking charge."

d. Numerous occasions in which Egloff grabbed her ponytail and pulled her neck back. On one occasion when Boutin objected and said that she had a neck injury, Egloff said "Oh, you have a neck injury?; I'll remember that when I'm Chief."

P. Boutin explained that since being assigned to work for Egloff 1 ½ years ago, she hated going to work; and was constantly in tears at home in front of her son.

Q. Investigators then asked Boutin: "How willing would you be to help us in getting [the alleged victims] to talk to us? You could sit in on the interviews."

R. Boutin told investigators that she had already spoken to Firefighter Humason about the issue, to which the investigators replied: "we'd like to get her story."

S. The investigators then left the room and returned two (2) minutes later.

T. When the investigators returned, they told Boutin that they wanted to get a written statement from her.

U. Boutin hesitated about providing certain details in a written report, including the incidents regarding the grabbing of her ponytail because Egloff would know where that information came from and would likely retaliate against her.

V. The investigators said they understood, but stated that such information "could be used as evidence in a trial" and urged her to provide as many details as possible.

W. Investigators told Boutin that she had "the backing of the Massachusetts State Police and the District Attorney", specifically telling Boutin: "Don't feel like you are alone …the right thing eventually happens; it takes the right people to have courage" and that it was important to "be on the right side of history."

X. As they began working on Boutin's written statement, the recording is shut off. (Resp. Ex. 11C)

48. After the recording was off, investigators suggested that Boutin call Firefighter Humason and Ms. N from their office. Boutin declined and told investigators that she would feel more comfortable calling from home. Boutin, Tr. Day 6, p.210.

49. Investigators talked to Boutin about the serious nature of the allegations; that the matter could be going to Court and, if that happened, the alleged victims would need to testify in Court. Boutin, Tr. Day 6, p. 210[4]

4. [See next page.]

50. Later that day, Boutin called Firefighter Humason, telling her she had talked to the State Police. Humason recanted her statement that she had been touched by Egloff. Boutin, Tr. Day 6, p. 213. Humason said she didn't want to be involved, that this would ruin her career and make female firefighters look bad. Boutin, Tr. Day 6, p. 213.

51. Boutin then called Ms. N who was "worried about her job", but "willing to tell the truth." Boutin, Tr. Day 6, p. 215. Ms. N said she would call Ms. S. Boutin did not know Ms. S and never did speak with her. Boutin, Tr. Day 6, p. 218.

52. Ms. N called Captain Boutin back and told her that Ms. S was willing to come forward. Boutin, Tr. Day 6, p. 219 Ms. N later called and said she (Ms. N) was afraid about coming forward and that she had talked to the CEO at her hospital about this matter. Boutin, Tr. Day , p. 219

53. Boutin called McNally back and told him that Ms. N and Ms. S were willing to come forward but not Humason. Boutin's phone records show that she had the following phone conversations after her meeting with the troopers:

Feb. 1:	5:48 p.m.	Humason
	6:07 p.m.	Ms. N
	6:10 p.m.	Ms. N
	7:15 p.m.	McNally
Feb. 2:	12:43 p.m.	Ms. N
	2:40 p.m.	McNally
Feb 5:	10:15 a.m.	McNally
Feb. 7:	1:16 p.m.	McNally

(P.H. Ex. 5; Boutin, Tr. Day 7, pp. 10-12)

54. After Boutin's phone calls to the alleged victims, Burke called the alleged victims on February 2, 2018. (Resp. Ex. 11A) He set up a tentative interview with Humason. (Resp. Ex. 11A; McNally, Tr. Day 4, p. 103) On February 5, 2018, McNally spoke with Ms. S who set up an interview for February 7, 2018, but then called back on February 6, 2018, leaving a message that she did not want to be interviewed: "I don't want to go down that road and talk about it and really have anything to do with it. It happened two years ago and I'm quite content leaving it there." (Resp. Ex. 11A) On February 5, 2018 at 11:45 A.M., McNally spoke with Humason who stated: "I don't want to be involved. Nothing happened to me … I feel this is a witch hunt going the wrong way." (McNally, Tr. Day 4, p. 105; Resp. Ex. 11A) Later that day, Ms. N called and stated: "I'm torn. I don't feel like I'm a victim" and said she was not interested in providing a statement at this time. (Res. Ex. 11A)

55. On February 6, 2018, Captain Boutin (who at this point was unaware that Ms. N and Ms. S had opted not to give a statement to the State Police) communicated with two fellow captains separately: Captain Charles Warren and Captain Keith Supinski. Boutin, Tr. Day 6, p. 225.

56. Captain Warren has been employed by the Westfield Fire Department since 1995 and has been a Fire Captain since 2009. Warren, Tr. Day 2, p. 284. Warren has known Egloff for many years, considers him a friend; and they "hang out together." Warren, Tr. Day 2, pp. 298-299.

57. On February 6, 2018, Captain Warren had been attending a technical rescue drive with Boutin's husband who is a Captain in the Chicopee Fire Department. After the two men completed training, they returned to the Boutin home and Warren stopped in to use the bathroom. Warren, Tr. Day 2, p.285.

58. Warren recalls that, after stepping out of the bathroom and into the hall, Rebecca Boutin asked him: "Did you hear the news?" When Warren said "What news?"; Rebecca Boutin "kind of pulled [him] off to the side" and said that Egloff was "being arrested on Friday." When Warren said "for what?", Boutin said: "for rape." Warren, Tr. Day 2, pp. 285-286.[5]

59. After his conversation with Boutin, Warren first called Curt Gezotis, a retired firefighter, informing him of his conversation with Boutin. Warren, Tr. Day 2, pp. 299-302. Gezotis was friends with Egloff. Warren, Tr. Day 2, p. 303.

60. Also, on February 6, 2018, Captain Boutin spoke with her co-captain in Group C, Keith Supinski. Boutin, Tr. Day 6, p. 271. Supinski says Boutin called him on February 5, (Supinski, Tr. Day 2, p. 276) but Boutin's phone records show that Supinski called her on the 6th. (P.H. Ex. 5).

61. During the approximately 30-minute phone conversation, Boutin provided Supinski with some background information about the State Police investigation and then Boutin told Supinski that Egloff was being arrested for rape. Supinski, Tr. Day 2, p. 236.[6]

62. During this conversation, Supinksi never told Boutin that he had already been told of the allegations against Egloff by Kozikowski; that he had been at the parade that day; or that he had been in Chris Bard's truck with Egloff at the St. Patrick's Day Parade. Supinski, Tr. Day 2, p. 239.

63. On February 7, 2018, Egloff called Humason. (App. Ex. 10, pp. 2-3). Humason told Egloff that she and Ms. N and Ms. S had refused to talk to the State Police. (App. Ex. 10 pp. 2-3). Egloff

4. I listened carefully to Boutin's testimony on direct and cross and asked follow-up questions of my own. I don't credit her recollection that investigators told her, either as part of their interview, or at any other time, that: a) Egloff would have to go to court; and b) Egloff would be facing serious charges. After reviewing the entirety of Boutin's testimony, the testimony of the investigators, and after reviewing the recorded interview of Boutin (twice), I find it more likely than not that investigators told Boutin that allegations *could* result in serious charges and, *if* that happened, alleged victims and witnesses would need to testify in Court.

5. Boutin denies making this statement. Rather, she recalls telling Warren that Egloff was "facing serious charges." (Boutin, Tr. Day 6, p. 210, 224). For reasons discussed in the analysis, I credit Warren's testimony over Boutin's

6. Similarly, Boutin denies making this statement to Supinski. Rather, she recalls telling Supinski the same thing she recalls telling Warren, that Egloff was "facing serious charges." (Boutin, Tr. Day 6, p. 227). I credit Supinski's testimony over Boutin's.

places the conversation as prior to his trip to the State Police. (Resp. Ex. 1B, p. 27).

64. Around this time, Kennedy called Trooper McNally because Miltimore had said he wanted to talk to anyone with information. Kennedy said McNally was put off but Kennedy told him what he knew. (Kennedy, Tr. Day 6, p. 20). McNally then called Miltimore and complained about Miltimore giving his number to Kennedy. Miltimore, Tr. Day 6, p. 129.

65. On February 7, 2018, the State Police called Egloff and asked him to come in. (Resp. Ex.11A, pg. 4). Egloff did go to their office but refused to be recorded. (Resp. Ex.11A, pg. 4). Trooper McNally said he could not go forward on those terms and said that Egloff did not have to talk to them. (Resp. Ex.11A, pg. 4). Egloff demanded to know the charges and said he'd heard that Captain Boutin brought up the "R" word ("you know, rape"). (Resp. Ex.11A, pg. 4). Egloff also stated "what happened took place two years ago and it took place in front of numerous people from work" and further that he was not going to "incriminate" himself. (Resp. Ex.11A, pg. 5). McNally warned Egloff not to retaliate against perceived witnesses or victims. (Resp. Ex.11A, pg. 5).

66. The then Chief of the WFD, Mary Regan, did not testify in this hearing. She did provide a written statement to the investigator. (Resp. Ex. 1B, pp. 23 -25). Regan wrote that she received a call from Gezotis, the retired firefighter and friend of Egloff, on February 8, 2018 to ask if she was investigating Egloff and that Gezotis said the City was doing an investigation . (Resp. Ex. 1B, pp. 23-25). Regan said she was unaware. (Resp. Ex. 1B, pp. 23-25). Gezotis told her that Egloff had "grabbed a nurse's ass" two years prior at the St. Patrick's Parade, but had apologized and it was now a dead issue. (Resp. Ex. 1B, pp. 23-25). Gezotis told Regan that the DA's office was calling people and that there was an investigation of whether Egloff had penetrated a different nurse with his fingers. (Resp. Ex. 1B, pp. 23-25). He said that this was impossible because of witnesses being present and because she (presumably Ms. S) was a "fat girl." (Resp. Ex. 1B, pp. 23-25). Regan believed that Gezotis was trying to get her to stop the investigation. (Resp. Ex. 1B, pp. 23 -25).

67. On February 11, 2008, Kozikowski spoke with Egloff who insisted that Supinski be present. (Kozikowski, Tr. Day 1, pp. 195-197). Kozikowski told him what Ms. N and Ms. S had told him and that if Egloff had done that, he deserved whatever bad things might happen to him, but that he felt bad that he had a hand in the police calling him. (Kozikowski, Tr. Day 1, p. 197). Egloff told him he knew that Kozikowski, Kennedy, Miltimore and Genereux had gone to a meeting. Kozikowski, Tr. Day 1, p. 207.

68. According to Regan's report, Egloff met with Chief Regan on February 13, 2018 and for the first time informed her about the State Police investigation. (Resp. Ex. 1B, pp. 23-25). Regan's reports states that: "At that time he [Egloff] had thought it was only about grabbing someone's ass to which he stated he had apologized and everything was over as she had accepted the apology." (Resp. Ex. 1B, pp. 23-25). Egloff accused (saying he "had been told") Boutin, Kennedy, Miltimore, Kozikowski and Genereux of calling and texting the "nurses" to go to the DA to say that they had been assaulted and stated that Miltimore had reported it to the State Police. (Resp. Ex. 1B, pp. 23-25). Egloff accused them of trying to get the nurses to "change their story." (Resp. Ex. 1B, pp. 23-25). Egloff said that Ms. N, Ms. S and Humason "will not talk to the DA office." (Resp. Ex. 1B, pp. 23-25).

69. Regan then called the Mayor to tell him what she had been told. Regan's notes state:

> "I called the Mayor and went an (sic) informed him of what I had heard. I told him I don't think we need to start an investigation internal because no one has come forward with a[] complaint. I believe we should wait and see if there are any changes to what we know at which time we can act on it. Everyone who has talked to me other that (sic) Egloff has been off the record. Mayor asked what do I want from him and I said nothing at this point until something official happens . This incident was not on duty and not in Westfield and at this time in the DA Office. I told him I don't believe the assault is true and that I believe it's a small group of people who have a personal issue with Egloff and want to prevent him from becoming Chief."

(Resp. Ex. 1B, pp. 23-25).

70. On February 16, 2018, Humason visited Chief Regan and told her that at the parade, Egloff had "cupped" Ms. N. (Resp. Ex. 1B, pp. 23-25) and that Ms. S claimed Egloff had penetrated her with his finger, which Humason said wasn't possible because Humason was in the same vehicle as she was. (Resp. Ex. 1B, pp. 23-25). Humason also told Regan that Ms. S makes up stories. (Resp. Ex. 1B, pp. 23-25). Humason had not talked to Ms. S about the allegations at the time she talked to Chief Regan. Humason, Tr. Day 2, pp. 154-156.

The Anonymous Letter

71. On February 22, 2018, the following letter was sent to Westfield Personnel Director Jane Sakiewicz, signed as "Sincerely, Westfield Fire Fighters." (Resp. Ex. 1B, p. 31).

> "Dear Personnel Director Jane Sakiewicz,
>
> We write to you with the hope to address a serious matter at the Westfield Fire Department. We have great concern regarding Deputy Chief Patrick Egloff. Over the past few years the vast majority of us fire fighters have been victimized in some form by Deputy Egloff. Most recently several fire fighters have been contacted by the Massachusetts State Police regarding a criminal investigation involving Deputy Egloff sexually assaulting several females, which there is concern it involves female fire fighters and hospital staff. Several fire fighters are in fear of retaliation from Deputy Egloff due to his malicious and violent behavior towards his subordinates. There have been countless occasions where he has acted in an unprofessional manner towards coworkers, and when someone tries to stand up to him he threatens them using his rank as a Deputy Chief. He has voiced in a room full of people on numerous occasions, that he has pull with the Chief and the Mayor; he has also mentioned he has been under the Fire Chiefs desk doing sexual favors. He has acted in gross sexual manners verbally and physical towards numerous employees, pulling their hair, making cruel comments, and the list goes on. This is unprofessional, poor leadership, and just out right disgusting. He has bragged to groups of people on group C

> about his malicious plans toward other employees, such as with unfair schedule assignments, unfavorable duties, blocking health and wellness initiatives, discipline for sick time use. There have been several major events that occurred with Deputy Egloff, especially the thanksgiving (Pie Gate event); this will summarize his personality and unprofessional behavior. Our intentions are to notify you of the ongoing problems at the Fire Department, some of which may have been swept under the rug. We hope this is taken seriously and will be addressed.
>
> Sincerely
>
> Westfield fire fighters"

(Resp. Ex. 1B, p. 30)

72. Each of the Appellants denies having written the letter, together or separately and, to the extent that writing the letter would constitute misconduct, none of the Appellants have been charged with writing this letter. Kennedy, Tr. Day 6, pp. 28; Miltimore, Tr. Day 6, p. 130; Boutin, Day 6, p. 234; McDonald, Tr. Day 1, p. 181.

73. On February 26, 2018, Gezotis called Kyle Miltimore. (Miltimore, Tr. Day 6, pp. 120-121). Gezotis told Miltimore about the letter. (Miltimore, Tr. Day 6, p. 120-121). Gezotis said he was calling for his friend Egloff. Gezotis said he had discussed this with the Chief and the Mayor and City councilors and that this was coming up again because of the letter. (Miltimore, Tr. Day 6, pp. 120-121). Gezotis said he heard this from the Mayor, that he had just been at the Tavern Restaurant with some City Councilors, having had a meeting with them about this and he had given them Miltimore's name as sending the letter. (Miltimore, Tr. Day 6, pp. 120-121). Gezotis told him numerous times he'd better keep his mouth shut, the Councilors would be coming after his job. Gezotis told Miltimore that he had previously squashed this with the mayor and the Chief. Miltimore, Tr. Day 6, p. 129.

74. On February 28, 2018, in the early morning hours, Humason recalls having a conversation with Ms. S. about the allegations against Egloff. According to Humason, she then received the following unsolicited text from Ms. S at 4:00 a.m.to Humason (the copy does not show the name of the sender of the text) that reads:

> "Chrissy thank you so much for talking to me. Please extended my apologies for this all thing to forgive me I forgot his name Egeloft or something. I can't believe the stories are so out of control and far fetched. He'd have to be a midget to be able to do any of the things you were telling me. Again thanks for talking to me and if there is anything I can do please let me know. And I miss you! I'll call and talk to [name redacted] today."

(Resp. Ex. 1B, p. 21)

75. On the same day, February 28, 2018, Trooper McNally closed the investigation, but said he was unaware of the text. (McNally, Tr. Day 4, p. 97). Despite closing the file because the victims didn't want to go forward, McNally "believed what [Boutin and Miltimore] told me to be true." McNally, Tr. Day 4, pp. 62-63.

76. At some point in February, after talking to the State Police, Boutin tried to speak with Chief Regan about these matters but the Chief refused to do so, saying that she had been advised by a City Councilor and her own "personal representative" not to speak to her. Boutin, Tr. Day 6, pp. 229-230.

The City Opens an Investigation

77. After the receipt of the letter, the City, through the City Law Department, hired Attorney Dawn McDonald to conduct an investigation whose stated purpose was to determine the following:

> 1) Is there any merit to the allegations of misconduct against Deputy Chief Patrick Egloff as set forth in the Anonymous Letter?
>
> 2) Who wrote the Anonymous letter?
>
> 3) What was the purpose of sending the Anonymous Letter? Was it in fact sent because there was serious misconduct occurring at the fire department or was the letter sent in an effort to undermine, discredit and disgrace Deputy Chief Patrick Egloff, thereby derailing his promotion to Chief of the Westfield Fire Department?
>
> 4) If the sexual misconduct allegations were made, and the Anonymous Letter was sent, in an attempt to undermine, discredit and disgrace Deputy Chief Patrick Egloff, thereby derailing his promotion, what is the appropriate discipline for the person(s) involved?
>
> 5) In light of the allegations in the Anonymous Letter, should Deputy Chief Patrick Egloff be promoted to Chief of the Westfield Fire Department?

(Report, p. 2)

78. In conducting her interviews, McDonald began with Chief Regan (McDonald, Tr. Day 1, p. 27) who provided a written statement. (Resp. Ex. 1B, pp. 23-25). McDonald took notes of all of her interviews.

79. Next, she interviewed Egloff who provided a "timeline of events" from February 6, 2018 to February 26, 2018. (Resp. Ex. 1B, pp. 27-28). Egloff told McDonald he had learned of the State Police involvement from Gezotis who in turn had learned of it from Warren. (App. Ex. 10, p. 2). Egloff said he called Humason who gave her version of the State Police interaction. (App. Ex. 10, p. 2-3). McDonald reports that Egloff admitted to the assault on Ms. N ("grabbed her by the vagina"). Specifically, McDonald's report states:

> "At some point during the day, Deputy Egloff went up to [Ms. N] and grabbed her by the vagina. [Ms. N] immediately shoved him off and yelled at him, words to the effect that if he ever laid hands on her again, she would knock him out. He apologized, [Ms. N] accepted his apology and everyone continued with the festivities and having a good time. Egloff admits to this incident and further states that a few days later he again called [Ms. N] to profusely apologize for his conduct. He is embarrassed, ashamed and full of remorse at his behavior. [Ms. N] verifies this account and states that as far as she was concerned, it was one drunken incident, it was dealt with and over that day, and there was nothing further to apologize for."

(Report p. 9; McDonald, Tr. Day 1, pp. 107-108).

80. McDonald next interviewed Kozikowski, Boutin, Kennedy, Miltimore and Genereux. (App. Ex. 10, pp. 14-30). McDonald

believed that the order of the interviews was based on the convenience of the employees and the convenience of the Department. McDonald, Tr. Day 1, p. 115.[7]

81. McDonald completed and delivered her report to the City Solicitor in June of 2018. McDonald, Tr. Day 1, p. 25.

82. McDonald recommended that all three Appellants be terminated (Report pp. 23-28) and that Kozikowski and Genereux receive lesser discipline. (Report, pp. 29-31). She concluded that the five had engaged in a "conspiracy" to undermine Egloff and a "plot" to have him arrested for rape. (Report, p. 23).

83. In regard to Boutin, McDonald wrote in part:

> "Boutin's conduct as it relates to the allegations of sexual misconduct against Egloff was **reprehensible**. Egloff was her deputy and she is a Captain. She spoke to Union President Niles LaValley multiple times about Egloff yelling at her and each time refused his advice that she file a grievance. Instead, she joined Miltimore and Kennedy in a **plot** to have Egloff arrested for rape. **A reaction so disproportionate** to anything that Egloff had ever done to her that **it defies credulity**. **She took great pleasure in**, and worked at, notifying people that he was a rapist and his arrest was imminent; both of which were completely false. She **defamed** her superior officer and took pleasure in doing it; was excited about it because it would "solve all her problems." When I confronted her with her **lack of conscience** and feeling toward ruining a man's life based on false allegations, she got nervous and upset and said that [Ms. S] said it was true. **The level of her immaturity is so great**, that she accused a man of rape, with absolutely no remorse, based solely on unsubstantiated gossip that she heard from Kozikowski and then, even when informed by the three alleged "victims" that it wasn't true and they had no intention of giving statements to the police, she put effort into trying to convince them to change their mind. **Boutin's biggest source of angst in what has occurred is that nobody will talk to her**, she has lost all her friends in the Department, and has also lost the friendship of Ms. N because they all think she wrote the Letter." (Report, p. 23) (emphasis added)

84. McDonald went on to write:

> "**Boutin put Egloff and his family through hell** by her conduct when all she had to do was file a grievance, speak to the Chief, or call the Personnel Director if she was truly having problems with Egloff. There are policies and procedures in place and she followed none of them. Boutin showed willful disregard for the welfare and safety of not just Egloff, but also non-municipal employees at Noble Hospital. She, more than any other, contributed to the horrible morale in the department and the productivity of the Department has been significantly impacted by her actions. That she is a Captain, makes her conduct that much worse." (Report, p. 24) (emphasis added)

85. In regard to what rules were violated by Boutin, McDonald wrote:

"The following sections of the Employee Manual have been violated by Boutin:

> Behavior: specifically, "Each employee should be aware that his/her actions on the job come under public scrutiny. Dereliction of duty of any form brings discredit not only on oneself but on fellow employees and Municipal government as a whole. Courtesy to the public and to one's superiors and fellow employees at all times is required. Employees must not work in a manner that willfully obstructs or hinders another employee from completing his or her assigned duties."
>
> Cost Control: "strive to keep employees morale as high as possible."
>
> Discipline and Schedule of Discipline: Insubordination, threatening or intimidating other employees, failure to maintain productivity standards, inability or unwillingness to work harmoniously with fellow employees
>
> Insubordination: (requires no explanation)
>
> Sexual Harassment: "sexually explicit language or gestures... an offensive overall environment, including the use of vulgar language, and the telling of sexual stories... "
>
> Purpose #4 referenced above is: If the sexual misconduct allegations were made, and the Anonymous Letter was sent, in an attempt to undermine, discredit and disgrace Deputy Chief Patrick Egloff, thereby derailing his promotion, what is the appropriate discipline for the person(s) involved?

(Report, pp. 23-24)

86. In regard to Kennedy, McDonald wrote the following in her report:

> "Kennedy involved himself and participated in accusing Egloff of rape. He **conspired** with Boutin, Miltimore, Genereux and Kozikowski to "do something about Egloff." He tried to **recruit** people to attend the **secret** meeting at Miltimore's house to gather support to **bring down** Egloff. When he learned of the statements made by [Ms. S] **he began hounding her** by both text messages and in person every time he went to the hospital, to the point where the women were complaining to others that it was interfering with their work and was embarrassing. He disregarded the wishes of the women who made it clear they did not want to come forward and wanted to put any incidents related to the parade behind them. When the State Troopers closed the investigation and no action had been taken, he sought out the number of Trooper McNally, and called him to try to find out what was happening. The Troopers had never spoken to Kennedy previously. They told him they had nothing to say to him and not to call them again. Kennedy did all of these things, solely because **making complaints and getting people into trouble is what he likes to do**. He is certainly familiar with all of the procedures and avenues he could have taken if what he really wanted to do was correct a problem. He did not follow them. He claims his goal was only to help the women, yet he completely ignored their wishes and interfered with their employment, which he did while on the clock for the Fire Department delivering patients to the hospital.
>
> …
>
> Like Boutin, he had no qualms about accusing Egloff of rape. **He thought nothing of ruining a man's life, his family and his livelihood**. In his mind, justice must be done, but he has no reali-

7. It cannot be that people who obviously were the main target of the investigation just happened to come first. At the start, McDonald says that "they" suspected these five individuals. (McDonald, Tr. Day 1, p. 125). From this and numerous other aspects of the report noted below, it is clear that the investigation was focused on the Appellants and Kozikowski and Genereux.

> zation that it is he that is being unjust in pursuing unsubstantiated allegations, **defaming** a superior, and making false accusations."
>
> Kennedy should be terminated for violating all of the foregoing policies. Kennedy, together with Boutin and Miltimore put Egloff and his family through hell by his conduct. Kennedy showed **willful disregard for the welfare and safety of not just Egloff, but also non-municipal employees at Noble Hospital**. If he had truly been concerned about righting a wrong, there were many, many other avenues to pursue.
>
> Accusing someone of rape on behalf of another person, based on hearsay, is not one of them. He contributed to the horrible morale in the department and the productivity of the Department has been significantly impacted by his actions putting this juggernaut in motion. None of the allegations made by others against Egloff had anything to do with Kennedy. He simply jumped on the band wagon and he did it for his own enjoyment."

McDonald added the following footnote regarding Kennedy:

> " … While I am not a doctor and am not qualified to say so, **I believe that Kennedy is unstable and a danger to the department. He gets whipped into a frenzie (sic) over perceived wrongs and someday, I believe there could be harmful consequences of disregarding him and the threat he presents".**

(Report, pp. 25-26) (emphasis added)

87. In regard to what rules Kennedy violated, McDonald wrote:

"The following sections of the Employee Manual have been violated by Kennedy:

> Behavior: "Each employee should be aware that his/her actions on the job come under public scrutiny. Dereliction of duty of any form brings discredit not only on oneself but on fellow employees and Municipal government as a whole. Courtesy to the public and to one's superiors and fellow employees at all times is required. Employees must not work in a manner that willfully obstructs or hinders another employee from completing his or her assigned duties."
>
> Cost Control: "strive to keep employees morale as high as possible."
>
> Discipline and Schedule of Discipline: Insubordination, threatening or intimidating other employees, failure to maintain productivity standards, inability or unwillingness to work harmoniously with fellow employees
>
> Insubordination: (requires no explanation)" (Report, p.26)

88. In regard to Miltimore, McDonald wrote:

> Miltimore is the one that reported the rape allegation to the District Attorney. He denies it, but his **coconspirators** said that he did it. The only Westfield Fire Department employees who were contacted were Miltimore, Boutin and Humason, in that order. There is literally no reason for the Mass State Police to call Miltimore unless he was the person who made the report. [Ms. S]'s first report (albeit false) was to Kozikowski, not Miltimore. Ms. N did not report it to him either. He was not at the Parade with relevant people, so had no personal knowledge. I believe Miltimore's motivation is completely different from the others, and more **sinister**: **I believe he is attempting to set up another lawsuit**, likely what he believes would be a whistleblower suit.
>
> I base this opinion on what I have learned about him in this investigation, his past conduct and pattern of that conduct and my 18 years of experience in handling employment litigation with Plaintiffs like Miltimore. **He does not care about [Ms. S, Ms. N] or even his co-conspirators.** The theme of his interview was: I don't know what all the fuss is about. I don't know anything, I didn't do anything, and people are retaliating against me because I wanted to help them with their problems with Egloff, who is just strange.
>
> Unfortunately, **Boutin, Kozikowski, Kennedy and Genereux, are not smart at all**. Even when I suggested to them that they had been **manipulated** by Miltimore, they each flatly denied it and asserted that they were acting on their own, **ignoring the life ring I was throwing them and drowning themselves further**. Miltimore needed support and witnesses favorable to him for any potential suit to materialize, so he **recruited** people that he knew had a problem with Egloff, or in Kennedy's case, just loved making complaints. Unfortunately, **Miltimore got a gift** when Curt Gezotis called him and intentionally threatened him with an admittedly false story. Adding fuel to the fire are Egloff and the Chief, who have **gathered up their minions** of support and have **perpetuated** Egloffs side of the story, getting much of the department to turn against Miltimore and his **co-conspirators**. Miltimore is already saying that the Chief is retaliating against him for keeping him assigned to the substation and is not allowing him to rotate out. When Miltimore asked the Deputy Bishop why he wasn't being rotated, Bishop told him, "the Chief said you are there until the investigation is over." Bishop verified that this is what the Chief told him.
>
> According to the Personnel Director, the Chief is not rotating anyone, but through perhaps poor choice of words, together with Gezotis' s conduct, combined with an intelligent professional Plaintiff, **you have the makings of a retaliation claim**, which even if it is completely defensible is a costly proposition for the City. **Something Miltimore would be counting on in order to make money on a settlement**.
>
> …
>
> I believe Miltimore wrote the Letter with Kennedy. It is his style and he has a history of writing anonymous letters leading to lawsuits. He learned from his past mistakes, and I do not have the investigatory powers of the Massachusetts State Police, but I am as certain as I can be that he is responsible. I believe his motivation was to set up a lawsuit. He cannot be disciplined for writing the Letter, because as discussed above with respect to my recommendations on Egloff, **he left himself exposed** and there is enough truth to some of the allegations, that disciplining Miltimore for writing the Letter would play into his hands.
>
> Miltimore must be terminated. As with Boutin and Kennedy, it is not the Letter writing that is of most concern. It is his serious and substantial conduct in making a false report of rape, harassing the women to come forward and interfering with their jobs, his **defaming** Egloff to the Department and to others out in the public, and the fact that **he is so feared and mistrusted by almost the all his co-workers that his mere presence endangers the whole Department**."

(Report, pp. 27-28)

89. In regard to what rules Miltimore violated, McDonald wrote:

> The following sections of the Employee Manual have been violated by Miltimore:

> Behavior: "Each employee should be aware that his/her actions on the job come under public scrutiny. Dereliction of duty of any form brings discredit not only on oneself but on fellow employees and Municipal government as a whole. Courtesy to the public and to one's superiors and fellow employees at all times is required. Employees must not work in a manner that willfully obstructs or hinders another employee from completing his or her assigned duties."
>
> Cost Control: "strive to keep employees morale as high as possible."
>
> Discipline and Schedule of Discipline: Insubordination, threatening or intimidating other employees, failure to maintain productivity standards, inability or unwillingness to work harmoniously with fellow employees
>
> Insubordination: (requires no explanation)

(Report, p. 28)

90. After McDonald's report, the Appellants experienced incidents at work that they considered harassment. A photo that had been posted in one of the stations, that included Boutin and Miltimore with other firefighters had the heads of Boutin and Miltimore cut out. (Miltimore, Tr. Day 6, pp. 146, Boutin, Tr. Day 6, p. 236); (P.H. Ex. 1). Both Kennedy and Miltimore had items removed from their lockers. (P.H. Ex. 1); (Kennedy, Tr. Day 6, pp. 27, Miltimore, Tr. Day 6, pp. 83-89, 144). On another occasion in the winter of 2019, Kennedy and Miltimore were on the ice, during rescue training on a Westfield pond. While Miltimore and Kennedy were on the ice, the sled Kennedy was on (connected by rope to the others on shore) was pulled out and Kennedy suffered a fractured tailbone. (Kennedy, Tr. Day 6, p. 43). Miltimore was also injured (suffered a pinched nerve). (Miltimore, Tr. Day 6, 146).

91. After the report, the Appellants received notices on August 7, 2018, that the WFC was proposing they be terminated on the basis of the report. (Apps. Exs. 14, 15 and 16).

92. The notices were signed by Deputy Chief Seth Ellis (Apps. Exs. 14, 15, 16). Each of the notices states that "the undersigned supervisor/department head or designee has determined that your conduct as described, above, requires disciplinary action." (Apps. Exs. 14, 15, 16). The caption also provides that it comes "from" the WFC "acting by and through the Deputy Chief on duty, as directed." (Apps. Exs. 14, 15, 16). Deputy Chief Ellis didn't read the notices, did not know the content (and that it was not his recommendation), and he only signed because he was instructed to and/or ordered to by the City Solicitor or the Chief (then Acting Chief Hart) as advised by the WFC. (Ellis, Tr. Day 3, pp. 20-27). Acting Chief Andrew Hart testified that he also had not seen the documents before they were sent out, had no input into their content, "didn't want to know what was in it", had "no part of that", was told about them by the Law Department, and did not believe that even the WFC had seen the notices before they were sent out. (Hart, Tr. Day 3, pp. 88-91). As far as Hart knew, no one working in the Fire Department had any input into the decision. (Hart, Tr. Day 3, p. 90). Hart had not seen the McDonald report. Hart, Tr. Day 3, p. 91.

93. The Appellants believed, after reading the notices, that the WFC had held a meeting regarding the discipline of the Appellants in violation of the Open Meeting Law. The Appellants filed an action in Superior Court for a violation of the Open Meeting Law. (Apps. Exs. 1 and 2).

94. On August 23, 2018, Hart, acting on instruction from the Personnel Department directed Boutin to a "fitness for duty" examination by a Doctor Michael Rater, MD because Boutin had claimed work related emotional distress and "PTSD" by virtue of the harassment and retaliation she was facing. (App. Ex. 3). Rater filed a report on September 12, 2018 finding that Boutin had depression, anxiety and emotional distress related to her threatened termination and was thereby incapacitated temporarily. (App. Ex. 6). In a subsequent report, Rater said that Boutin was permanently incapacitated. (Apps. Ex. 8).

94. The Superior Court voided the terminations on August 29, 2018 and found that there was an intentional violation of the open meeting law (fining the WFC). After the Court's August 29, 2018 decision, the WFC took no further action on the proposed terminations until December of 2019.

The Fire Commission Re-Opens the Matter in December 2019

95. Fire Commissioner Jeffrey Siegel was asked why this matter came back before the Fire Commission in December 2019. His testimony on cross-examination was as follows:

Counsel:	Well what prompted this matter to []come before the Fire Commission in December of 2019?
Siegel:	My understanding was that there was a desire on the part of the Chairman of the Commission to bring the matter back on to the docket to have it resolved hopefully before the end of the year and perhaps there might have been a change in the administration but I couldn't cite what they were.
Counsel:	So it was your understanding that Chairman Mascriadelli wanted to get this resolved before the new Mayor took office in January of 2020.
Seigel:	To try to get it before he got into in my opinion it had been too long and we would try to get it in before the end of the year and the new administration.

(Siegel, Tr. Day 5, pp. 48-49)

96. On December 4, 2019, each of the Appellants were served with the Notices of Contemplated Action which were, in content, identical to the August 2018 notices. (Jt. Exs. 1, 2 and 3). Each attached the summary portion of McDonald's report on the individual appellant.

97. On December 10, 2019, the WFC held a hearing regarding the proposed terminations. (Jt. Ex. 7). On December 18, 2019, the WFC met again to deliberate. The WFC members discussed their reasons, and then voted to accept, with only a few differences, the recommendations of McDonald report. (Jt. Ex. 8).

98. At their meeting, Commission member Siegel stated: "It appears to me there likely would not have [sic] any investigation of

any kind of this had Kyle Miltimore not complained to his friend who happened to work for the state." (Jt. Ex. 8, p. 9). He also claimed that the Appellants had failed to file an "official, formal" complaint. Siegel, Tr. Day 5, p. 30.

99. Commission member C. Lee Bennett stated "you did cause an investigation by calling an acquaintance who was a state Trooper…" (Jt. Ex. 8, p. 13). She further stated that the Appellants were "wasting the investigator's time." (Jt. Ex. 8, p. 13). She made further references to other matters apparently blaming Kennedy of fabricating the ice incident. (Jt. Ex. 8, p. 15). She also found Miltimore not to be credible because he had been terminated for being a whistleblower from a part-time position in another town. (Jt. Ex. 8, p. 15).

100. Chairman Mascriadrelli stated that the Appellants did not "follow rules and policies of presenting any problems through their supervision." (Jt. Ex. 8, p. 16). He otherwise adopted the statements of the other commissioners. (Jt. Ex. 8, pp. 16-17).

101. Commissioner Siegel's basis for termination was that he believed Ms. McDonald (the investigator) was more "credible" than the Appellants. (Siegel, Tr. Day 5, pp. 10-13). He accused Kennedy of "coercing testimony" and Miltimore for "similar reasons" and for "riling up" people against Egloff. (Siegel, Tr. Day 5, pp. 10-13). He also cited his belief that the Appellants' motive was to prevent Egloff from becoming Chief. (Siegel, Tr. Day 5, pp. 10-14). He acknowledged that his reference at the WFC hearing to Miltimore going to the State Police was "stirring the pot" and that this played a role in his decision. Siegel,Tr. Day 5, p. 19-20.

102. Siegel was "leery of these two women who may or may not have issues in this scenario" in reference to Ms. N and Ms. S. and questions whether their allegations were credible. Siegel, Tr. Day 5, p. 20.

103. Siegel could not identify the procedures he had stated that the Appellants should have followed. (Siegel, Tr. Day 5, pp. 21-24). He couldn't recall if Boutin had even spoken to the police. (Siegel, Tr. Day 5, p. 24-25), but he stated that speaking to the police was a correct and proper procedure. Siegel, Tr. Day 5, p. 28.

104. On December 19, 2019, the Fire Commission sent a notice of termination to Boutin stating in relevant part:

> " … The Fire Commission finds that Captain Boutin failed in her duties as Captain, engaged in insubordination and subverted the chain of command as more specifically set forth in the Investigator's recommendation attached hereto and incorporated as Exhibit A. Policies and procedures exist inside the Fire Department or inside the City of Westfield to properly address concerns with a commanding officer. In a paramilitary organization such as a Fire Department, involvement in the creation or spread of inaccurate and harmful information as was done here has the potential to jeopardize efficient operations, did disrupt operations including the delay of the process to appoint the next Chief, eviscerated morale, and has the potential to result in physical and/or emotional harm—or worse—to employees and citizens alike."

(Jt. Ex. 4)

105. The termination letter to Kennedy dated the same day stated in relevant part:

> "The Fire Commission finds that Private Kennedy engaged in serious and substantial conduct including making a false report(s), insubordination and subverting the chain of command as more specifically set forth in the Investigator's recommendation attached hereto and incorporated as Exhibit A. Policies and procedures exist inside the Fire Department or inside the City of Westfield to properly address concerns with a commanding officer. In a paramilitary organization such as a Fire Department, involvement in the creation or spread of inaccurate and harmful information as was done here has the potential to jeopardize efficient operations, did disrupt operations including the delay of the process to appoint the next Chief, eviscerates morale, and has the potential to result in physical and/or emotional harm—or worse—to employees and citizens alike."

(Jt. Ex. 5)

106. The termination letter to Miltimore stated:

> "The Fire Commission finds that Private Miltimore engaged in serious and substantial conduct including making a false report(s), insubordination and subverting the chain of command as more specifically set forth in the Investigator 's recommendation attached hereto and incorporated as Exhibit A. Policies and procedures exist inside the Fire Department or inside the City of Westfield to properly address concerns with a commanding officer. In a paramilitary organization such as a Fire Department, involvement in the creation or spread of inaccurate and harmful information as was done here has the potential to jeopardize efficient operations, did disrupt operations including the delay of the process to appoint the next Chief, eviscerates morale, and has the potential to result in physical and/or emotional harm—or worse—to employees and citizens alike."

(Jt. Ex. 6)

107. On May 7, 2019, the Westfield Fire Commission voted unanimously to promote Patrick M. Egloff from Deputy Fire Chief to permanent, full-time Fire Chief. As of the issuance of this decision, Egloff remains in that position.

APPLICABLE LAW

G.L. c. 31, §43 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of the evidence establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *School Comm.* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). *See also Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited.

ANALYSIS

The Westfield Fire Commission relied on the conclusions of an investigator to justify the termination of the three Appellants. Over a period of seven (7) days of hearing, I had the opportunity to: a) listen to the sworn testimony of and assess the credibility of over a dozen witnesses, including the testimony of a State Trooper that the investigator did not hear from; and b) review hundreds of pages of exhibits, including audio/video recordings of State Police interviews that the investigator was also not able to review. After reviewing (and re-reviewing) the relevant testimony and exhibits, my findings differ significantly from those of the investigator and the Fire Commission. The majority of the conclusions of the investigator, relied on by the Westfield Fire Commission to terminate the Appellants, either exonerate the Appellants from any wrongdoing or are not supported by a preponderance of the credible evidence. Further, the impetus behind the report, and the report itself, are riddled with examples of unsubstantiated "beliefs" instead of "facts" along with inappropriate disparaging personality assessments that I find tainted the investigation with bias and personal animus against the Appellants, and that further discredit the conclusions of the investigator as they relate to the Appellants.

In summary, a preponderance of the evidence does not support any of the charges cited by McDonald or the Westfield Fire Commission to justify disciplinary action against Kennedy or Miltimore. A preponderance of the evidence does not support the majority of charges cited by McDonald or the Westfield Fire Commission to justify disciplinary action against Boutin, with the exception of her telling Warren and Supinski, falsely, that Egloff was about to be arrested for rape.

A. The Investigator Could Not Prove Who Wrote the Anonymous Letter

The task given to the investigator by the City's law department was to answer the following questions:

> 1) Is there any merit to the allegations of misconduct against Deputy Chief Patrick Egloff as set forth in the Anonymous Letter?
>
> 2) **Who wrote the Anonymous letter?**
>
> 3) **What was the purpose of sending the Anonymous Letter? Was it in fact sent because there was serious misconduct occurring at the fire department or was the letter sent in an effort to undermine, discredit and disgrace Deputy Chief Patrick Egloff, thereby derailing his promotion to Chief of the Westfield Fire Department?**
>
> 4) **If the sexual misconduct allegations were made, and the Anonymous Letter was sent, in an attempt to undermine, discredit and disgrace Deputy Chief Patrick Egloff, thereby derailing his promotion, what is the appropriate discipline for the person(s) involved?**
>
> 5) In light of the allegations in the Anonymous Letter, should Deputy Chief Patrick Egloff be promoted to Chief of the Westfield Fire Department?

(Report, p. 2)

Setting aside the peculiar wording of these questions for a moment, I first focus on the three (3) questions potentially related to the Appellants: 2, 3 and 4.

Question 2: Who wrote the Anonymous letter?

After reading the investigator's report, I was uncertain if she had firmly concluded whether any of the Appellants had written the anonymous letter referenced in the findings. Thus, I asked her for clarification during her sworn testimony before the Commission. My questions and the investigator's responses were as follows:

Commissioner:	Okay. The second question, who wrote the anonymous letter. Did you ever reach any findings or conclusion in regard to whether or not Rebecca Boutin wrote the anonymous letter?
Investigator:	Nothing that I could prove but I had a long conversation with her in the second interview about the anonymous letter, the allegation in the letter and how each of the, almost every allegation had to do with, it's similar things that had happened with her specifically. We had a long conversation about that, <u>but I actually did not think that she wrote the letter</u>. McDonald, Tr. Day 1, p.75.
Commissioner:	Did you answer … one way or another whether David Kennedy wrote the anonymous letter, which is number two under purpose?
Investigator:	<u>No. I can't prove that *any of them* wrote that letter</u>. I can make an educated guess, but <u>I cannot prove it</u>.

McDonald, Tr. Day 1, p.85

Questions 3 & 4

Given that the investigator had affirmatively concluded that Boutin did *not* write the letter, and that she "cannot prove" that Kennedy or Miltimore wrote the letter, I asked the investigator how questions 3 and 4, which relate to the "purpose" of the letter, were relevant to the Appellants. Her answers as they pertain to Boutin, referenced below, shed some light on the investigator's thinking regarding all three Appellants:

Commissioner: Okay. So, Rebecca Boutin, your finding is that she didn't write the letter. Now, question number three on the purpose, what is the purpose of sending the anonymous letter. If Rebecca Boutin didn't write the letter, does three apply?

Investigator: Well, she didn't write the letter but she certainly, I believe that she participated in this what I would call a ploy to prevent Deputy Egloff from becoming Chief.

….

Investigator: I am inclined to believe, I believe she participated by supplying information for the letter. I cannot say that she sat in the room where it was written. I cannot say that she had a hand in actually writing it, but she almost certainly supplied the information that's contained in the letter because every allegation has to do with her.

Commissioner: Does question four apply to Rebecca Boutin?

Investigator: Yes … I believe the letter was sent with an intent to undermine his credit and displace him and deny his promotion, and there is some evidence of that because when she told, it was either Chuck Warren or Keith Supinski, I don't recall which one, but she mentions to one or both of them that her problems would be over if he was arrested for rape.[8]

In short, although the investigator, according to her own sworn testimony, did not believe and/or could not prove that any of the Appellants wrote the anonymous letter, she "believed" that Boutin (and, according to her further testimony, the two other Appellants) had some role in preparing the letter and, thus, she deemed the "purpose" of the letter to be relevant to the Appellants, about whom the investigator went on to make findings and conclusions.

B. The Investigator had an insufficient basis on which to conclude that nothing happened to Ms. S.

An underpinning of the investigator's entire report starts with her conclusion that Ms. S. made false allegations about Egloff in regard to the St. Patrick's Day Parade in 2016. The investigator reaches this conclusion with a twisted and selective cherry-picking of the information she learned, writing:

"Several of the witnesses know [Ms. S.] All described her to be a nice girl who is insecure, easily influenced, with low self esteem and someone who makes up and/or exaggerates stories for attention; both positive and negative attention. I do believe that she told Kozikowski that Egloff did *something*. I am also equally certain that Egloff did ***nothing.*** There were too many people in the truck, meaning too many witnesses, all of whom say nothing happened. None of the people who were in the truck would have allowed Egloff to get away with doing anything inappropriate and there is even photographic evidence showing all smiling faces. In addition, [Ms. S.] never told a soul anything about Egloff until January of 2018, years after the incident. Ms. N and Chrissy Humason who work with, and are friendly with her, say she never said anything of the kind to them …"

It is troubling that an investigator quizzed dozens of Westfield firefighters, mostly male, about the character of an alleged female victim of sexual assault. It is equally troubling that the investigator dismissed her allegations based on debunked and cringeworthy assumptions regarding victims of sexual assault (i.e.—she was seen smiling in a photograph so it couldn't have happened; she did not tell her friends and co-workers at the time so it couldn't have happened; the largely male—and highly intoxicated—firefighters would have seen what happened and intervened.) Also troubling is that the investigator equated Ms. S's refusal to talk with her as indicative that she was not a victim.

Most relevant to this appeal regarding the Appellants, however, is that the investigator reported that Ms. S did indeed make some sort of allegations against Egloff. I credit the testimony of Kozikowski, who swore before me, that Ms. S, in 2018, reported to him that Egloff, at some point during the 2016 St. Patrick Day Parade, "went down her [Ms. S's] pants and touched her vagina." that she pushed Egloff away and he then "went up her shirt and attempted to touch her breasts" and she pushed him away again.

When Appellant David Kennedy was told this information, he spoke directly to Ms. S. I credit his testimony that Ms. S. "proceeded to relate the same incident, same description that … [Kozikowski] had told [him and others and] … she was kind of crying." The testimony of Kozikowski and Kennedy is consistent with the testimony of Firefighter Jennifer Daley, a witness who has no stake in the outcome of this appeal. She credibly testified that Ms. S. "just said something that it happened to her too and couldn't figure why everybody was focused on [Ms. N]." Ms. S specifically told Firefighter Daley that "Eggy [Egloff] had groped her" at the 2016 St. Patrick's Day Parade.

C. The Appellants Did Not "Plot" to Have Egloff Arrested

The credible testimony contradicts the conclusion made by the investigator that:

"Boutin joined Miltimore and Kennedy in a plot to have Egloff arrested for rape." The investigator singles out Kennedy in particular for " … accusing someone of rape on behalf of another person, based on hearsay." In her testimony before the Commission, McDonald stated: The only information that [Miltimore] or any of them had about this came from Lee Kozikowski. I don't believe Kyle Miltimore ever spoke to [Ms. S.] himself. I don't recall that anyway. And so, these people just went off and decided that they were going to call the District Attorney's Office and/or State Police who investigate for the District Attorney and they were accusing him of rape. They seemed to do that for the pettiest reasons …."

The Appellants did not concoct this story in an attempt to have Egloff arrested for rape. Rather, three separate witnesses offered credible testimony that Ms. S., during three separate conversations, made consistent statements regarding allegations against Egloff. When Kennedy heard this information second-hand (from Kozikowski), he did not rely on Kozikowski's hearsay account of his conversation with Ms. S. Rather, Kennedy spoke direct-

8. Neither Warren nor Supinski testified to this.

ly with Ms. S, the alleged victim, who gave Kennedy her first-hand account of her allegations against Egloff. Interwoven into McDonald's report is the premise that the Appellants should have reached the same conclusion that she (McDonald) did—that Ms. S's allegations were purportedly fabricated, even though Kennedy had spoken personally to Ms. S and McDonald did not. As discussed in more detail below, the Appellants, when questioned, including two by State Troopers, explicitly stated that they were not present at the St. Patrick's Day Parade; that they could not have witnessed any alleged actions by Egloff; and that they were simply reporting what had been told to them. For all of the above reasons, the conclusion that the Appellants were "engaged in a plot" to have Egloff arrested for rape is not supported by a preponderance of the evidence.

D. The Investigator's Charge that the Appellants were Insubordinate

The related charge included in the investigator's report and adopted by the Fire Commission—insubordination—equally lacks merit. McDonald cites this charge against each of the Appellants with the explanation: "requires no explanation." Based on the termination letters, I infer, but I am still not quite clear, that the charge of insubordination is for failing to refer these criminal allegations up the chain of command at the Fire Department before going to the State Police, although the rules and regulations regarding insubordination relate solely to actions taken at a fire scene. McDonald could not recall what the definition of insubordination was in the rules and regulations nor could she offer a cogent explanation of the actions that supported this charge, which the report, again, states: "requires no explanation."

To the extent that "insubordination" does indeed relate to failing to follow the proper chain of command upon learning of the alleged criminal allegations against Egloff, that charge is undermined by the following facts. First, when Kozikowski returned to the Fire Department after speaking to Ms. S, he reported his conversation to Captain Supinksi. Supinski specifically recalls being told by Kozikowski that Ms. S had allegedly been "digitally raped" by Egloff. Fire Commissioner Siegel, in his testimony before the Commission, stated that, upon Supinski learning this information, there should have been an "investigation." Supinski, however, did nothing. Rather, he dismissed the charges as untrue ("a lie") and failed to report this information to anyone further up the chain of command in the Fire Department. He has faced no disciplinary action for failing to do so. Second, at least one of the Appellants (Miltimore) did report the allegation to his superior—Captain Boutin. Third, although it occurred after speaking to the State Police, Captain Boutin did attempt to talk to then-Chief Regan about the matter. Regan refused to talk to Boutin, purportedly on the advice of a City Councilor and her own personal counsel. Finally, Fire Commissioner Siegel, in his testimony before the Civil Service Commission, acknowledged that reporting a criminal allegation to the State Police was not necessarily inappropriate. For all of these reasons, including the failure of the Fire Commission's own witnesses to adequately explain the basis of this charge, the conclusion of the investigator and the Fire Commission that the Appellants are guilty of insubordination is not supported by a preponderance of the evidence.

McDonald also cites Kennedy for misconduct based on the fact that he called State Police investigators after Ms. N and Ms. S. told investigators that they were no longer willing to come forward and be interviewed. The record here shows that Kennedy called Trooper McNally because Miltimore told him that they wanted to speak with anyone who had knowledge of the events and Kennedy had spoken directly with Ms. S. He informed McNally what he knew, although at that point, presumably after Ms. S and Ms. N had declined to come forward, McNally did not welcome the call. But Kennedy, like Miltimore and Boutin, had no way of knowing that the victims had declined to proceed. The call was so unremarkable to Investigator McNally that he doesn't even remember it. For these reasons, the preponderance of evidence does not support McDonald's conclusion that Kennedy's phone call to State Police investigators was evidence of misconduct by Kennedy.

E. The Appellants' "Secret Meetings" Were Nothing of the Sort

Following next in chronological order regarding the charges against the Appellants is the fact that four firefighters (Miltimore, Kennedy, Lavalley and Generoux) met at Kyle Miltimore's house. McDonald describes this gathering as a "… secret meeting at Miltimore's house to gather support to bring down Egloff." A more objective description would be that four firefighters, three of whom felt personally aggrieved by Egloff, met to discuss their grievances against Egloff as well as the serious allegations that Ms. S had made against Egloff to three different members of the Westfield Fire Department. (Kozikowski, Kennedy and Jennifer Daley). As referenced above, Kozikowski had already reported Ms. S's allegations up the chain of command to Captain Supinski, who dismissed them as a "lie" and took no action. I have carefully reviewed the list of rules and regulations cited by McDonald as having been violated by the Appellants. The meeting at Miltimore's house, and the discussion that occurred, did not violate any of the rules cited. Rather, the credible testimony of the four meeting participants show that the four firefighters discussed their grievances related to Egloff and wrestled with what to do about the allegations by Ms. S, which had been personally communicated by Ms. S to two of the firefighters present (Kozikowski and Kennedy). No plan was designed to "bring down Egloff" nor was there even agreement about what, if any, next steps would be taken regarding the allegations made by Ms. S. In short, the preponderance of the evidence does not support any conclusion or implication that attending and participating in the meeting at Miltimore's house constituted misconduct.

F. The Appellants Never "Harassed" Ms. S. or Ms. N.

Shortly before this meeting at Miltimore's house, Kennedy had a text message exchange with Ms. S, following up on their one-on-one conversation at the hospital and inviting her to attend the meeting. McDonald, in her report, concluded that " when [Kennedy] learned of the statements made by [Ms. S] he began hounding her by both text messages and in person every time he went to the hospital, to the point where the women [Ms. N and Ms. S] were complaining to others that it was interfering with their work and was embarrassing. He disregarded the wishes of the women who made it clear they did not want to come forward and wanted to put any

incidents related to the parade behind them." First, as previously referenced, I credit the testimony of Kennedy that Ms. S tearfully explained to him what allegedly occurred at the St. Patrick's Day Parade, allegations that were consistent with what Ms. S. had told to Kozikowski and, later, to Daley. The investigator's conclusions appear to put Kennedy in a Catch-22 situation. If he reported what Kozikowski told him about his conversation with Ms. S. without hearing it directly from her, that would constitute misconduct by relying on "hearsay" allegations. However, when he spoke to Ms. S. and heard the allegations directly from her, he is now guilty of harassment. His conversation with Ms. S, by any objective standard did not constitute "hounding" or "harassing" Ms. S. In regard to the exchange of text messages between Kennedy and Ms. S., I printed the exchange in the findings which included the following:

> Ms. S: Hey Dave I'm really sorry I can't make it today. Dads wound care nurse never showed so I have to take care of that and nap at some point for work tonight. I hope you guys come up with a plan. I hope you have a good day. And sorry again.
>
> _____ D.K.: No problem at all, I understand. Hope your dad is doing better. Just want to make sure that you're still on board if we go forward.
>
> _____ Ms. S:Yes just keep me in the loop.
>
> _____ D.K.: Will do!

Again, by any objective standard, this simply does not equate to "harassment" or "hounding" of Ms. S. As referenced later in the findings, I also did not give any weight to the testimony of Firefighter Humason that, on February 28th, Ms. S. complained that certain firefighters "were always talking to her" about these allegations. Finally, there is no credible evidence that Kennedy ever harassed or hounded any other alleged victim. For all of these reasons, McDonald's conclusion that Kennedy "harassed" or "hounded" the alleged victims is not supported by a preponderance of the evidence.[9]

As stated above, McDonald also concluded that Miltimore, similar to Kennedy, "harass[ed] the women to come forward and interfere[ed] with their jobs." First, there is no evidence that Miltimore ever spoke with Ms. N. As for Ms. S, there is only Firefighter Humason's hearsay testimony that Ms. S *once* stated, on February 28th, that Kozikowski, Kennedy and Miltimore always tried talking about it. That testimony by Humason, even if true, simply does not equate to "harassing the women to come forward and interfering with their jobs." For these reasons, the preponderance of evidence does not support McDonald's conclusion that Miltimore "harass[ed] the women to come forward and interfer[ed] with their job".

McDonald made similar conclusions about Boutin which are not supported by the evidence, including Boutin's recorded interview with State Police investigators. Specifically, McDonald concluded the following about Boutin:

> "The level of her immaturity is so great, that she accused a man of rape, with absolutely no remorse, based solely on unsubstantiated gossip that she heard from Kozikowski and then, even when informed by the three alleged "victims" that it wasn't true and they had no intention of giving statements to the police, she put effort into trying to convince them to change their mind.
>
> …
>
> Boutin showed willful disregard for the welfare and safety of not just Egloff, but also non-municipal employees at Noble Hospital."

It appears that McDonald was either unaware of or disregarded the undisputed fact that Boutin did not initiate contact with State Police investigators. Rather, immediately after their interview with Miltimore, *State Police investigators contacted Boutin and asked her to come in for an interview*. The findings provide a detailed summary of what Boutin said during that interview and what investigators asked her to do in regard to the alleged victims. First, similar to Miltimore, Boutin explicitly told State Police investigators that she was not a percipient witness to anything that may have occurred at the 2016 St. Patrick's Day Parade. Investigators then specifically asked Boutin to tell them what she had heard occurred at the Parade—and Boutin complied with their requests. Importantly, State Police investigators implored Boutin to assist them with getting cooperation from the alleged victims, telling her that she had the support of the State Police and the District Attorney's office. Their plea didn't stop there. State Police investigators spoke about "doing the right thing" and "being on the right side of history." Further, I credit Boutin's testimony that State Police investigators, after the recorded interview was concluded, asked Boutin to call the alleged victims before leaving their office. Boutin declined. Contrary to McDonald's report, Boutin was not acting on her own initiative—or pressuring any alleged victims. Rather, she was complying with a request by State Police investigators to get the assistance of three alleged victims of alleged sexual assault. In fact, Boutin, during her recorded interview, actually expressed some reluctance to State Police investigators, reminding them how difficult it is for alleged female victims to come forward and tell their story.

It is in this context that Boutin, after her interview with State Police investigators, reached out to Humason and Ms. N. Boutin never actually spoke with Ms. S but, rather, she asked Ms. N., Ms. S's colleague at Noble Hospital, to speak with her.

I credit Captain Boutin's testimony that, when she called Firefighter Humason, Humason retracted her prior statement that Egloff had made inappropriate physical contact with her at the 2016 Parade. Boutin's version of events is more plausible than Humason's account. Firefighter Humason denies ever telling Captain Boutin that Egloff made inappropriate contact with her at the 2016 Parade. If true, Boutin would have no reason to share this information with State Police investigators, knowing that Humason would contradict her statement when she talked to investigators. Further, I listened (and re-listened) to Firefighter Humason's testimony. She

9. I also gave no weight to the text message purportedly sent to Humason by Ms. S. I do not believe the text message was unsolicited, but, rather, was sent at the encouragement of Humason, who promptly notified Egloff of the contents of the text message.

repeatedly stated that she "declined comment" to State Police investigators. Her testimony appeared painfully geared toward exonerating Egloff of any wrongdoing, often ignoring questions put to her and, instead, repeating that Ms. N had "moved on" and that Ms. S was not credible, in part because Ms. S had failed to make a quilt she had promised her. The more plausible explanation is that, when Boutin told Firefighter Humason about her interview with State Police, Firefighter Humason chose to retract her prior statement about Egloff and to tell Egloff directly of her denial.

I also credit Captain Boutin's testimony regarding her conversation with Ms. N. While Ms. N. said that she and Ms. S would talk to investigators, Ms. N. also expressed concern about the consequences of doing so. That is exactly what Boutin conveyed to State Police investigators; and both Ms. N and Ms. S did indeed initially tell State Police investigators that each of them was willing to be interviewed—consistent with Boutin's version of events. There is no credible evidence that Boutin, after Ms. N and Ms. S canceled their appointments with investigators, sought to pressure them to change their mind. For all of these reasons, McDonald's conclusions that Boutin: a) "even when informed by the three alleged 'victims' that it wasn't true and they had no intention of giving statements to the police, she put effort into trying to convince them to change their mind" and b) that "Boutin showed willful disregard for the welfare and safety of not just Egloff, but also non-municipal employees at Noble Hospital," are not supported by a preponderance of the evidence.

G. Charges of Untruthfulness Against Miltimore Were Not Proved

Moving forward chronologically, McDonald concluded that Miltimore was untruthful during her investigation regarding what occurred next: Miltimore's contact with the State Police. It appears that McDonald was confused regarding the fact that *State Police investigators* reached out to Miltimore to get a statement from him, rather than Miltimore first contacting the investigators. As referenced in the findings, Miltimore decided to reach out to a member of his church who is a State Trooper (Trooper Dolan) for advice. I credit the testimony of Miltimore that the Trooper told Miltimore that he (Miltimore) had a duty to act. Miltimore did *not* then reach out to State Police investigators. Rather, within hours, *State Police investigators* contacted *Miltimore*, and asked to meet with him for an interview that day.[10] Thus, any conclusion that Miltimore was untruthful on this point is not supported by a preponderance of the evidence.

The investigator also concluded that Miltimore " … [made] a false report of rape, harass[ed] the women to come forward and interfere[ed] with their jobs." McDonald reached her conclusion about Miltimore making a false report of rape without having the opportunity to review the State Police investigators' recorded interview with Miltmore. I did. As stated in the findings, Miltimore, at the outset of the recorded interview, which was initiated by the State Police investigators, stated that he (Miltimore) *was not involved in the St. Patrick's Day Parade and he was not a witness to what may have occurred between Egloff and any alleged victims*. He then went on to tell investigators what he had been told by Kozikowski, who had spoken directly to Ms. S and what he had been told by Kennedy, who had also spoken directly to Ms. S. He went on to provide the names of two possible percipient witnesses (Firefighters Rick Paul and Nyles Lavalley) regarding Egloff's alleged behavior (toward Ms. N) at the St. Patrick's Day Parade—who State Police investigators chose not to contact. Although Miltimore, at times, without attribution, reported that he had heard about specific, graphic details of what occurred regarding Ms. S, he never stated that he witnessed any such behavior and he made it clear that he was providing second-hand information to investigators. In summary, Miltimore did not, as part of that interview, "make a false report of rape" to State Police investigators.

Aside from his interview with State Police investigators, McDonald states in her report that Miltimore supposedly told "several" people that Egloff's arrest for rape was imminent. No witness testified before the Commission to this. McDonald's notes also do not support the allegation. They reference "No. 12" (A. Lafreniere) (App. Ex. 10, pp. 85-86, 145). Those notes do not state Miltimore told him Egloff would be arrested for rape; "No. 9" (D. Desilets) (App. Ex. 10, pp. 82-83) who he only supposedly told that Egloff was being *investigated* for rape; and "No. 72" (D. Pleshaw) (App. Ex. 10, p. 108), who doesn't say Miltimore said anything about an arrest or rape. That leaves only No. 56 (J. Greene) for whom McDonald's notes (App. Ex. 10, pp. 56-57) are illegible on this point, leaving it unclear who was saying what. None of these individuals were called as witnesses by the Fire Commission and thus, they never testified under oath; they were never cross-examined; and I never had an opportunity to assess their credibility. For all of the above reasons, McDonald's conclusion that Miltimore " [made] a false report of rape" against Egloff is not supported by a preponderance of the evidence.

H. Captain Boutin misrepresented that Egloff was about to be arrested for Rape

It remains a separate issue whether Captain Boutin falsely told Fire Department employees that Egloff was about to be arrested for rape. None of the McDonald notes clearly indicate that anyone other than two captains (Supinksi and Warren) said that Captain Boutin told them that Egloff was to be imminently arrested for rape. Number 56 (J. Greene) (App. Ex. 10, pp. 56-57) may have claimed this, but the notes are unclear, and it appears there were four people in the conversation including Chris Genereux and any one of them could have said this. I did, however, hear live testimony from Fire Captains Warren and Supinski who both testified that Captain Boutin told them that Egloff was about to be arrested for rape.

I considered the following factors that could detract from Warren's testimony on this issue. First, Warren is friends with Egloff and has known him for 25 years, since high school. Second, despite a

10. I did not overlook the fact that Trooper Dolan testified that Miltimore only discussed general allegations of sexual harassment at the workplace. Dolan's testimony was inconsistent with the testimony of Miltimore and the testimony of Trooper McNally, one of the investigators, who specifically recalls Dolan telling him (McNally) about the allegations of alleged sexual assault raised by Miltimore during their conversation that day.

family friendship with the Boutins, I credit Miltimore's testimony (which Warren did not deny) that Warren spoke disparagingly about Boutin behind her back. Third, Warren only testified that he "believes" that's what Boutin said and that it had been "three years ago now" since the conversation in question. Fourth, Warren showed an animus toward Boutin, based on his (false) belief that Boutin and others were "investigating" Egloff on their own initiative.

Even after considering the above factors, I found Warren's testimony—that Boutin told him that Egloff was about to be arrested for rape—to be credible. Warren was genuinely shocked then, and now, about Boutin's statement. He underwent tough questioning during his sworn testimony and, ultimately, he did recall Boutin telling him that Egloff was going to be arrested for rape. His testimony stood in contrast to the more equivocal testimony by Boutin regarding their conversation. She wavered about important aspects of her conversation with Warren, including whether she told Warren that Egloff was "facing charges" or was about to be "charged." She also seemed to suggest that she may have used the word "arrest," suggesting that she found that to be interchangeable with "facing charges."

It is undisputed that Boutin then called Captain Supinksi. Supinksi had a vivid recollection of the conversation. Supinski recalls that he was taking vacation time and was at home when Boutin called him and told him that Egloff was going to be arrested for rape. Having listened to the testimony of both Warren and Supinski- I do not believe that they conspired to perjure themselves before the Commission. I credit the testimony of both of them in regard to Boutin telling them Egloff was going to be arrested for rape, something that Boutin, by her own admission, had never actually been told. By making these statements, Boutin engaged in substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.

I. Allegations that the Appellants' Behavior Undermined Morale is Without Merit

McDonald's conclusion that the Appellants damaged the morale of the Westfield Fire Department is without merit and can be addressed summarily. As discussed in more detail below regarding disparate treatment, any purported poor morale in the Department cannot be traced back exclusively to the Appellants, but, rather, was attributable to many factors, including, in substantial part, the conduct of the individual who the Westfield Fire Commission has now chosen to lead the Department—Patrick Egloff.

J. Explanation for the Differences in My Findings from those of the Investigator and the WFC

The stark difference between my findings and those of the investigator appear to be attributable to two factors. First, the investigator did not have the opportunity to speak with the State Police investigators and nor did she have the opportunity to review the recorded interviews that the State Police investigators had with Miltimore and Boutin. Second, it appears that bias infected the overall investigation and the investigator's conclusions. McDonald effectively acknowledged that certain officials were guiding her to a pre-determined outcome, testifying that then-Chief Regan told her that she "suspected" the Appellants and two others of misconduct. McDonald went on to testify that Regan " … absolutely attempted to direct the course of the investigation from the beginning."

While McDonald insisted during her testimony that her investigation was fair and objective, it is clear that McDonald developed a bias and/or animus against the Appellants. During her approximately ninety (90) interviews of Westfield Fire Department employees, she allowed, if not openly encouraged, employees to share the same type of unfounded gossip that she ultimately accused the Appellants of. Some of these conversations were downright bizarre and not consistent with conducting an objective interview. As an example, McDonald entertained gossip—and repeated in her report—allegations that an individual allegedly defecated in the middle of a classroom in high school. Her salacious conversations with male firefighters about Captain Boutin, whose title is *earned*, were particularly disturbing and went far beyond the scope of her investigation. The bias and personal animus that McDonald developed against the Appellants was also evident in her notes and final report. Between her notes and her final report, McDonald characterized individual Appellants as:

- a "lying sack of shit"
- "unstable"
- "jumpy and jittery"
- "unfit"
- "has issues"
- "only happy if creating conflict"
- "not smart at all"

McDonald then, referring to her interviews, stated that individual Appellants were referred to as:

- a "sociopath"
- a "psychopath"
- a person who would "go after their wives and children".

While there is no statutory requirement that the investigator be fair and impartial, the personal animus the investigator developed against the Appellants appears to have influenced her findings and conclusions, most of which, as referenced above, are not supported by a preponderance of the evidence.

K. Modification of the Penalty Imposed on Captain Boutin

Since none of the charges against Kennedy or Miltimore are supported by a preponderance of the evidence, their two (2) appeals must be allowed.

In regard to Boutin, I have found that the preponderance of evidence shows that she did engage in one instance of misconduct. Having made that determination, I must determine whether the level of discipline (termination) against Boutin was warranted.

As stated by the SJC in *Falmouth* v. *Civ. Serv. Comm'n*, 447 Mass. 814, 823-825 (2006):

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], § 43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to 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. *citing Watertown* v. *Arria*,16 Mass. App. Ct. 331, 334 (1983).

> "Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.' citing *Police Comm'r of Boston* v. *Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system—'to guard against political considerations, favoritism and bias in governmental employment decisions.'" *Id*. (citations omitted).
>
> --
>
> "Unless the commission's findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the [appointing authority] on the basis of essentially similar fact finding without an adequate explanation."

Id. at 572. (citations omitted).

First, my findings of facts do different significantly from the Westfield Fire Commission and the underlying findings of the investigator relied upon by the Fire Commission regarding the decision to terminate Captain Boutin. As detailed above, all but one of the charges against Boutin were not supported by a preponderance of the evidence. The charge that *was* supported by the preponderance of the evidence, however, involves a serious matter: Boutin falsely reporting that a person was about to be arrested for rape.

Second, I have found evidence of bias, including a personal bias by the investigator.

Finally, there is overwhelming evidence that the decision to terminate Captain Boutin was not consistent with the principle of uniformity and the need to ensure the equitable treatment of similarly situated individuals. The decision to terminate Captain Boutin, while almost simultaneously *promoting* Patrick Egloff to Fire Chief is one of the more egregious examples of disparate treatment that I have encountered during my decade and a half tenure on the Civil Service Commission.

While they *accepted* the investigator's findings and conclusions to justify their decision to terminate Boutin, the Westfield Fire Commission *rejected* the same investigator's findings and conclusions regarding Patrick Egloff. Specifically, McDonald found in relevant part that:

> "For all of the … reasons detailed in this report, I do not believe Deputy Egloff should be promoted to Chief. I recommend he be sent for immediate training including, but not limited to Sexual Harassment Training, Personnel management Training and Anger Management. If Deputy Egloff corrects his behavior, there is no reason why he should not remain a Deputy and re-apply for the Chiefs position the next time there is an opening … ."

Significant portions of Fire Commissioner Siegel's testimony, listed below, illustrate the degree of disparate treatment that existed here.

Counsel:	Okay, and the fact that Patrick Egloff had assaulted [Ms. N] was an undisputed fact, was it not?
Siegel:	Yeah, I believe that's true.
…	
Commissioner:	… Are you aware that Deputy Chief Egloff allegedly made crude comments that he was under the desk of … the Fire Chief, performing oral sex on her?
Siegel:	I do recall that.
Commissioner:	… Are you aware of any statements by Rebecca Boutin that Deputy Egloff grabbed her ponytail?
Sigel:	I do recall that.
Commissioner:	… Are you also aware of any allegations that Deputy Chief Egloff blew up emotionally, etc. went on a tirade … ?
Siegel:	Yeah, I do recall reading it.
Commissioner:	… Why did you not discipline … Deputy Chief Egloff?
Siegel:	…. In regard to the blowing up issue, I believe it was a little over the top but I do not believe it reached the level of discipline. In regard to pulling the pony tail, I mean, it's an allegation but I was very surprised that any kind of unwanted touching of any kind can be considered an assault and it was not reported formally or otherwise, so I think it's probably horseplay, for a lack of a better word, not appropriate, but I don't think it rose to the level of discipline. I think that answers your question.
Commissioner:	Well, there's a couple more things in there. We have the Deputy Fire Chief apparently acknowledging that he made crude comments about performing oral sex on the female Fire Chief. How can that not warrant discipline?
Seigel:	No, I do not believe that would warrant discipline.
Commissioner:	Okay. How about the admitted misconduct about groping … a female citizen while in uniform? Does that not warrant discipline?
Siegel:	It might have, but my understanding is that [Ms. N] … had spoken with Chief Egloff and in some way or another had satisfied herself, she had no desire to press any other charges. Perhaps it would have been appropriate to discipline him for that, but we chose not to.
Commissioner:	Because?

Siegel: Primarily because we feel he was appointed commissioner, Fire Chief rather, and we were satisfied that he had assumed responsibility for a previous action and was prepared to change some of the ways he was doing with his people.

…

Commissioner: … Tell me why it's not disparate treatment for there to be no discipline against [Egloff] and there's to be discipline against the Appellants …

Siegel: Well, mainly because the Appellants' behavior involved naming other parties in an attempt to discredit and defame and prevent the appointment of Deputy Chief Egloff to Chief, whereas the others weren't, if you will, one-on-one type situations that either to my mind, had been resolved in some way, had credibility issues or it wasn't the level of discipline.

The main reason it is difficult to discern this inaccurate and sometime circular testimony is clear: there simply is no rational explanation for the Fire Commission's decision to terminate Captain Boutin, while taking no disciplinary action, and actually promoting, Patrick Egloff to Fire Chief.

For all of these reasons, a modification of the penalty against Captain Boutin is warranted. Her termination shall be modified from termination to a thirty (30)-day suspension.

RELIEF

The Westfield Fire Commission has not shown, by a preponderance of the evidence, that there was just cause for terminating the Appellants from their employment.

As referenced above, G.L. c. 31, § 43 states:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority." (emphasis added)

Therefore, the Appellants shall each be returned to their positions in the Westfield Fire Department without loss of compensation or other rights.[11]

Further, the Appellants shall be entitled to all reimbursements required under G.L. c. 31, § 45 which states that:

> "A tenured employee who has incurred expense in defending himself against an unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position and who has engaged an attorney for such defense shall be reimbursed for such expense, but not to exceed two hundred dollars for attorney fees for each of the following: (1) a hearing by the appointing authority; (2) a hearing pursuant to section forty-two or forty-three; (3) a judicial review pursuant to section forty-four; and not to exceed one hundred dollars for each of the following: (1) summons of witnesses; (2) cost of stenographic transcript; (3) any other necessary expense incurred in such defense.
>
> Any person seeking such reimbursement shall file with his appointing authority a written application therefor within thirty days after final disposition of his case. The appointing authority shall, within thirty days after receipt of such application, pay such reimbursement from the same source as that from which the salary of the person seeking the reimbursement is paid, but only upon receipt of satisfactory proof that such expenses were actually incurred for the purposes set forth in this section."

ADDITIONAL RELIEF WARRANTED UNDER G.L. C. 31. § 2(A) AND CHAPTER 310 OF THE ACTS OF 1993

While Section 43 of the civil service law compels the reinstatement of all three Appellants, without loss of compensation or other benefits, this remedy, standing alone, would force the Appellants to return to a workplace in which their safety and well-being would be jeopardized for the following reasons. First, I credit the testimony of the Appellants that they have been subject to retaliatory actions including threats, theft of equipment and gear; and the real possibility that the actions of other firefighters at a training session resulted in serious injury to one of the Appellants. Second, the Appellants would be returning to a workplace headed by Patrick Egloff, whose own alleged behavior was the actual impetus for what occurred here. Third, any requests for intervention to the Fire Commission to prevent further retaliation would likely be futile, given the commissioners' past and ongoing failure to ensure a safe work environment—ignoring even the undisputed behavior of Egloff at the St. Patrick's Day Parade and deeming a male aggressively pulling the ponytail of a female subordinate to be nothing more than "horseplay."

For these reasons, pursuant to its authority under Section 2(a) of Chapter 31 and Chapter 310 of the Acts of 1993[12], the Commission hereby opens an investigation into actions necessary to ensure a safe working environment for the Appellants. Mandatory actions

11. I did not overlook the fact that Kennedy, effective one day after his termination retired from the Westfield Fire Department. Kennedy still has standing to appeal his termination even though he retired in order to receive benefits while pursuing his appeal. *See Silvia* v. *Dep't of Correction*, 20 MCSR 409 (2007).

12. Chapter 310 of the Acts of 1993 states:

> If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.

by the Westfield Fire Commission shall include, but not be limited to:

> 1) Appropriate disciplinary action against Patrick Egloff for his admitted misconduct.
>
> 2) Completion of a fair, objective, unbiased, independent investigation regarding any allegations of disputed misconduct by Patrick Egloff, followed by the imposition of discipline for any proven misconduct.
>
> 3) Development and implementation of a comprehensive program to prevent and address sexual harassment in the Westfield Fire Department, including required sexual harassment training by a qualified outside expert to be completed by all WFD personnel and all Westfield Fire Commissioners.

Until these actions are taken to ensure the safety of the Appellants, any request by the Appellants to be placed on paid administrative leave shall be allowed by the Fire Commission.

SO ORDERED.

CONCURRING OPINION OF COMMISSIONER ITTLEMAN

While I concur with the majority's opinion, I respectfully submit that Ms. Boutin's modified discipline should be far less than 30 days. As was established by a preponderance of the evidence in this decision, Ms. Boutin told at least two (2) people that then-Deputy Fire Chief Egloff was going to be arrested for rape when there was no basis for that statement. Ms. Boutin's comments in that regard were wholly inappropriate and inexcusable, warranting suitable discipline. However, prior to making those comments, Ms. Boutin was also a victim of Chief Egloff's reprehensible conduct, which was undoubtedly a cause of the stress for which she sought and obtained leave. In *Town of Brookline* v. *Alston and Civil Service Commission*, 487 Mass. 278 (2021), the Supreme Judicial Court recently affirmed this Commission's decision finding that Brookline's decision to fire Mr. Alston was the result of its own inappropriate actions after a superior member of the Brookline Fire Department used a racist epithet on a voicemail message received by Mr. Alston. So too here, given the stress that now-Chief Egloff's conduct caused Ms. Boutin prior to her making the inappropriate comments about him, her discipline should be far less than a 30-day suspension as a matter of equity.

[signed]
Cynthia A. Ittleman, Commissioner

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on May 21, 2021.

Notice to:

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* * * * * *

CODEY SAWYER

v.

CITY OF LOWELL[1]

G1-18-058

May 21, 2021
Cynthia A. Ittleman, Commissioner

***Bypass Appeal-Original Appointment as a Lowell Police Officer-Immaturity-Poor Interview-Ability to Complete Police Academy-Positive Test for Cocaine While in High School-Furnishing Complete Military Records*—**The Commission voted unanimously to void the bypass of a candidate for original appointment to the Lowell Police Department after it found speculative the City's concerns with his inability to complete the academic components of police academy and that the accuracy of a positive test for cocaine when he was 16 was impossible to determine. The Appellant had never tested positive during his regular drug tests in the military. Hearing Commissioner Cynthia A. Ittleman also concluded that the Appellant had not failed to fully comply with the provision of requested documentation of his military service and that the "immaturity" he may have demonstrated in the interview was due to nervousness rather than character flaws.

DECISION

On March 27, 2018, the Appellant, Codey Sawyer ("Mr. Sawyer" or "Appellant"), pursuant to the provisions of G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission) contesting the decision of the City of Lowell ("City") to bypass him for original appointment to the position of permanent full-time police officer with the Lowell Police Department ("LPD").

A pre-hearing conference was held on May 14, 2018, and a full hearing was held on June 11, 2018 at the Armand Mercier Community Center in Lowell.[2] The full hearing was digitally recorded, and copies of the recordings were provided to the parties.[3] Both parties submitted post-hearing briefs. Based on the facts and the law as found herein, the appeal is allowed.

FINDINGS OF FACT

The parties stipulated to certain facts and additional exhibits were entered into evidence at the full hearing (Exhibits 1 through 9 for the City, and Exhibits A through F for Mr. Sawyer); the record was left open for the parties to submit additional documentation, which I received and of which I take administrative notice. The following witnesses testified:

Called by the City:

- Sgt. James Fay, LPD, Director, Lowell Police Academy
- Jonathan Webb, LPD, Acting Superintendent
- Deborah Friedl, LPD, Deputy Superintendent

Called by the Appellant:

- Codey Sawyer, Appellant
- Michael Ferrant, Appellant's Sergeant in the military[4]
- Tyler Grant, Appellant's lifelong friend
- Vanita Sawyer, Appellant's wife

Based on the documents submitted and the testimony of the witnesses, and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of the evidence establishes the following facts:

1. On March 25, 2017, Mr. Sawyer took the Civil Service examination for police officer and passed it with a score of 88. (Stipulated Facts)

2. On December 5, 2017, pursuant to a request of the City to appoint 20 permanent full-time police officers, the Massachusetts Human Resources Division ("HRD") issued Certification #05088 to the City. Mr. Sawyer's name appeared tied for 19thposition on the Certification. (Stipulated Facts)

3. As part of the City's hiring process, applicants are subject to a background investigation and are required to provide certain documentation, including military discharge paperwork for applicants who identify prior military service or claim veteran status. (Testimony of Fay)

4. Applicants are also required to participate in an oral board interview in which they are asked a pre-determined set of questions by a three-member panel, with particularized follow up inquiry where applicable. The oral board panel for all interviews conducted during this hiring round consisted of Sgt. James Fay, Deputy Superintendent Deborah Friedl, and Captain Jonathan Webb, the Acting Superintendent at the time of the hearing. (Testimony of Fay, Friedl, and Webb)

5. The panel members took notes about each applicant's demeanor and responses to the questions but no numerical or standardized scoring system was used. (City Exs. 6, 7, 8 and 9)

1. Adam R. LaGrassa, then-Assistant City Solicitor of Lowell, and Rachel Brown, then First Assistant City Solicitor of Lowell, represented Lowell up to the hearing and submission post-hearing briefs but appear to be no longer employed there at this time. As a result, this decision is addressed to City Solicitor Christine O'Connor.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission, with Chapter 31 or any Commission rules taking precedence.

3. 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 they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this digital recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

4. As an employee of the Vermont State House, Mr. Ferrant was unable to appear personally at the hearing. Instead, Mr. Ferrant testified remotely by computer. Both parties were able to view and hear Mr. Ferrant and conduct direct and cross-examinations of him. I was able to see and hear Mr. Ferrant testify.

6. The oral board panel was responsible for making recommendations to then-LPD Superintendent William Taylor as to which candidates should receive conditional offers of employment and move on in the hiring process and which candidates should be bypassed. (Testimony of Fay, Friedl and Webb)

7. The oral board panel recommended that the City bypass Mr. Sawyer and this recommendation was accepted by Superintendent Taylor and the City Manager. The City Manager is the appointing authority. (Testimony of Fay, Friedl and Webb)

8. By letter to HRD dated January 29, 2018, the City identified the specific reasons relied upon to support the decision to bypass Mr. Sawyer. The City's reasons are summarized as follows: (1) Mr. Sawyer's failure to provide requested documentation concerning his prior military service; (2) Mr. Sawyer's testing positive for cocaine when he was sixteen (16) years old and the explanation he gave for the test result; (3) Mr. Sawyer's unprofessional and immature demeanor during the oral interview; and (4) Mr. Sawyer's statements during the oral interview which led to a concern about his ability to complete the Lowell Police Academy. (Exs. 1 and 6)

9. On March 23, 2018, Mr. Sawyer was notified by HRD that the reasons for bypass as set forth in the City's January 29, 2018 bypass letter were acceptable and he was further notified of his right to appeal that determination. Thereafter, Mr. Sawyer timely filed his appeal. (Stipulated Facts)

10. At the Commission hearing, the Appellant was articulate and an open book, giving direct answers to questions and explaining himself, events and his intentions. In high school at age sixteen (16), with his parents' assent, the Appellant enlisted in the military while attending school. The Appellant's activities while in high school included, among other things, weekly meetings with a service representative. After graduating from high school, Mr. Sawyer served in the U.S. Army Reserves, serving for approximately seven years, from November 2009 through November 2016. From June 2015 through July 2016, he was in active service with deployments in Kuwait and Iraq. The Appellant explained that he did not go to college after high school because he does not believe that he performs best exclusively in a classroom setting. At the age of twenty-five (25) at the time of the hearing, the Appellant indicated that he is married, has already bought a home, and was a new father. The Appellant is fully committed to doing whatever it takes to become a police officer. (Testimony of Sawyer; Ex. 3)

11. Since Mr. Sawyer claimed veteran's status, he was required by the City, as part of the hiring process, to provide a complete and current form DD214 (i.e., "Department of Defense Form 214 - Certificate of Release of Discharge from Active Duty). (Testimony of Fay)

12. Mr. Sawyer timely provided to the City his DD214, which noted his periods of active service and reserve service, the medals and campaign ribbons awarded, and his being honorably discharged from service. (Testimony of Sawyer; Exs. 3, 4, and 5; Ex. D)

13. During the oral interview, the panel questioned whether Mr. Sawyer had submitted an accurate or the most recent version of the DD214 because the panel was unfamiliar with DD214s for veterans like Mr. Sawyer who had served active- duty in the U.S. Army after his reserve service in the U.S. Army Reserves. (Testimony of Fay; City email to CSC dated June 22, 2018 in Ex. E)

14. Two days after the oral interview, Detective Erickson, the background investigator for the LPD, asked Mr. Sawyer to ask the National Archives to produce another DD214 for resubmittal directly to the City. On the same day that Det. Erickson asked Mr. Sawyer to obtain an additional DD214 from the National Archives, Mr. Sawyer promptly made this request in writing to the National Archives. Through no fault of Mr. Sawyer, the National Archives did not send the additional DD214 form to the City until the day after the bypass decision was made. Nothing in the new DD214 documentation sent by the National Archive to the City was inconsistent with the DD214 initially provided by Mr. Sawyer to the City. (Testimony of Sawyer; Exs. D and E)

15. During the oral interview, Mr. Sawyer informed the panel that prior to joining the military, when he was participating in a high school military recruitment program at the age of sixteen, he tested positive for the use of cocaine. The recruitment program conducted drug tests on the student recruits. The interview panelists were unfamiliar with the high school military recruitment program in which Mr. Sawyer had participated. (Testimony of Fay, Friedl, Webb and Sawyer)

16. At his LPD interview, Mr. Sawyer denied that he used or uses illegal drugs except for the use of marijuana a few times when he was fourteen and fifteen years old. (Testimony of Fay, Friedl, Webb and Sawyer)

17. Mr. Sawyer told the oral interview panel that the reason for the positive cocaine test result when he was in high school was that he had been at a friend's house where crack cocaine was being smoked by adults and that he apparently ingested second-hand smoke that was in the air. (Testimony of Fay, Friedl, Webb and Sawyer)[5]

18. The oral interview panel believed that Mr. Sawyer's positive drug test result explanation was implausible. (Testimony of Fay, Friedl and Webb)

19. In his seven years of service in the U.S. Army Reserves, the Appellant never failed the random drug tests whenever they were administered. (Testimony of Sawyer)

20. The City had no specific policy or guidelines concerning the effect an applicant's prior drug use would have on the hiring decision. (Testimony of Fay)

5. At the Commission hearing, the Appellant similarly denied using crack cocaine at any time. (Testimony of Appellant)

21. Mr. Sawyer submitted a letter of recommendation in support of his candidacy from Michael Ferrant, who had been his supervising sergeant for several years in the military, including during Mr. Sawyer's overseas active duty period. Mr. Ferrant is retired from the military and now works at the Vermont State House. (Testimony of Ferrant; Ex. 2)

22. Mr. Farrant's recommendation letter stated that Sawyer is professional, reliable, and dependable, with a strong work ethic. The letter also stated that although Mr. Sawyer would "sometimes offer a somewhat 'immature' personality, he NEVER displayed anything less than total professionalism when it came to combat or tactical training." Mr. Ferrant highly recommended Mr. Sawyer for employment as a police officer. (Ex. 2; Testimony of Ferrant)

23. Upon reflection during his testimony, Mr. Ferrant found that his use of the word "immature" was an inappropriate usage of that word since he meant to convey only Mr. Sawyer's sense of humor and ability to instill camaraderie and relieve stress among his fellow soldiers outside of combat and training. Mr. Ferrant apologized for the miscommunication. (Testimony of Ferrant; Ex. A)

24. As proof of his positive assessment of Mr. Sawyer, Mr. Ferrant indicated that, given Mr. Sawyer's assignment as a 50-caliber machine gunner and his performance in that capacity, in fact Mr. Sawyer is very mature and that Mr. Ferrant would not entrust Mr. Sawyer with that assignment if Mr. Sawyer were immature. (Testimony of Ferrant)

25. As further evidence of his maturity, Mr. Sawyer indicated that he bought a house at the age of 23 for his family and that he had been entrusted to take full-time care of a paralyzed in-law for a period of time. (Testimony of Sawyer)

26. After the oral interview, the panel discussed what could be perceived to be Mr. Sawyer's inappropriate laughing during the questioning, although only one of the panel members' interview notes reflected that to be the case. During that discussion, the panelists attributed this behavior not to nervousness or some other non-disqualifying reason, but to the immaturity referenced in Mr. Ferrant's recommendation letter. (Testimony of Fay, Friedl and Webb; Exs. 6, 7, 8 and 9) However, Mr. Sawyer arrived early for his interview and he was nervous. An officer in the Department saw that he was nervous and told him to relax and show a bit of personality during his interview to be more comfortable. Thus, Mr. Sawyer's behavior at the interview was in fact a reflection of nervousness. (Testimony of Sawyer)

27. Mr. Sawyer did not go to college after graduating high school, opting to join the military instead. (Testimony of Sawyer)

28. A college education is not a requirement for employment with the LPD. (Testimony of Fay)

29. Newly appointed police officers are required to complete the Police Academy. (Testimony of Fay, Friedl and Webb)

30. The Police Academy is very fast paced and intensive, with the first three months consisting almost entirely of rigorous classroom work on topics such as criminal law, criminal procedure, ethics, medical training, and accident reconstruction. Classroom sessions typically operate for six hours per day, five days per week. There are weekly quizzes and quarterly tests. (Testimony of Fay, Friedl and Webb)

31. Mr. Sawyer stated at the interview that he was not a smart man and that he did not think he would succeed in a classroom environment. (Testimony of Fay, Friedl and Webb) While the Appellant admitted at the hearing that he told the LPD interviewers, trying to be humble, that he is not a smart man, he considers himself to be an intelligent person, although not well-educated. He further indicated that if he had the time and the means that he would attend college, especially if it helped him become a police officer, but in the interim he has served his country in the military for six or more years, during which time he learned a significant amount, and he had served his family by taking care of his then-girlfriend's (now wife's) minor sister and then his wife's paralyzed grandfather. (Testimony of Appellant)

32. During the current round of hiring, two applicants other than Mr. Sawyer were bypassed because of the City's concerns about their ability to complete the Police Academy. (Testimony of Friedl)

33. In the previous hiring round, a number of applicants sent to the Police Academy failed. (Testimony of Fay) The City incurs various costs in sending a person to the Police Academy, including the cost of uniforms, equipment and recruit salaries. In addition, if a person fails to complete the Police Academy, there will be a year's delay in filling a needed slot in the Police Department. (Testimony of Fay, Friedl and Webb)

LEGAL STANDARD

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 (2001), 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, § 1.

"When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the [civil service] commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority….In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." *City of Cambridge*, 43 Mass. App. Ct. at 304-305. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing

authorities are given significant latitude in screening police officer candidates. *See, e.g*., *City of Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189, 190-191 (2010), citing *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 824-826 (2006).

In reviewing a bypass decision by an appointing authority, the role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge* v. *Civil Service Commission*, 43 Mass. App. Ct. at 304. An action is justified when it 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." *Selectmen of Wakefield* v. *Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928).

Further, G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." *Mayor of Revere* v. *Civil Service Commission*, 31 Mass. App. Ct. 315 (1991); G.L. c. 31, § 43. More recently and specifically, the Supreme Judicial Court, in *Boston Police Department* v. *Civil Service Commission and another*, 483 Mass. 461, 469 (2019), added that it is an Appointing Authority's "burden to establish such reasonable justification by a preponderance of the evidence." *Id*. at 469. "[W]here, as here [in the case of alleged cocaine ingestion], the alleged misconduct [leading to a bypass] is disputed, an appointing authority is entitled to such discretion ***only*** if it demonstrates that the misconduct occurred by a preponderance of the evidence." *Boston Police Dep't*, *supra*, 483 Mass. at 477 (emphasis in original).

ANALYSIS

Based upon applicable legal standards and the evidence presented in this case, the City has not established by a preponderance of the credible evidence that it had reasonable justification for bypassing the Appellant for original appointment to the position of permanent full-time police officer with the City of Lowell. Rather, the City mistook information provided by the Appellant, or acted based on a lack of information by those involved in the LPD recruit hiring process, to draw conclusions that were not supported by the evidence.

Police Academy

The City asserted that it had serious concerns about whether Mr. Sawyer would be able to successfully complete the Police Academy if he were hired and that accepting him was not a risk that it was willing to take. While the Appellant openly testified and told the LPD interview panel that a classroom setting may not be his optimal learning environment, the City's conclusion that he would fail out of the academy is little more than speculation. It justified its actions, in part, on the failure of other prior candidates to successfully complete the academy. The performance of other candidates has no bearing on the Appellant's abilities. In fact, the Appellant performed well enough on the police officer civil service exam to rank among the highest scorers on the exam such that he was among those who were qualified to be considered by the LPD. The civil service exam is highly competitive and the Appellant was clearly able to study and prepare himself to perform well on the exam. The City offered no evidence that the Appellant has failed or otherwise performed poorly in any academic or training environment. In the approximately seven years that the Appellant served in the military, he received a variety of trainings and, as his superior officer for years reported, performed well in a key battle position after training. That the Appellant served in the military after high school instead of college is of no negative consequence and attending college is not a requirement of the LPD. As a veteran, the Appellant is knowledgeable about the chain of command, which is crucial to the effective operation of a police department. Moreover, the Appellant articulated his affirmative commitment to do whatever it takes to become a police officer, including preparing to represent himself in the Commission hearing on this matter, which he did capably.

Positive Test for Cocaine

The City has not established by a preponderance of the evidence that it had reasonable justification for bypassing Mr. Sawyer in connection with his positive drug test when he was a teenager. During the oral interview, Mr. Sawyer candidly admitted that he had tested positive for cocaine when he was sixteen years old, approximately two (2) years before he graduated from high school in 2011, which was nearly a decade before the Appellant applied to the LPD. First, there is no drug test documentation in the record. The sole source of the drug test result was the Appellant's disclosure at the LPD interview. As a result, there is no way of assessing the accuracy of the test result. The City doubted the Appellant's statements denying that he had used cocaine and his statements that he tested positive due to second-hand cocaine smoke exposure. However, I believe that the Appellant's reference to second-hand exposure to cocaine, and the article about such exposure that he included among his exhibits, indicate that he was searching for a reason to explain how he tested positive, given that, to him, it could not be possible that he willfully ingested cocaine. At the time of the positive test result the Appellant was in high school and enlisted in the military with his parents' assent and there is no indication in the record that the positive drug test result triggered any discipline. There is no suggestion that the Appellant used cocaine on any other occasion. For these reasons, I find the Appellant's denial that he used cocaine when he was sixteen (16) years old credible. Moreover, there is no indication in the record that the City has a policy or guideline for considering the date of a candidate's prior illicit drug use. Even if the Appellant had tested positive a decade before he applied to the LPD, given that seven (7) years of random drug testing in the military showed no positive drug test results, the Appellant's supposed one-time high school age use does not provide reasonable justification for bypassing the Appellant.

Failure to provide DD214

During submission of his application and related materials, Mr. Sawyer gave the City the DD214 he received upon his honorable

discharge from the military. To the extent the oral interview panel was concerned about the completeness of the DD214 provided, such concern was predicated upon its own lack of knowledge regarding Mr. Sawyer's periods of active and stateside service in the Army Reserves. Specifically, the Appellant first served in the Army Reserves, followed by active military duty. The City erroneously believed he had served on active duty continuously. As a result of that mistake, the City, through Detective Erickson, the background investigator of the applicants, asked Mr. Sawyer to obtain another DD214 from the National Archives. Mr. Sawyer promptly made the written request to the National Archives the *same day* that the Detective requested it. Through no fault of Mr. Sawyer, the latest DD214 was not received by the City until the day after the bypass decision was made. Nothing in the resubmitted DD214 documentation was inconsistent with the DD214 initially provided by Mr. Sawyer to the City.

Mr. Sawyer did exactly what the City requested of him with respect to the submission of the DD214 and he did so promptly. He cannot be faulted for the delay of the National Archives in providing another form, especially where that subsequently submitted form was not inconsistent with the DD214 initially submitted by Mr. Sawyer, which showed all his years of active and stateside service in the U.S. Army Reserves, noted the awards and ribbons awarded to him, and stated that he had been honorably discharged. Mr. Sawyer acted promptly, diligently, and in good faith to comply with the City's DD214 request. As a result, the City has not established by a preponderance of the evidence that the Appellant failed to submit his DD214 as alleged in the bypass letter sent to and approved by HRD.

Immaturity

After Mr. Sawyer's oral interview, the panel discussed Mr. Sawyer's apparently inappropriate laughter on occasion during the interview and attributed it not to nervousness but to immaturity. However, only one of the panel members noted this behavior in the interview notes.

In addition, as stated in the bypass letter, the panel members focused on the recommendation letter from Michael Ferrant, Sawyer's supervising sergeant for four years in the military, in which the word "immature" was used in quotation marks by Mr. Ferrant in describing Mr. Sawyer's personality, to buttress their conclusion. Mr. Ferrant testified that his use of the word "immature" in his reference letter was an inappropriate usage of that word since he meant to convey only that Mr. Sawyer had a sense of humor and the ability to instill camaraderie and relieve stress among his fellow soldiers. Mr. Ferrant apologized for the error and stated that he would not have assigned Mr. Sawyer to the weighty responsibility of being a large caliber gunner if he truly thought that Mr. Sawyer was "immature." I credit Mr. Ferrant's testimony as credible in view of his recognition of his mistake, his years of supervising the Appellant, and his work with him under the stresses of war. It is hard to imagine that someone who has served seven years successfully in the military is immature. Mr. Ferrant's testimony was also supported by the Appellant's credible testimony about his own maturity as reflected in his purchase of a home for his family at 23 years of age and his having taken full-time care of a paralyzed relative. Further, I credit the Appellant's testimony that he laughed on occasion at his interview for the LPD because he was nervous, not immature. The Appellant testified credibly that he arrived early for his interview and that a member of the LPD, who saw that the Appellant was nervous, suggested that the Appellant relax and show a bit of personality during his interview. For these reasons, the City has not established by a preponderance of the evidence that Mr. Sawyer is immature.

In the future, should the City choose to rely on a poor interview performance to justify bypassing a candidate for a putatively more qualified lower-ranked one, it must ensure that the process is consistent with basic merit principles of civil service law. Some degree of subjectivity is inherent (and permissible) in any interview procedure but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynchpin to the basic merit principle of civil service law. *See e.g.*, *Malloch* v. *Town of Hanover*, 472 Mass. 783, 796-800 (2015); *Flynn* v. *Civil Service Comm'n*, 15 Mass. App. Ct. 206, 208, *rev. den*., 388 Mass. 1105 (1983); *Pilling* v. *City of Taunton*, 32 MCSR 69 (2109); *Conley* v. *New Bedford Police Dep't*, 29 MCSR 477 (2016); *Dorney* v. *Wakefield Police Dep't*, 29 MCSR 405 (2016); *Cardona* v. *City of Holyoke*, 28 MCSR 365 (2015); *Phillips* v. *City of Methuen*, 28 MCSR 345 (2015); and *Morris* v. *Braintree Police Dep't*, 27 MCSR 656 (2014).

The process followed here of note-taking, followed by group discussion to reach conclusions about which candidates continue in the hiring process, is problematic. It would be preferable for there to be objective criteria and separate, independent numerical scoring by each panel member of each candidate. Also, when, as here, the recollection of panelists differs as to the colloquy and demeanor of candidates, it would be helpful to have a recording of the interviews for the Commission's review.

CONCLUSION

For all the reasons stated herein, Codey Sawyer's appeal under Docket No. G1-18-058 is hereby ***allowed***.

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

1. HRD shall place the name of the Appellant at the top of any future Certification for appointment as a Lowell Police Officer until the Appellant is appointed or bypassed.

2. The City shall not use the reasons deemed invalid in this decision in any future bypass.

3. Should the Appellant be appointed, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 05088.

This civil service seniority is for civil service purposes only and shall not entitle the Appellant to any other pay or benefits, including creditable years toward retirement.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on May 21, 2021.

Notice to:

Codey Sawyer
[Address redacted]

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* * * * * * *

JEFFREY SEMEXANT

v.

BOSTON POLICE DEPARTMENT

G1-20-008

May 21, 2021
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Boston Police Officer-Untruthfulness in Application-Employment History Marked by Absences and Tardiness—The Boston Police Department established reasonable justification to bypass a candidate for original appointment as a police officer based on his poor employment history that included performance issues, a history of absenteeism, tardiness, and failure to give proper notice of resignation. The Appellant was also bypassed for lying about his employment record in his application.

DECISION

The Appellant, Jeffrey Semexant, acting pursuant to G.L. c. 31, §2(b), appealed to the Civil Service Commission (Commission) from the decision of the Boston Police Department (BPD), to bypass him for appointment as a BPD Police Officer.[1] A pre-hearing conference was held on February 11, 2020 and a full hearing was held via video conference (Webex) on August 7, 2020, which was both digitally and audio/video recorded with a link to the recording provided to the parties.[2] The BPD filed a Proposed Decision on October 23, 2020 and Mr. Semexant filed a Post-Hearing Statement on October 22, 2020. For the reasons set forth below, Mr. Semexant's appeal is denied.

FINDINGS OF FACT

Twenty-one (21) exhibits were introduced into evidence, nineteen (19) on behalf of the Respondent and two (2) on behalf of the Appellant. Based on the documents submitted and the testimony of the following witnesses:

Called by the BPD:

- Sergeant Detective John Puglia, Commander of Recruit Investigations, BPD
- Mary Flaherty, Director of Human Resources, BPD
- Detective Anthony Ortiz, Recruit Investigations Unit, BPD

Called by the Appellant:

- Jeffrey Semexant, Appellant

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

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

PROCEDURAL BACKGROUND

1. The Appellant, Jeffrey Semexant, was twenty-nine (29) years old when he first applied for the position of police officer with the Boston Police Department in April 2018. He graduated from Charlestown High School in 2007 and took courses thereafter at Mass Bay/Roxbury Community College from 2007-2010, although he has not earned a degree. (Respondent Exhibit 1).

2. On or about March 25, 2017, Mr. Semexant took the civil service examination for police officer. (Stipulated Fact).

3. On September 1, 2017, the state's Human Resource Division (HRD) established a list of eligible candidates for police officer. (Stipulated Fact).

4. In or about April 2018, Mr. Semexant signed Certification #05198 issued by HRD to the BPD for appointment of a class of BPD police officers and submitted a BPD Student Officer Application, along with the required documentation. (Respondent Exhibit 1)

5. Detective Ortiz was assigned to investigate Mr. Semexant's candidacy for the BPD in 2018. As a recruit investigator, he was responsible for investigating Mr. Semexant's background and documenting his findings in a Privileged and Confidential Memorandum (PCM). (Testimony of Ortiz; Respondent Exhibit 2).

6. Detective Anthony Ortiz is a sixteen (16)-year veteran of the Boston Police Department, assigned to the Domestic Violence Unit and detailed to the Recruit Investigations Unit as a recruit investigator. In his career as a detective, he has conducted over forty-five (45) recruit background investigations for the Recruit Investigations Unit. (Respondent Exhibit 18; Testimony of Ortiz).

7. As part of his background investigation of the Appellant, Detective Ortiz verified background information that Mr. Semexant provided in his Student Officer Application (Application) by interviewing his prior employers, educators, personal references and romantic partners. Detective Ortiz also obtained other information bearing on his candidacy, including but not limited to, criminal database queries, court records and police reports. (Respondent Exhibit 18).

8. On or about April 15, 2018, Mr. Semexant submitted his BPD application and Detective Ortiz reviewed his responses thereafter. Detective Ortiz then conducted a home visit to further observe Mr. Semexant in his own residential environment and verified the information that Mr. Semexant provided. (Testimony of Ortiz; Respondent Exhibit 18).

9. By letter dated November 7, 2018, Mary Flaherty, BPD Director of Human Resources, notified the Appellant that the BPD was bypassing him for appointment. (Respondent Exhibit 10).

10. On or about December 26, 2018, Mr. Semexant filed an appeal of the BPD's 2018 bypass decision with the Commission, Docket No. G1-19-009. (Respondent Exhibit 11).

11. On or about March 28, 2019, the Commission dismissed Mr. Semexant's appeal based on his voluntary withdrawal. (Respondent Exhibit 12).

12. On or about March 29, 2019, HRD, at the request of the BPD, sent Certification #06203 to the BPD. (Stipulated Fact).

13. Mr. Semexant reapplied for the position of BPD Police Officer, submitting his second application on or about June 2, 2019. (Respondent Exhibit 13).

14. Mr. Semexant was ranked tied for forty-eighth (48th) among those willing to accept employment. (Stipulated Fact).

15. Detective Melody Nash was assigned to provide an updated background investigation of Mr. Semexant's application, which she submitted on or about July 22, 2019. (Respondent Exhibit 14)

16. By letter dated November 15, 2019, Mary Flaherty, BPD Director of Human Resources, notified Mr. Semexant that the BPD was bypassing him for appointment. The November 15, 2019 bypass letter delineated the reasons and reads in part:

> "As detailed herein, the Boston Police Department has significant concern with your work performance and untruthful responses in your application to be a Boston Police Officer. The Department is concerned with discrepancies in your 2018 and 2019 applications and information from previous employers…. Police officers must report for duty when expected and prepared to work. The discipline contained in your personnel files reflect negatively on your ability to complete these job-related responsibilities and your commitment to the position and deem you unsuitable for employment as a Boston Police Officer. Truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings…. As a result, the untruthfulness identified in your application as well as the other concerns detailed herein, deems you unsuitable for employment as a Boston Police Officer….

(Respondent Exhibit 15).

17. Of the one hundred twenty-one (121) candidates selected for employment by the BPD from Certification #06203, fourteen (14) were ranked below Mr. Semexant. (Stipulated Fact).

18. On or about December 28, 2019, Mr. Semexant filed his current appeal of the BPD's 2019 bypass decision with the Commission. (Claim of Appeal).

APPELLANT'S PRIOR EMPLOYMENT HISTORY

19. Pursuant to the instructions on the application, every candidate is advised to "answer all questions asked of you truthfully, completely and to the best of your ability. Failure to do so may result in a 'Bypass' or non-selection from employment with the Boston Police Department." (Respondent Exhibits 1 & 13).

20. Additionally, on page 39 of the 2018 application (page 34 of the 2019 application), the Declaration of Acceptance states that a candidate is aware that willfully withholding information or making false statements will result in the rejection of the application. This Declaration of Acceptance acknowledges that all statements on the application are true and complete. (Respondent Exhibits 1 & 13).

21. In his 2018 application, Mr. Semexant answered "No" to Question 3 when asked "Have you ever received a written warning, been officially reprimanded, suspended or disciplined for any misconduct in the workplace, including but not limited to, use of accrued time and violation of a company policy or security rule?" (Testimony of Semexant; Respondent Exhibit 1).

22. Additionally, Mr. Semexant answered "No" to Question 4 in his 2018 application, which asked "Have you ever quit a job without giving proper notice?" (Testimony of Semexant; Respondent Exhibit 1).

23. Mr. Semexant worked for a security company from 2009 to January 2018. (Testimony of Ortiz; Respondent Exhibits 1, 18).

24. Mr. Semexant's personnel file was provided to Mr. Semexant by the security company at his request during the 2018 BPD application process and forwarded to Detective Ortiz. Within that file, the security company provided copies of ten (10) instances of discipline from September 2010 through September 2014 for unexcused absences, tardiness, and failure to follow procedure. (Testimony of Ortiz; Respondent Exhibits 1, 4, 5, 18, 19; Appellant's Exhibit 21).[3]

25. Detective Ortiz contacted the security company to inquire about his work history and performance with that company. (Testimony of Ortiz; Respondent Exhibits 1, 18).

26. Detective Ortiz learned that Mr. Semexant was not eligible for rehire because he resigned without notice and had a record of disciplinary reports and violations of the attendance policy. This was in direct contradiction to Mr. Semexant's negative responses to Questions 3 and 4 on his Application. (Testimony of Ortiz; Respondent Exhibits 1, 2, 14 &18).

27. Mr. Semexant resigned from the security company with no notice. He sent an email to his manager on January 14, 2018 stating that he was resigning effective that *same date*, January 14, 2018. (Respondent Exhibits 7, 18).

28. The security company suspected that Mr. Semexant resigned to avoid termination due to his poor work performance. Internal emails amongst management at the security company provided to the BPD reveal that the company believed that Mr. Semexant may have been alerted to the fact that he was going to be terminated, so it was the security company's belief that Mr. Semexant resigned before this could take place. (Respondent Exhibit 1).

29. Mr. Semexant knew that the security company believed that he was repeatedly not following company procedure by clocking in late and failing to clock out at the end of his shift, possibly leaving early, just prior to his resignation. (Testimony of Semexant)

30. Additionally, the security company completed a form that the BPD provided, entitled the Human Resource Data Form (Form), which was part of the 2018 BPD application. A human resources employee at the security company filled out the form and wrote that: "we were having problems with [the Appellant] at the site and his attendance is bad." She attached a letter to the form, dated April 13, 2018, which stated that during Mr. Semexant's employment from February 1, 2010 to January 14, 2018, he quit with no notice and was out sick 17 times, was late to work 118 times, had 6 unexcused absences, and 1 no call/no show. (Respondent Exhibit 8, 18).

31. Detective Ortiz sent a follow-up email to the human resources employee on September 4, 2018 to get more information as to what her statement, that "we were having problems with [the Appellant] at the site and his attendance is bad," meant. In her response-email dated September 4, 2018, she explained to the detective that the company was having problems with Mr. Semexant's "attendance in that he would show up late and was leaving early without clocking out or telling anyone." (Respondent Exhibit 1; Respondent Exhibit 18; Testimony of Ortiz).

32. On September 7, 2018, Detective Ortiz contacted Mr. Semexant via telephone to discuss the conflict between Mr. Semexant's answers to Application Questions 3 and 4 and the information provided by the security company about the discipline he received and that he resigned without proper notice. During that phone conversation, Mr. Semexant admitted that he received *several warnings* for his attendance issues within the years he worked there because his schedule with the MBTA conflicted with this job. He told Detective Ortiz that he sent an email *two (2) weeks prior* to resigning from the security company. Detective Ortiz requested that Mr. Semexant submit an explanation in writing relative to his discipline and notice of resignation at that job. (Testimony of Ortiz; Respondent Exhibits 2, 18).

33. On September 7, 2018, Mr. Semexant sent Detective Ortiz an email which conflicted with the telephone conversation they had that same day. In the email, Mr. Semexant said that, in his long career with the security company, he received a *single warning* due to being tardy. He did not remember the date, but he believed that it happened in 2014-2015 when his mother was terminally ill. He provided her end-of-life care. He ended the explanation with "JS 8-15-18." This document was added to his April 2018 application in August 2018. (Testimony of Ortiz; Respondent Exhibits 9, 18).

34. At the Commission hearing, Mr. Semexant offered a new excuse for not mentioning his disciplinary record, claiming that he had only remembered "one or two" and did not inquire because

3. Mr. Semexant signed for six (6) of the disciplinary reports signifying that he had received, at a minimum, those six. (*Exhs 20 &. 21; Testimony of Appellant)*

"everything would be erased" in 30-60 days and it would "disappear." (Testimony of Semexant).

35. Mr. Semexant is currently employed by the Massachusetts Bay Transportation Agency (MBTA), where he began working in 2014. In conflict with Mr. Semexant's negative answer to Question 3 in his application regarding prior discipline, Detective Ortiz discovered that Mr. Semexant received written counselling on August 24, 2017 from the MBTA for 2-5 continuous unexcused absences in a 3-month period. An MBTA supervisor explained that the attendance program only allowed him to view the previous two years of his records. Mr. Semexant had twelve (12) protected and six (6) unexcused sick days off in a sixty (60) day period. There had been no attendance issues since the warning. (Testimony of Ortiz; Respondent Exhibits 1, 3, 18).

36. Mr. Semexant did not disclose his attendance issues at the MBTA on his April 2018 application. (Respondent Exhibit 1).

2018 Decision to Bypass Appellant

37. On or about September 20, 2018, a roundtable panel at the BPD convened to review Mr. Semexant's 2018 application and discussed his suitability for employment. The members of the roundtable panel included the Deputy Superintendent of the Internal Affairs Division, the Commander of the Recruit Investigations Unit, the Director of Human Resources, and an attorney from the Legal Advisor's Office ("Round Table"). (Testimony of Flaherty; Respondent Exhibit 19).

38. Detective Ortiz undertook the background investigation of Mr. Semexant and authored the Privileged and Confidential Memorandum (PCM) dated September 19, 2018 outlining the results of the investigation. He presented the details to the Round Table. Detective Ortiz did not give any input as to his opinion about the Appellant's suitability for the position. He only presented the findings of his investigation. (Testimony of Ortiz; Testimony of Flaherty; Respondent Exhibit 2).

39. Members of the Roundtable at the BPD considered the fact that Mr. Semexant's personnel file from the security company contained ten (10) instances of discipline from 2010 to 2014 for unexcused absences, tardiness, and failure to follow procedures. Further, the BPD also considered that Mr. Semexant had failed to give proper notice when he resigned from that job, resigning on the same day that he gave his notice. Members of the Roundtable also considered that the Appellant had received written counselling from the MBTA in August 2017 for 2-5 continuous absences in a three-month period. (Testimony of Flaherty; Respondent Exhibits 2, 3, 4, 10, 18, 19).

40. Members of the Roundtable considered the fact that Mr. Semexant, in contradiction with the personnel files received by the BPD investigator, as well as conversations with former employers, denied that he ever received discipline from his employer or that he had failed to properly resign from a prior job. Members of the Roundtable believed that Mr. Semexant had been untruthful in his responses to both Questions 3 and 4 in his application. (Testimony of Mary Flaherty; Respondent Exhibits 1, 7, 8, 19).

41. Members of the Roundtable concluded that Mr. Semexant was not suitable to perform the essential job functions of a police officer based on his untruthfulness. (Testimony of Flaherty; Respondent Exhibit 19).

42. Additionally, members of the Roundtable were concerned with Mr. Semexant's work history based on the ten (10) disciplinary reports in the security company personnel file, his attendance records at the security company and the written counselling from the MBTA. (Testimony of Flaherty; Respondent Exhibits 10, 19).

43. Members of the Roundtable considered whether the prior employment history was stale, where the last written discipline occurred in September 2014 at the security company and September 2017 at the MBTA. Ultimately, members of the Roundtable determined that, because the extensive history of written discipline and the attendance violations for tardiness spanned his entire employment at the security company, Mr. Semexant's work performance was relevant and of great concern. (Respondent Exhibits 3, 4, 19).

44. Based on his untruthfulness and his poor work history, Mr. Semexant was bypassed for appointment as a Boston Police Officer and was notified via correspondence dated November 7, 2018. (Testimony of Flaherty; Respondent Exhibits 10, 19).

45. Prior to any evidentiary hearing, Mr. Semexant withdrew this appeal. (Respondent Exhibit 12)

2019 Decision to Bypass Appellant

46. On August 6, 2019, Detective Melody Nash presented Mr. Semexant's background investigation to the Round Table. Detective Nash's findings indicated no new issues regarding Mr. Semexant, noting, in particular, that he had not had any further attendance issues at the MBTA since 2017. (Respondent Exhibits 14, 19; Testimony of Flaherty).

47. Detective Nash also reported to members of the Roundtable that Mr. Semexant changed his answers to Questions 3 and 4 in his 2019 application from "No" (in 2018) to "Yes", and listed the ten (10) disciplinary instances at the security company and the written counselling at the MBTA. (Testimony of Flaherty; Respondent Exhibits 1, 13, 14, 19).

48. It was also noted that Mr. Semexant's explanation for his answer to Question 4 in the 2019 application stated that he "resigned from [the security company] without giving proper two-week notice." (Respondent Exhibit 13).

49. Members of the Roundtable acknowledged the positive aspect of Mr. Semexant answering these two questions accurately and truthfully. However, the BPD remained concerned about Mr. Semexant's untruthfulness in his 2018 application just one year prior, his untruthfulness with Detective Ortiz in 2018, as well as the underlying facts disclosed about his prior poor work performance and attendance history. (Testimony of Flaherty; Respondent Exhibit 19).

50. Members of the Roundtable determined that Mr. Semexant was unsuitable to perform the essential functions of a Boston

Police Officer based on his untruthfulness and poor work performance. (Testimony of Flaherty; Respondent Exhibit 19).

51. On November 17, 2019, the BPD notified Mr. Semexant that he had been bypassed for providing untruthful statements in connection with his 2018 application and his poor work performance. (Testimony of Flaherty; Respondent Exhibit 15).

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259 (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass. 1106 (1996)

Original and promotional appointments of civil service employees are made from a list of candidates, called a "certification", whose names are drawn in the order in which they appear on the applicable civil service "eligible list", using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons—positive or negative, or both—consistent with basic merit principles—for bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n,* 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton,* 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient")

The governing statute, G.L. c. 31, gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) The commission ". . . cannot substitute its judgment about a ***valid*** exercise of ***discretion based on merit or policy considerations*** by an appointing authority" but, when there are "***overtones of political control or objectives unrelated to merit standards or neutrally applied public policy***, then the occasion is appropriate for intervention by the commission.." *Id*. (***emphasis added***) *See also Town of Brookline* v. *Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law).

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

> "Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Police Comm'r v. *Civil Service Comm'n*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27, 32 *rev.den.* 398 Mass. 1103, 497 N.E.2d 1096 (1986).

The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. "[P]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." *Falmouth* v. *Civil Service Comm'n*., 61 Mass. App. Ct. 796, 801 (2004) citing *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) ("The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer…. It requires no strength of character to speak the truth when it does not hurt.") *See, e.g*., *Desmond* v. *Town of West Bridgewater*, 27 MCSR 645 (2014); *Ung* v. *Lowell Police Dep't*, 24 MCRS 567 (2011); *Gallo* v. *City of Lynn*, 23 MCSR 348 (2010). *See also Minoie* v. *Town of Braintree*, 27 MCSR 216 (2014); *Everton* v. *Town of Falmouth*, 26 MCSR 488 (2013) and cases cited, *aff'd*, SUCV13-4382 (2014); *Gonsalves* v. *Town of Falmouth* and cases cited, 25 MCSR 231 (2012), *aff'd,* SUCV12-2655 (2014); *Keating* v. *Town of Marblehead*, 24 MCSR 334 (2011) and cases cited.

Providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Kerr* v. *Boston Police Dep't*, 31 MCSR 25 (2018), *citing Morley* v. *Boston Police Department*, 29 MCSR 456 (2016) Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. *See* G.L.c. 31,§ 27,¶2.

Thus, the corollary to the serious consequences that flow from a finding that a law enforcement officer or applicant has violated

the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g.*, *Boyd* v. *City of New Bedford*, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); *Morley* v. *Boston Police Dep't*, CSC No. G1-16-096, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); *Lucas* v. *Boston Police Dep't*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history).

ANALYSIS

The BPD established reasonable justification to bypass Mr. Semexant for appointment as a BPD police officer based on the preponderance of the evidence presented relative to his poor employment history that includes performance issues, a history of absenteeism, tardiness and failure to give proper notice of resignation, together with his lack of candor in providing information about his employment record.

First, the facts about Mr. Semexant's employment history are now largely undisputed. He had a history of tardiness with two employers. He resigned from the security company in 2018 without notice after learning that his termination was imminent. He is not eligible for rehire there. While his record of employment at the MBTA was only available for the two years prior to his 2018 BPD application, he had multiple unexcused absences during that period, including a written counselling in August 2017. Thus, this record contains undisputed evidence of sufficiently recent, problematic behavior that, alone, supports the BPD's conclusion that Mr. Semexant was not a suitable candidate for appointment as a BPD police officer in 2018 and remained unsuitable in 2019 for the same reasons.

Second, the BPD's reliance on Mr. Semexant's "untruthfulness" is a closer call. I credit Mr. Semexant (as did the BPD) for correcting his untruthful answers given in 2018 when he completed the 2019 application. If Mr. Semexant's original responses in 2018 were simply "honest mistakes", it would be unfair to penalize him for correcting those mistakes in a subsequent application. Here, however, there are too many errors, many of which related to very recent incidents or discipline of which he admitted he was aware, to conclude that they all were just "honest mistakes." Moreover, Mr. Semexant, in his testimony at the Commission hearing, demonstrated to me that he still has a tendency to "fudge the truth" about his employment history. For example, he continued to revise his explanations about the attendance issues at the security company and at the MBTA during the Commission hearing.

Specifically, both the 2018 and 2019 BPD applications contain a section on employee discipline and ask, "Have you ever received a written warning, been officially reprimanded, suspended or disciplined for any misconduct in the workplace, including but not limited to, use of accrued time and violation of company policy or security rule?" Mr. Semexant answered "No" in 2018 and "Yes" in 2019. Mr. Semexant, however, continued to downplay the level of discipline, telling Detective Ortiz that he had "several" warnings from the security company, then emailing him that it had been only one warning. At the Commission hearing, Mr. Semexant testified that he did recall getting disciplined at the security company but he gave another explanation for not mentioning that discipline in his 2018 application, namely, he thought the discipline was supposed to be removed from his records after 30-60 days.

The security company personnel file, which Mr. Semexant had provided to the BPD, contains ten (10) instances of disciplinary reports from September 2010 through September 14, 2014 for unexcused absences, tardiness, and failure to follow procedure. Six of the disciplines contained his signature acknowledging receipt. I also credit Detective Ortiz testimony that Mr. Semexant never mentioned his discipline at the MBTA during the 2018 application process although the MBTA records reveal that he had received written counseling for multiple unexcused absences in three months just one year prior in 2017. [4]

Mr. Semexant's response to Question 4 is even more troubling. The question expressly asked, "Have you ever quit a job without giving proper notice?" Mr. Semexant responded "No" in 2018 and "Yes" on his 2019 Application. The undisputed fact is that, on January 14, 2018, Mr. Semexant notified the security company that he would be resigning from him position effective that *very same day*, January 14, 2018. During his telephone conversation with Detective Ortiz after he submitted his 2018 application, Mr. Semexant was asked about his resignation from [security company], specifically his "No" response to Question 4. In that phone conversation, Mr. Semexant failed to tell the truth to Detective Ortiz about his resignation, stating falsely that he gave two (2) weeks' notice to the security company via email, proved false by the actual email, sent less than a year earlier..

In sum, at the time of his 2018 and 2019 applications, the preponderance of the (largely undisputed) evidence of Mr. Semexant's poor employment history, with issues that related back barely a year or two, and his recent lack of candor about that history, proved that Mr. Semexant presented an unreasonable risk for appointment as a BPD police officer at that time. Mr. Semexant impressed me as sincerely passionate about his desire to become a BPD police officer. He must demonstrate, if he can, by his future employment record and improved candor, however, that he has overcome the problems that justified this bypass before the BPD can be expected to give him a fresh look.

4. At the Commission hearing, Mr. Semexant initially said that he did not initially mention the discipline at the MBTA because he believed it was covered by approved FMLA (Family Medical Leave). On cross-examination, Mr. Semexant was reminded that the discipline by the MBTA was in 2017, not 2014, and Mr. Semexant changed his response. He said his supplemental response to Question 6 concerned his answers about Northeast Security and that his MBTA absences were time he took off to help his father who was still dealing with him mother's death but that he thought he still was covered under FMLA. (Testimony of Semexant; Respondent Exhibits 1 & 5)

CONCLUSION

For all of the above stated reasons, the bypass appeal of Jeffrey Semexant, under Docket No. G1-20-008, is ***denied***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein & Tivnan, Commissioners) on May 20, 2021.

Notice to:

Jeffrey Semexant
[Address redacted]

Tanya E. Dennis, Esq.Assistant Corporation Counsel
City of Boston Law Department
One City Hall Square, Room 615
Boston, MA 02201

* * * * * *

BONNIE J. CUNHA

v.

DEPARTMENT OF CORRECTION

E-21-008

June 3, 2021
Christopher C. Bowman, Chairman

Non-Bypass Appeal-Reduction in Force-DOC-List Shrunk From 30 to 7 Correctional Officers—A non-bypass appeal from a candidate for original appointment as a correctional officer was rejected where she had been conditionally appointed but then the appointment was withdrawn after operational needs for new correctional officers were reduced from 30 to seven. Absent any proof of subterfuge or ulterior motives on DOC's part, the Appellant's claim could not be distinguished from the classic case of "dying on the vine" where a person near the top of an eligible list finds herself removed or lowered due to a subsequent exam.

SUMMARY DECISION

On December 28, 2020, the Appellant, Bonnie J. Cunha (Appellant), filed a non-bypass equity appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to not appoint her to the position of Correctional Program Officer A/B (CPO A/B) from Certification No. 06864.

On January 8, 2021, DOC filed a Motion to Dismiss the Appellant's appeal and the Appellant filed an opposition. On February 9, 2021, I held a pre-hearing conference which was attended by the Appellant and a representative for DOC. Subsequent to the pre-hearing conference, DOC submitted additional information and the Appellant submitted a reply.

Viewing the facts most favorably to the Appellant, I find the following:

1. The Appellant is employed a Clerk VI at DOC.

2. On October 20, 2018, the Appellant took the civil service examination for CPO A/B and received a score of 86.

3. On July 1, 2019, the Appellant's name was place on the eligible list for CPO A/B.

4. On May 15, 2020, DOC created Certification No. 06864 from which it anticipated appointing thirty (30) CPO A/Bs.

5. The Appellant was ranked 19th among those willing to accept appointment on Certification No. 06864.

6. On August 15, 2020, additional names were placed on the eligible list, apparently due to a subsequent examination. The Appellant is now ranked 66th on this eligible list, although it appears that DOC continued to process Certification No. 06864.

7. In August 2020, the Appellant received a conditional offer of employment from DOC, conditional upon passing medical and drug screening tests.

8. On September 15, 2020, the Appellant received an email from DOC stating in part: " … This is your *official conditional offer* for the MADOC Academy pending the results of your psych test (we don't have the results back) and your COVID-19 results (information below) … as of now you want to plan to start the Academy. **The first day of the Academy is Monday, October 26, 2020**.)" (emphasis in original)

9. The Appellant passed the medical (including psychological) tests and drug screening.

10. The Appellant purchased the necessary gear in anticipation of attending the training academy.

11. On September 28, 2020, a day before the scheduled COVID-19 test, the Appellant received an email from DOC stating that "due to current operational needs", DOC was only able to hire 7 CPO A/Bs, as opposed to 30, and that the Appellant's rank on the Certification was not reached in regard to those 7 appointments. The email stated in part, "Therefore, for now, you will stay in your Clerk position and we will look to hire you as a CPO come early next year."

12. On November 19, 2020 DOC sent the Appellant an email informing her that no additional CPO A/Bs would be hired for the January 2021 Academy.[1]

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1. This effectively marked the end of the certification. Any future certifications would be generated from the updated eligible list upon which the Appellant's rank was now considerably lower.

13. On December 1, 2020, DOC sent the Appellant a formal non-selection letter confirming that she was not considered for appointment to the October 11, 2020 Academy as "your rank was not reached on the certification …".

14. On December 28, 2020, the Appellant filed this appeal with the Commission, arguing that she is an aggrieved person and asking the Commission to place her name at the top of the next certification for CPO A/B.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See, e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

ANALYSIS

The Appellant received a conditional offer of employment for CPO A/B from DOC; she completed the required medical and drug screening; and she made plans to attend the October 2020 training academy. As her conditional offer of employment was, effectively, rescinded prior to her attending the training academy, the Appellant argues that she is an aggrieved person for whom relief is warranted.

I am not unsympathetic to the Appellant's plight here. She was understandably looking forward to what, for her, was a promotional opportunity at DOC. Importantly, however, even when viewing the facts in the light most favorable to the Appellant, there is no evidence, or even an allegation, that DOC's actions here were the result of any personal, political or other reasons not related to basic merit principles. The Appellant has not disputed the detailed reasons cited by DOC for the decision to appoint 7, as opposed to 30, CPO A/Bs, which include the unanticipated closure of at least two minimum security facilities which resulted in the displacement of many incumbent CPO A/Bs.

In sum, absent proof of any subterfuge or ulterior motives on DOC's part, the Appellant's claim cannot be distinguished from the classic case of " dying on the vine", which is the inevitable plight of any person whose name appears near the top of an eligible list and is then removed or lowered due to a subsequent examination. *See Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 253 (2006) and cases cited (placement on civil service list is no guarantee of appointment or promotion); *Callanan* v. *Personnel Adm'r*, 400 Mass. 597, 600 602 (1987) (no vested interest in position during life of an eligible list); *Mandracchia* v. *City of Everett*, 21 MCSR 307 (2008) ("A candidate whose name is not reached for promotion or appointment has no recourse but to take the next examination.")

For all of the above reasons, the Appellant's appeal under Docket No. E-21-008 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Bonnie J. Cunha
[Address redacted]

Joseph Santoro
Department of Correction
Division of Human Resources
50 Maple Street, 1st Floor
Milford, MA 01757

* * * * * *

MICHAEL CALLAHAN

v.

HUMAN RESOURCES DIVISION

B2-21-042

June 3, 2021
Christopher C. Bowman, Chairman

Examination Appeal-E&E Credits-Fire Lieutenant Exam-Time Served as Temporary Lieutenant—The Commission reversed HRD's denial of E&E credit to a Lowell firefighter for 1,740 hours of time served as a temporary Fire Lieutenant that had been justified by HRD because the Fire Chief made a clerical error in submitting the Employment Verification Form that showed the individual hours from payroll records but did not list the total hours. HRD also made a number of unconvincing technical arguments finding fault with the documents submitted, which the Commission also rejected. The Commission went further to suggest the agency add a "good cause" provision to their rules in order to address anomalous situations such as this one that lead to unjustifiable denial of credits.

DECISION ON CROSS MOTIONS

On February 25, 2021, the Appellant, Michael Callahan (Appellant), a firefighter in the Lowell Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not grant him 0.5 points on Question 4 and 0.75 points on Question 5 of the Education and Experience (E&E) component of the Fire Lieutenant examination for time served as a Temporary Fire Lieutenant.

On March 30, 2021, I held a remote pre-hearing conference, which was attended by the Appellant, counsel for HRD and the Lowell Fire Chief. Based on the information provided and/or re-

viewed at the pre-hearing conference, the following does not appear to be in dispute:

A. HRD administered a promotional examination for Fire Lieutenant on November 21, 2020.

B. The deadline for completing the E&E component of the examination, and submitting the supporting documentation, was November 28, 2020.

C. The Appellant completed the online E&E module before the filing deadline.

D. As part of the E&E module, the Appellant claimed 0.5 points and 0.75 points for Questions 4 and 5 for time served as a Temporary Fire Lt.

E. The Appellant submitted supporting documentation to HRD before the filing deadline, including an Employment Verification Form completed and signed by the Fire Chief, and many pages itemizing the shifts worked.

F. The Employment Verification Form did not list the time spent as Temporary Fire Lt.

G. HRD, relying on the Employment Verification Form, did not give the Appellant credit for the 0.5 and 0.75 points.

H. On February 22, 2021, HRD released the scores to candidates.

I. That same day, the Appellant filed an appeal with HRD, which included an appeal of the points in question.

J. Also that same day, HRD emailed the Appellant stating: "Your score does not reflect the acting time you claimed as it was not provided on official letterhead and signed by a chief/appointing authority."

K. On February 23, 2021, prior to the establishment of the eligible list, Lowell's Fire Chief penned a letter stating: "This letter is in reference to Firefighter Michael Callahan and verification of him working as a temporary officer. Firefighter Callahan worked as Temporary Lieutenant form 9/26/11 through 6/18/20 for a total of 1740 hours. If any additional information is needed please contact my office at …".

L. On February 25, 2021, the Appellant filed an appeal with the Commission stating:

> "May I please have my Acting Temporary Lieutenant time added to my E&E Score. My original E&E paperwork included all my days, dates and hours. It came from the Fire Chief's office from the city computer. It has [C]ity of Lowell [l]logo on the top corner. I received the [HRD email] that Civil Service needed a signed letterhead form the Chief. The following day [] Chief P. Charron made such letter and I have emailed it to Civil Service. You're welcome to call the office to verify. Also, see attached letter. I would like to fix this before the promotional list is posted at Civil Service and the City next Monday, March 1st."

M. On March 1, 2021, HRD established the eligible list for Lowell Fire Lt.

N. The Appellant's total score on the examination was 84.77, resulting in him being tied with 4 other persons for 5th on the eligible list.

O. The Lowell Fire Department breaks ties by going down to the one-hundredth decimal point.

P. While HRD was unable to confirm this at the pre-hearing conference, it is likely, but not certain, that crediting the Appellant with these additional points would change his placement vis-à-vis other candidates tied for 5th, when broken down to the hundredth decimal point.

Q. On March 22, 2021, the Appellant sent an email to the Commission and HRD stating:

> "This is sent to all involved in the pre-hearing appeal scheduled for 3-30-21
>
> This week I was going over my paperwork for the test and for my appeal and upcoming pre-hearing video conference with Civil Service. My coworker reviewed my documents and discovered my (HRD) Fire Dept Promotional Exam Employment Verification Form may have been missing information. The Chiefs office did in fact send the supporting documentation with the shifts and hours for supporting documentation that I forwarded for the exam but the office didn't note the information on the [] HRD form. This was a clerical error from the Chiefs office that should have been picked up on but wasn't by the office staff or me. This was my first exam and I trusted the documents from the office would be correct.
>
> I'm asking if you could please extend to me the E&E for working as a temporary lieutenant (1740 hrs) 1.25 point in the E&E. This would be greatly appreciated.
>
> I'm not sure if this applies or not but I do have a lifelong reading disability that is well documented and covered under the Americans with Disabilities Act. At this point I'm hoping Civil Service could grant the points and be understanding and act in my behalf. I feel this would be a reasonable request."

R. On March 23, 2021, the Lowell Fire Chief forwarded an email to HRD and the Commission stating: "Please see attached the amended copy of the Employment Verification Form with supporting documentation for Michael T. Callahan." The Employment Verification Form now listed the time the Appellant served as Temporary Lt. The attachments were identical to the attachments that were initially sent to HRD.

S. On March 30, 2021, the Fire Chief attended the remote pre-hearing conference and took responsibility for the administrative error related to the initial Employment Verification Form (e.g.—not listing the time as Temporary Lt. on the actual form, although providing an itemized list that supported what the Appellant sought credit for on the examination).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) states in part that:

> "No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or

> basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

G.L. c. 31, § 5(e) states in relevant part that:

> "The administrator [HRD] shall have the following powers and duties:
>
> …
>
> To conduct examinations for purposes of establishing eligible lists."

G.L. c. 31, § 22 states in relevant part that:

> "The administrator shall determine the passing requirements of examinations. In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held. In any examination, the applicant shall be allowed seven days after the date of such examination to file with the administrator a training and experience sheet and to receive credit for such training and experience as of the time designated by the administrator."

PAR.06(1)(c) stated in relevant part that:

> "The grading of the subject of employment or experience as a part of an entry-level examination shall be based on a schedule approved by the administrator which shall include credits for elements of employment or experience *related to the title for which the examination is held*".

related to the title of CO I."

STANDARD OF REVIEW: MOTION FOR SUMMARY DECISION

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h). These motions are decided under the well recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non moving party", the substantial and credible evidence established that the non moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. *See e.g., Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005). *Accord Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249, (2008). *See also Iannacchino* v. *Ford Motor Company*, 451 Mass. 623, 635 36, (2008) (discussing standard for deciding motions to dismiss); *cf. R.J.A.* v. *K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiffs standing required denial of motion to dismiss).

ANALYSIS

As cited by HRD in its motion for summary decision, precedent-setting judicial decisions and a long line of Commission decisions have affirmed that, under Massachusetts civil service law and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the technical requirements related to completing the examination.

HRD's discretion, however, it not without limits. Intervention by the Commission is warranted when an action or inaction by HRD is contrary to basic merit principles and/or arbitrary and capricious. There is a difference between ensuring uniformity to protect the integrity of the civil service examination process as opposed to a rigid, inflexible interpretation of granular requirements that may undermine confidence in the testing process. HRD's determination here is an example of the latter for the reasons discussed below.

First, HRD's argument that the documents attached to the Employment Verification Form could not be accepted because they were not "affirmed or attested to as true" is not supported by their own instructions in which no such affirmation or attestation is referenced as a requirement. It also seems to contradict HRD's initial position, as stated in an email to the Appellant, that the documents could not be accepted because they were "not on official letterhead and signed by a chief/appointing authority."

Second, HRD's argument that those same documents should not be accepted because they reference "Temporary Acting Officer" instead of "Temporary Acting Lieutenant" seems to be holding the Appellant responsible for how such service is recorded by the Lowell Fire Department's payroll system.

Third, it is now clear, based on the statements by the Fire Chief at the pre-hearing conference, that the Fire Chief's office provided the Appellant with the supporting documentation that was attached to the Employment Verification Form, a form that was signed by the Fire Chief.[1]

Fourth, in a fairly rare occurrence, the City's Fire Chief participated in the pre-hearing conference and took full responsibility for the administrative error which resulted in the Appellant's hours as temporary lieutenant not being listed on the actual Employment Verification Form that was submitted to HRD in a timely manner.[2] Once informed of the error, he provided an updated form with the same supporting documentation to HRD.

In this context, failing to credit the Appellant for the 1740 hours that he worked as a Temporary Fire Lieutenant appears to be inconsistent with basic merit principles which includes, in part: " … recruiting, selecting and advancing of employees on the basis of their relative *ability, knowledge and skills* …" as opposed to penalizing the Appellant for failing to notice an administrative error of the City's Fire Chief.

1. The attached supporting documents also had the seal of the City of Lowell in the upper left corner.

2. The Fire Chief stated that he does not want the Appellant penalized for his administrative error and supports the Appellant's appeal.

As the Commission has recommended in the past, I encourage HRD to incorporate some type of "good cause" provisions into their rules to address these infrequent circumstances and ensure an outcome that is consistent with basic merit principles. During my tenure in state government, I have seen various state agencies and tribunals incorporate such provisions into their governing procedures. For example, the Probate and Family Court allows judges to deviate from state-issued child support guidelines in limited circumstances as long as the presiding judge records his/her reasons for doing so. The state's Division of Unemployment Assistance can effectively waive certain repayment of non-fraudulent overpayments when such repayment would be against equity and good conscience. The Commission's own rules include good cause provisions which allows for an Appellant to explain, for example, why an appeal should not be dismissed for failure to appear for a scheduled pre-hearing or hearing despite receiving notice.

CONCLUSION

For all of the above reasons, HRD's Motion to Dismiss is denied; and the Appellant's reply, which I have deemed a Motion for Summary Decision, is allowed. HRD shall credit the Appellant for his hours served as Temporary Fire Lieutenant; adjust his score accordingly and notify the Appellant and the Lowell Fire Department of this adjusted score, broken down to the one-hundredth decimal point.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Michael Callahan
[Address redacted]

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Human Resources Division
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Phillip A.J. Charron
Lowell Fire Chief
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* * * * * *

PIERRE GRENIER

v.

SPRINGFIELD FIRE DEPARTMENT

G2-20-020

June 3, 2021
Paul M. Stein, Commissioner

***Bypass Appeal-Appointment as Springfield District Fire Chief-Interview-Limited Continuing Education-Poor Critical Thinking Leading to Dangerous Mistakes In Interview Scenario*—**The Springfield Fire Department did not act unreasonably in bypassing a captain for promotion to District Fire Chief based on his imprecise answer to a firefighting scenario question and his lack of suggestions for improving the Department. Although immaterial to the outcome affirming the bypass, Commissioner Paul M. Stein did find that the City had not properly justified the bypass based on the Appellant's inferior record of continuing education since the relative differences among candidates in this area were poorly documented.

DECISION

The Appellant, Pierre Grenier, currently a Fire Captain in the Springfield Fire Department (SFD), appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2 (b), from his bypass by the SFD for appointment to the position of District Fire Chief.[1] The Commission held a pre-hearing conference on April 22, 2020 via remote videoconference (Webex). A full hearing was held, also by remote videoconference (Webex), on September 29, 2020, which was digitally recorded.[2] Sixteen (16) Exhibits (*Exhs.1 through 11; App. Exhs.1 through 5)* were received in evidence. Each party filed a Proposed Decision on December 4, 2020. For the reasons stated below, Capt. Grenier's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Catlyn Julius, City of Springfield Personnel Director
- Bernard Calvi, SFD Fire Commissioner

Called by the Appellant:

- Pierre Grenier, SFD Fire Captain, Appellant

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. A recording of the full hearing was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

PROCEDURAL BACKGROUND

1. The Appellant, Pierre Grenier, is a tenured member of the SFD with over 23 years of service. He has held the rank of Fire Captain for ten years. He reports to a District Fire Chief and, as senior Captain in his group, has filled in (estimated at over 500 hours) as Acting District Chief in his supervisor's absence. Earlier in his career, he served as a District Chiefs' Aide. (*Exhs.1 & 8; App.Exh.2; Testimony of Appellant*)

2. Capt. Grenier is a U.S. Marine Corps veteran who served as a squad commander and was deployed overseas for Operation Desert Storm and Operation Desert Shield. He is a licensed journeyman electrician. He is 12 credits short of an Associate's Degree in Fire Science. He has a clean disciplinary record. (*Testimony of Appellant*)

3. The SFD is staffed by approximately 250 fire service personnel. The department head and appointing authority is Bernard Calvi, Fire Commissioner, whose senior command staff includes two Deputies reporting directly to him (Staff and Operations), 11 District Chiefs and 15 Captains, along with Lieutenants and Firefighters who operate the Department's firefighting apparatus. (*Testimony of Calvi*)

4. On May 19, 2018, Capt. Grenier took the written examination for District Fire Chief administered by the Massachusetts Human Resources Division. (*Exhs. 1 & 2*)

5. On or about August 15, 2018, HRD established the eligible list for District Fire Chief. (*Exh. 2*)

6. Pursuant to requisitions received from the SFD in December 2019, and supplemented in January 2020, HRD issued Certification #05199 that authorized the SFD to fill five vacancies in the position of District Fire Chief.[3] Capt. Grenier was one of six SFD Captains whose names remained on the eligible list. His name appeared below two candidates (Candidates A & B) and above three candidates (Candidates C, D & E) (*Exh. 3 through 5; Testimony of Calvi & Julius*)

7. Candidates were interviewed by a seven-member panel that included Fire Commissioner Calvi, SFD Deputy Chief Hess, two outside Fire Chiefs from nearby municipalities, the Springfield Director of Finance and Administration, the Springfield Chief Diversity and Inclusion Officer and the Springfield Assistant HR Director. (*Exhs. 6 through 8; Testimony of Calvi & Julius*)

8. Candidates were interviewed in the order of their place on the certification, but the candidate's scores on the written examination were unknown to Fire Commissioner Calvi or the other interview panelists at the time of the interviews. Fire Commissioner Calvi viewed the examination scores as testing what you "learn from a book" and simply gets a candidate "in the room". He gave no other weight to the candidate's relative ranking on the certification in making his ultimate decisions. (*Exh.5; Testimony of Calvi*)[4]

9. The interviews were conducted in a semi-structured format, with all candidates asked the same set of questions by Fire Commissioner Calvi. Each panel member kept notes of each candidate's answers to each question on a pre-printed form and independently assigned a score to each answer (1 low to 5 high). The interview panelists were not provided with any candidate's attendance, disciplinary or other personnel records. The interviews were not recorded. (*Exhs.5through 7; Testimony of Calvi & Julius*)

10. Ultimately, Fire Commissioner Calvi appointed five candidates from Certification #05199 (Candidates A, B, C & D were appointed to "line" (operations) District Chief positions. Candidate E was appointed to a staff District Chief Position. Capt. Grenier, the only remaining candidate on the list, was bypassed. (*Exhs.6 through 8 & 11; Testimony of Calvi*)

11. By letter dated January 29, 2020, Fire Commissioner Calvi informed Capt. Grenier of his non-selection for appointment to District Fire Chief. The bypass letter stated three reasons:

> (1) Capt. Grenier's "very limited" continuing education and experience, that focused on his "side job as an electrician" compared to the selected candidates who had college degrees or "almost" had a degree.
>
> (2) Poor critical thinking demonstrated by creating a "bad and dangerous situation" at an actual fire scene that "put lives at risk" and, then repeating this "dangerous mistake" before the interview panel in responding to a hypothetical fire scenario question; and
>
> (3) He was the only candidate who told the interview panel that the SFD should maintain its current path and "nothing can be done better in the department", which demonstrated "a lack of understanding of the department as a whole" and "how this particular industry evolves", which was particularly disappointing to the panelists in view of Capt. Grenier's substantial experience serving as an Acting District Chief.

(*Exh.8*)

12. In February 2020, this appeal was timely filed with the Commission. (*Claim of Appeal: Exh.8*)

13. Captain Grenier did not take the next examination for District Fire Chief administered by HRD in August 2020. (*Testimony of Appellant & Calvi*)

The Candidates' Education and Experience

14. Commissioner Calvi distinguished Capt. Grenier from the other candidates based on his conclusion that Capt. Grenier's re-

3. The SFD's initial requisition was for a lesser number but, as the hiring process got underway, additional vacancies arose and, ultimately, the SFD made five appointments. (*Exhs.3 through 5 &11: Testimony of Calvi & Julius*)

4. According to Capt. Grenier's undisputed testimony, he received a score of 80, which included two points added to his examination score for veteran's status (as the only veteran on the list). The candidates below him had scores of 78 (Candidate C) and 72 (Candidate D & E). (Exhs.5 & 11; *Testimony of Appellant*)

cord of continuing education was limited to courses in furtherance of his outside expertise as a journeyman electrician. (*Exh. 8; Testimony of Calvi*)

15. Capt. Grenier had begun describing the relevance of expertise as an electrician to his work in the fire service at the interview, when Commissioner Calvi cut him short, stating something to the effect: "so no degree", and moved on to the next question. (Exh.6; *Testimony of Appellant*)

16. Capt. Grenier is enrolled in a Fire Science degree program and, at the time of this appeal, he was 12 credits short of an Associates Degree. (*Testimony of Appellant*)

17. Only one of the selected candidates held a college degree. One of the lowest ranking candidates was 8 credits short of an Associate's Degree in Fire Science, which Fire Commissioner Calvi called being "close to" obtaining his degree. (*Exhs.7A through 7E & 8*)

18. Fire Commissioner Calvi did not take job performance experience into account. He is prohibited by collective bargaining rules from conducting formal performance evaluations and he believed all candidates had good performance records and saw no significant factors that distinguished the performance of one candidate over another. (*Testimony of Calvi*)

19. In particular, Fire Commissioner Calvi did not consider relevant the record of a selected candidate who, ten years ago, had failed a drug test and was written up for insubordination at a fire scene in 2018 which allegedly put the safety of others in jeopardy. (*App.Exh.5; Testimony of Calvi*)

20. Similarly, Fire Commissioner Calvi did take note of Capt. Grenier's considerable experience as an Acting District Chief but discounted that "acting" experience as being a positive factor in comparing Capt. Grenier to the candidates. (*Exh.8; Testimony of Calvi*)

Ability to Exercise Critical Thinking

21. Fire Commissioner Calvi concluded that the candidates whom he selected to bypass Capt. Grenier "outperformed" him in responding to an interview question about how he would handle a fire scenario as Incident Commander, repeating a "dangerous mistake" that "put lives at risk" that Commissioner Calvi said Capt. Grenier had recently committed at an actual fire scene, known as the Crystal Street Fire. (*Exhs.6 & 8; Testimony of Calvi*)

22. The fire scenario presented at the interview showed a hypothetical fire scene depicting a well-involved (fire-consumed) two-story building with the potential that someone was trapped inside. (*Exhs.6 & 7; Testimony of Appellant & Calvi*)

23. Fire Commissioner Calvi found Captain Grenier's response deficient. Capt. Grenier said he would handle the interview fire scenario, by setting up "opposing attacks", essentially, using a "deck gun" to stream water to the outside of the building while sending firefighters inside the building with land lines to perform a life-safety search. He graded Capt. Grenier's response a "2", as did all of the other four fire service personnel on the interview panel. (*Exh.6; Testimony of Calvi*)

24. Fire Commissioner Calvi also scored the fire scenario responses of one of the lowest ranked selected candidates who bypassed Capt. Grenier a "2", as did two of the other fire service personnel on the interview panel, one of them giving the candidate a "1" and one giving him no score.[5] Several of the fire service panelists commented that this other lower ranked candidate had suggested "inappropriate practices" and would place a truck in a "dangerous place". (*Exh.7c*)[6]

25. Fire Commissioner Calvi's recollection of Capt. Grenier's performance at the Crystal Street Fire differs significantly from what Capt. Grenier recalls. What is not disputed is the fact that Capt. Grenier was not the first officer on scene, but assumed the role of Incident Commander after another officer, who was responsible for establishing the initial attack strategy, had ordered one company to spray a "master stream" from the outside and ordered additional personnel to prepare to enter the building to attack the fire from within. These "opposing strategies", according to Commissioner Calvi, if implemented, were inconsistent with best practices and could put the lives of the firefighters in the building in jeopardy. (*Testimony of Appellant & Calvi*)[7]

26. According to Capt. Grenier, when he arrived on scene, he could not find the officer who had arrived first. He understood that he needed to make contact with that officer in order to assume command. Before Capt. Grenier had located this officer, or officially assumed command, Fire Commissioner Calvi arrived on scene and they interacted briefly. (*Testimony of Appellant*)

27. Fire Commissioner Calvi noticed the master stream attack and personnel preparing to enter the burning building. He had assumed that Capt. Grenier had ordered the "opposing strategies."[8] When he perceived that Capt. Grenier was hesitating about what to do, he "counseled" Capt. Grenier that he needed to turn off the master stream before any personnel entered the building before then leaving him to his duties as Incident Commander. (*Testimony of Calvi*)

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5. Overall, two of the four other fire service personnel scored Capt. Grenier higher than this candidate and one scored them equally. (*Exhs. 6 & 7c*).

6. The interview notes of the two selected candidates (ranked above Capt. Grenier) also contain comments about "opposing" and "mixed" strategy, on the fire scenario question; one of them getting a "2" from one fire service panel member but getting "3s, "4s' and "5s" from the other fire service panelists on that question. (*Exhs.7b & 7d*)

7. Springfield submitted an Affidavit from then retired District Chief Guyer who had been at the scene of the Crystal Street Fire in the capacity of "Safety Officer". Chief Guyer did not testify at the Commission hearing, was not subject to cross-examination, and, thus, I give no weight to the uncorroborated hearsay statements in his affidavit. (*Exh.10*)

8. I do not credit Fire Commissioner's testimony that he heard Capt. Grenier give the order setting up "opposing strategies, but credit Capt. Grenier's testimony that he did not. It is not disputed hat the order was never implemented.

Vision for the Department

28. The candidates were asked: "There is always room for improvement in the department, as this industry is always changing. Talk to us about some ideas you have for areas that should be looked at in this department and what you would suggest be done to improve them." (*Exhs.6 & 7*)

29. The interview panelists' notes state that Capt. Grenier responded that he felt the department was going in a positive direction, both as to staffing and equipment, and he would want it to maintain its current path. He offered no specific ideas for any changes. (*Exh. 6; Testimony of Appellant & Calvi*)

30. Fire Commissioner Calvi scored Capt. Grenier's response a "1". He considered this response unimaginative and an attempt to curry favor by praising him for how he ran the department. (*Exh.6; Testimony of Calvi*).

31. Two of the other fire service personnel on the interview panelist scored Capt. Grenier's response a "3" and two scored him a "2", one noting his response was "no real answer." (*Exh.6)*

32. All of the other candidates cited specific areas for improvement. Nearly all mentioned the need for more training, especially for recently hired new firefighters. Several mentioned the importance of public outreach and "accountability" (being sure everyone is doing the job they are supposed to be doing). (*Exh.7*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass.1106 (1996).

Original and promotional appointments of civil service employees are made from a list of candidates, called a "certification", whose names are drawn in the order in which they appear on the applicable civil service "eligible list", using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons—positive or negative, or both—consistent with basic merit principles—for bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient" and upon "failure of proof by the [appointing authority}, the commission has the power to reverse the [bypass] decision.")

The governing statute, G.L.c.31,§ 2(b) gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) The commission ". . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are *"overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*, then the occasion is appropriate for intervention by the commission." *Id*. (*emphasis added*) *See also Town of Brookline* v. *Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

Education and Experience

As the Appellant correctly points out, the examination scores awarded to the Appellant and other candidates on the certification for Deputy Fire Chief include pre-determined points for the candidate's prior education and experience (E&E) as established by the Massachusetts Human Resources Division (HRD) pursuant to its broad statutory discretion to provide credit for such education and experience as HRD designates, weighted as twenty percent (20%) of the final examination score,. G.L. c. 31, §22, ¶1. *See, e.g*., *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010)[9]

This embedded accounting for E&E, however, does not preclude an appointing authority from considering candidates' relative education and experience when appropriate, so long as it does not

9. Pursuant to the requirement to give veterans preference in civil service appointments, in promotional appointments, two points are added to this weighted final examination score (i.e., written test score + education & experience points). *See* Personnel Administration Rules, PAR.14(2). Thus, as the only veteran among the candidates, Capt. Grenier's place on the certification for Springfield Deputy Fire Chief (with a score of 80) was determined by adding two points to his examination score of 78.

undermine the credits awarded as part of the examination process prescribed by HRD. For example, when two candidates have tie scores, an appointing authority would be justified to pick a candidate who held an advanced degree over one who did not, in effect, using the educational record as a "tie-breaker", although the scores had already accounted for those differences (i.e., the candidate without a degree actually would have scored higher on the written examination portion in such a hypothetical). Similarly, an appointing authority might justify selecting for promotion a candidate who had demonstrated proficiency by accumulating considerable "acting" time in the position for which he or she is aspiring over another candidate with a close, but lower overall score who had little such experience, even though HRD would have included credit for such acting experience in the E&E scoring component.[10]

Here, however, Springfield attempts to distinguish Capt. Grenier (without a college degree) from at least one candidate without a degree on the grounds that the other candidate, was "close" to earning his degree (8 credits short) but Capt. Grenier (12 credits short) apparently was not. Moreover, the relative examination scores of the other candidate (72 - with 70 being the passing grade) is not so close to Capt. Grenier's score of 80, (or 78 without his veteran's preference) that the distinction Springfield makes is justified as a "tie-breaker". As to the other distinctions Springfield would make about Capt. Grenier's lack of continuing education, neither the bypass letter, nor the preponderance of the evidence, established the precise differences in experience and education on which Springfield relied, basing this reason solely on undocumented assertions that are insufficient to meet the burden of proof imposed on Springfield to justify the reasons for a bypass decision.

In sum, Springfield did not meet its burden to establish that Capt. Grenier's bypass was reasonably justified by an inferior record of education or experience.

Interview Performance

The other two reasons that Fire Commissioner Calvi provided for his decision to bypass Capt. Grenier stem from what Fire Commissioner Calvi characterized as unsatisfactory responses to questions on two specific subjects during the interview: (1) the fire scenario; and (2) recommendations for improving the department. Although this is a closer call, I find that, taken together, Capt. Grenier's responses provide a sufficiently reasonable basis to bypass him in favor of the three lower ranked candidates. In making this determination, I take into account the fact that the position of Deputy Fire Chief is a senior position in the SFD command structure that warrants a corresponding level of deference when making such a decision.

Public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one. *See, e.g.*, *Dorney* v. *Wakefield Police Dep't*, 29 MCSR 405 (2016); *Cardona* v. *City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of civil service law. *See e.g.*, *Malloch* v. *Town of Hanover*, 472 Mass. 783, 796-800 (2015); *Flynn* v. *Civil Service Comm'n*, 15 Mass. App. Ct. 206, 208, *rev.den.*, 388 Mass. 1105 (1983); *Pilling* v. *City of Taunton*, 32 MCSR 69 (2109); *Conley* v. *New Bedford Police Dep't*, 29 MCSR 477 (2016); *Phillips* v. *City of Methuen*, 28 MCSR 345 (2015); *Morris* v. *Braintree Police Dep't*, 27 MCSR 656 (2014);

I credit Springfield for taking some thoughtful measures to provide an interview process that was designed to be reasonably fair and not overly subjective or arbitrary, including, in particular, the inclusion of four senior level public safety officials (two from inside the SFD and two from outside departments), the use of a semi-structured format in which candidates were asked a pre-determined set of questions, and use of a scoring system that provided for independent assessment of each candidate's answers. When, as here, the recollections of the witnesses differed as to the content of some of the interview colloquy, it would have been helpful for me to have had access to a recording of the interviews. This deficiency was ameliorated here, however, by the fact that most of the interview panelists took copious notes which, for the most part, are remarkably consistent, and that enabled me to adequately corroborate which disputed version of the interviews to credit.

First, as to the fire scenario, I credit the Appellant's testimony that, as to the Crystal Street Fire, Fire Commissioner Calvi erroneously assumed that Capt. Grenier had ordered what seemed to be "opposing attacks". The preponderance of the evidence established that, if any such order were entered, it was issued by his predecessor as Incident Commander. However, I also credit Commissioner Calvi that, when he arrived on scene, he perceived Capt. Grenier to be uncertain whether to countermand the order on his own, without conferring with his predecessor, prompting Fire Commissioner Calvi's comment to shut off the master stream.[11] This uncertainty also comes through in the consistent interview notes taken independently by the fire service personnel on the panel, not just Fire Commissioner Calvi, concerning the similar situation presented to Capt. Grenier in the interview fire scenario:

- One panelist: "Not Real specific on tactics. . . opposing strategy (off-Def.)".
- Another noted" "Ladder company search, ground gun . . . not sure".

10. In the present appeal, Springfield discounted Capt. Grenier's considerable "acting" time in the position of Deputy Fire Chief, essentially, holding him to a higher standard due to his experience in his interview performance, as further discussed later in this Decision.

11. Fire Commissioner Calvi characterized his interaction with Capt. Grenier at the Crystal Street Fire as "counselling". Capt. Grenier does not deny the interaction and testified "it depends what you mean by counselling", which corroborates my conclusion that, while Capt. Grenier did not originate the order to set up opposing attacks, he was hesitating whether to cancel or proceed until Fire Commissioner Calvi intervened and gave him the guidance he needed to act.

- Another noted: "Seemed not sure of assignment. Started to use master stream then have members enter building with hand lines. No direct decisions given to specific companies."

Second, the fire service personnel, not just Fire Commissioner Calvi, uniformly reported that, in his response to the question about improving the department, Capt. Grenier stated that he believed the department is going in the right direction and he would "maintain the current path." Capt. Grenier was the only candidate who received predominately below average scores on this question, because he offered no specific suggestions for improvement, despite the express wording of the question: "There is always room for improvement in the department, as this industry is always changing. Talk to us about some ideas . . . ." Fire Commissioner Calvi explained that this question was intended to provide a candidate the opportunity to demonstrate initiative and independent judgment expected of a District Fire Chief. All of the other candidates offered concrete and generally parallel suggestions, such as the need to beef up training and improve public outreach. I credit Fire Commissioner Calvi's explanation that Capt. Grenier's response was the poorest of all the candidates and, especially, given his seniority and experience acting as a District Fire Chief, his inability to come up with even one suggestion, raised a legitimate concern about his readiness to assume an elevated level of responsibility on a permanent basis.

Disparate Treatment

I considered the Appellant's contention that Fire Commissioner Calvi harbored an animus or bias against Capt. Grenier. Whatever negative opinions Fire Commissioner Calvi had formed, some of them accurate and some not, they are all based on his percipient knowledge and perception derived from Capt. Grenier's on-the-job performance and did not come from an unlawful bias or undue political or personal favoritism toward any of the other candidates.

I also have considered the Appellant's argument that Fire Commissioner Calvi did not weigh the candidates' prior disciplinary history in making his selections, nor did he provide the interview panel with any personnel records for any of the candidates. The Appellant points out that at least one candidate had a prior disciplinary history while the Appellant did not. Springfield notes that, pursuant to collective bargaining rules, discipline of SFD firefighters has a short shelf life and is removed after one year from the personnel file. The Commission also has expressed concern that remedial discipline should not be a "forever" bar to original or promotional appointments. The Commission should not intervene when, as here, an appointing authority reasonably determines (especially in accordance with its collective bargaining rules) that prior discipline is too stale to be used as a basis for disqualification.

Finally, I have also considered that Capt. Grenier was not the only candidate who furnished a problematic answer to the fire scenario question. If his response were the only deficiency in his interview performance, it would have presented a stronger argument for disparate treatment. Here, however, Capt. Grenier's poor interview performance went beyond one question and, in particular, his undistinguished response to the question on improving the department separates him from the other candidates and, taken together, justifies Springfield's decision to bypass him for a senior command position in favor of others whose documented performance, overall, was better.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Pierre Grenier, CSC Docket No. G2-20-020, is ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

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* * * * * *

LISA LIMA-SOARES

v.

CITY OF SOMERVILLE

G1-19-150

June 3, 2021
Cynthia Ittleman, Chairman

Bypass Appeal-Original Appointment as Reserve Somerville Police Officer-Employment History-Credit History-Bankruptcy-Failure to File Tax Returns—The City of Somerville was justified in bypassing this candidate for original appointment as a reserve police officer in view of her 2017 bankruptcy, insubordination and failure to follow directives as a crossing guard, and her poor relationship with community members.

DECISION

On July 19, 2019, the Appellant, Lisa Lima-Soares (Ms. Lima-Soares or Appellant), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to bypass her for original appointment to the position of permanent, full-time reserve police officer. A pre-hearing conference was held on September 10, 2019 followed by two (2) days of

full hearing on November 12, 2019 and January 6, 2020, at the offices of the Commission.[1] The full hearing was digitally recorded and both parties received recordings of the two days of hearing.[2] Both parties submitted post-hearing proposed decisions. For reasons explained below, I conclude that the City's bypass decision should be upheld.

FINDINGS OF FACT

Joint Exhibits 1 - 8 were entered into evidence in this matter by both parties, Respondent Exhibits 1-6 were entered into evidence by the City, and Ms. Lima-Soares entered Appellant's Exhibits 1-18. Pursuant to an order by the Commission, the Respondent produced additional Post-Hearing Exhibits 1-3. Based on those exhibits, the stipulated facts, the testimony of:

Called by the City of Somerville:

- Sergeant Sean Sylvester, Somerville Police Department
- Candace Cooper, Personnel Director for the City of Somerville
- Deputy Chief Stephen Carrabino, Somerville Police Department

Called by the Appellant:

- Lisa Lima Soares, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences drawn therefrom, a preponderance of evidence establishes the following findings of fact:

1. At the time of the hearing, the Appellant was forty-five years old. She is a resident of Somerville and has obtained a bachelor's degree. (Testimony of Appellant)

2. On or about March 25, 2017, the Appellant took the civil service exam for the position of reserve police officer and received a score of 79. The eligible list was established September 1, 2017. (Stipulated Facts).

3. On January 10, 2019 the state's Human Resource Division (HRD) sent the City of Somerville Certification # 06035 for the appointment of ten (10) candidates to the position of Reserve Police Officer. The Appellant ranked 25th on the certification of those willing to accept employment. (Stipulated Facts; Testimony of Cooper).

4. Eight (8) candidates were appointed to the position of reserve police officer with the City, three of whom were ranked below the Appellant. (Stipulated Facts; Testimony of Cooper).

5. All candidates on Certification # 06035 who underwent the City's hiring process were required to submit documentation to the City including an application, resume, credit scores, tax returns, to undergo a residency verification investigation, and to undergo a background investigation conducted by a detective of the SPD. (Testimony of Cooper; Testimony of Carrabino).

6. Following the background investigation, all candidates, including Ms. Lima-Soares, were interviewed by the same interview panel consisting of the following individuals: Director of Human Resources Candace Cooper (Cooper), Deputy Chief Stephen Carrabino (Carrabino) of the SPD; and the Deputy Director of Health and Human Services for the City of Somerville, Nancy Bacci. (Testimony of Cooper; Testimony of Carrabino).

7. Deputy Chief Carrabino has been employed by the Somerville Police Department for twenty-fie (25) years. He is currently the Deputy in Charge of Operations. He has a BS in Nursing Science from Boston University, a JD from Suffolk University Law School, and a MA in Public Administration from Harvard Kennedy School of Government. He is a trained background investigator and currently oversees the background investigations for recruit hiring at the SPD. He has taken part in five (5) to ten (10) interview panels prior to this hiring round. (Testimony of Carrabino).

8. Candance Cooper has been the Director of Human Resources for the City of Somerville since 2016 and has been employed by the City since 2008, starting in payroll, then advancing to personnel, to Assistant Director, and to Deputy Director before her current role as Director. She participates in all police officer hiring, manages the process, collects information from the candidates, participates in the interview panel, and makes a recommendation to the Mayor. (Testimony of Cooper).

9. During the interviews, the panelists took turns asking questions. The general format for each interview was the same. The panel would go through each line of the multi-page application the candidate completed. Following that review, the panel walked each candidate through the findings of the background investigator's report. Finally, the candidate was then asked standard interview questions, which included numerous hypothetical scenarios. Once this process was complete, every candidate was given the opportunity to ask any questions he or she had before the interview was complete. (Testimony of Carrabino; Testimony of Cooper; Joint Ex. 1, 8).

10. Every candidate's interview was audio recorded by the City, with the consent and knowledge of the candidate, and has been submitted as evidence at the hearing of this matter. Ms. Lima-Soares interview lasted approximately two and half hours. (Jt. Ex. 1, 8).

11. Following the final candidate interview, the panel met to discuss and review every candidate. The interview questions were

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

not individually scored. The panel made a unanimous decision as to which candidate would be bypassed and which candidate would be given a conditional offer of employment. Following this decision, Ms. Cooper made a recommendation to the Mayor, who is given general, periodic updates on the hiring process. (Testimony of Carrabino; Testimony of Cooper).

12. On or about May 17, 2019, Ms. Lima-Soares was notified by the City that she would not be given a conditional offer of employment with the Somerville Police Department at that time, the reasons detailed therein. (Joint Ex. 7; Testimony of Cooper).

Concerns with Appellant's Prior History as Somerville Crossing Guard

13. Ms. Lima-Soares was employed by the City as a crossing guard from March 2016 to January 2018. Her supervisor was Officer Sean Sylvester during that time. He has since been promoted to the rank of sergeant. (Joint Ex. 2; Testimony of Sylvester; Testimony of Lima-Soares).

14. Early on in her time as a crossing guard, Ms. Lima-Soares spoke to Officer Sylvester at least three (3) different times (in a relatively short amount of time) about what she perceived to be illegal drug activity near her crossing guard post. Officer Sylvester informed Ms. Lima-Soares that he knew there to be a suboxone clinic in the area and took her concern seriously. (Testimony of Sylvester).

15. Within a few days of that first conversation, Ms. Lima-Soares came to Officer Sylvester again to report what she believed to be an illegal drug deal. She met with him at his desk at the precinct. At that time, Officer Sylvester informed Ms. Lima-Soares that he would pass her concern along to the Narcotics Unit. (Testimony of Sylvester; Testimony of Appellant).

16. Ms. Lima-Soares approached Officer Sylvester a third time to report perceived drug activity. At this time, Officer Sylvester told Ms. Lima-Soares that she needed to be more concerned with crossing children safely than repeatedly reporting the same information to him. He repeated to Ms. Lima-Soares that he had passed the information along to the Narcotics Unit. He also advised her that the Narcotics Unit often times works undercover and she would not be privy to what those undercover officers may or may not be doing in response to her report, neither would Officer Sylvester, for that matter. (Testimony of Sylvester).

17. Instead of accepting his response, Ms. Lima-Soares insisted on knowing who exactly he had passed the information along to. At that point, Officer Sylvester gave her the contact information of a detective in the Narcotics Unit. (Testimony of Sylvester).

18. Officer Sylvester initially thought her reporting showed initiative since part of the training of a crossing guard is to report suspicious activity; however, he became frustrated that she would not follow his directives, nor would she accept his answers on the subject as satisfactory or to her liking. (Testimony of Sylvester).

19. Ms. Lima-Soares was repeatedly counselled by Officer Sylvester on this same issue—advising her to focus on her primary responsibility—crossing children safely. Officer Sylvester did not write Ms. Lima-Soares up because he did not see this as rising to the level of discipline and because she was a relatively new employee at the time. He felt she was overreaching her authority as a crossing guard, questioning her supervisor multiple times. (Testimony of Sylvester).

20. Deputy Chief Carrabino spoke to the Narcotics Unit detective about this matter. The detective told him that Ms. Lima-Soares called him repeatedly about suspicious activity she witnessed as a crossing guard, even after he acknowledged her report. The detective described this to Deputy Carrabino as "almost badgering." (Testimony of Carrabino).

21. In her application, Ms. Lima-Soares checked "No" in response to the question, "Have you ever been counseled either verbally or in writing for poor job performance, inappropriate behavior, attendance or any other work-related issue?" (Joint Ex. 2).

22. During her interview for this position, Ms. Lima-Soares was asked whether a supervisor had ever spoken to her about concerns regarding her job performance. Ms. Lima-Soares stated that she "was never directly spoken to as though there was a problem." (Joint Ex. 1).

23. In the interview, Ms. Lima-Soares acknowledged that she felt she saw suspicious activity going on as a crossing guard, that she spoke to her supervisor, and that he referred her to the person who deals with that in the department. She admitted in the interview that she contacted the Detective in the Narcotics Unit several times and left messages, but he never called her back. She reiterated again, "I was never spoken to about my work." (Joint Ex. 1).

24. The interview panel felt that Ms. Lima-Soares' response to this line of questioning in the interview was not sufficient. The panel did not credit her when she said that she was never spoken to about her repeated conduct. The panel felt that she acknowledged the matter at hand—that she felt there were drug deals going on and that she reported it—but she would not acknowledge that her supervisor had counselled her to focus more on crossing children or that he told her he had passed along the information to the Narcotics Unit. (Testimony of Cooper).

25. The panel was concerned with Ms. Lima-Soares' ability to take orders. (Testimony of Carrabino).

Concerns about Appellant's Financial History; Bankruptcy Filing and Failure to File Taxes

26. Every candidate who applied for the position of reserve police officer with the SPD was required to provide credit reports as part of their application. Ms. Lima-Soares provided the City with three (3) credit reports. (Joint Ex. 2, 3; Respondent Post-Hearing Ex. 2, 3; Testimony of Cooper; Testimony of Carrabino).

27. Two bankruptcies appeared in Ms. Lima-Soares Experian Credit Report, one from 2010 and the other 2017. At the hearing of this appeal based on evidence presented by the Appellant, the City stipulated that the 2010 bankruptcy was not Ms. Lima-Soares'. This 2010 bankruptcy was the result of identity theft. (Stipulated Fact).

28. The 2017 bankruptcy that appears on her credit report is legitimate and factual. Ms. Lima-Soares filed for bankruptcy in 2017. (Testimony of Appellant; Joint Ex. 2, 3; Respondent Post-Hearing Ex. 2).

29. The interview panel discussed Ms. Lima-Soares 2017 bankruptcy with her during the interview at length. Ms. Lima-Soares confirmed that she had filed for bankruptcy in 2017. During the interview, she indicated that she had not been able to repay her student loans, which total $28,000; she had been paying, then they were put in forbearance. She filed for bankruptcy due to marital debt. The last time she paid on the student loans was nine years ago, around the time of her divorce. At the time of her divorce, her shared total debt was $75,000, which included the student loans. (Joint Ex. 1).

30. The interview panel felt that the filing of bankruptcy shed light on how responsible Ms. Lima-Soares is. (Testimony of Carrabino).

31. In Ms. Lima-Soares' application, she was asked, "Have your Federal Income Tax Returns been filed on time, each year, for the past 7 years?" Ms. Lima-Soares checked "Yes" to that question. She then attached a written attachment stating that she had *not* in fact filed income taxes for the years 2011-2015. She indicated that she owned a fitness business during that same time period; however, for various reasons, she did not file taxes from 2011-2015. (Joint Ex. 2).

32. Ms. Lima-Soares told the interview panel that, during the years she ran her fitness business (2013-2015), she did not file taxes because she did not make more than $400 per year, which was her understanding of the income limit at which one needs to file an income tax return. (Testimony of Appellant; Joint Ex. 1).

33. The interview panel was concerned with her statements on this topic and did not find her to be credible. Deputy Carrabino noted that Ms. Lima-Soares did not file a Schedule C (for independent contractors/business owners) so there was no way to determine what the "ins and outs" were, i.e., the money coming in and the money going out. She had her own location and clients, but she did not have net income. Although these were her statements to the panel, she did not have anything to back them up, explained Deputy Carrabino. (Testimony of Carrabino).

34. The panel believed Ms. Lima-Soares should have documentation to show that she earned less than $400 a year. (Testimony of Cooper).

35. In addition, Ms. Cooper and Deputy Carrabino believed Ms. Lima-Soares received credit towards her daughter's tuition in exchange for fitness classes, which both believed would need to be accounted for in calculating income taxes. Deputy Carrabino spoke with the principal of the school[3] who stated that Ms. Lima-Soares received a tuition credit for teaching fitness classes. (Testimony of Carrabino).

36. Ms. Lima-Soares denied that she received any tuition benefit for volunteering at the school. She acknowledged that those parents who opted out of the community service hours paid a fee to the school. (Testimony of Appellant).

37. Ms. Lima-Soares was unaware that she may have been eligible for an Earned Income Credit had she filed income taxes for the years 2013-2015. (Joint Ex. 1; Testimony of Appellant).

38. Deputy Carrabino thought that Ms. Lima-Soares "was trying to be artful not owning up to things, but she is intelligent and well-spoken and she can write, but I felt she was trying to work the corners instead of owning the situation." (Testimony of Carrabino).

Negative Community Feedback Regarding Appellant's Candidacy

39. As part of her background investigation, Ms. Lima-Soares' residency from March 25, 2016 to March 25, 2017 was checked by a third party, NWI Investigative Group (NWI), hired by the City of Somerville. (Respondent Ex.1).

40. The NWI investigator met with Ms. Lima-Soares on February 11, 2019 as part of the residency verification investigation for the City. The investigator informed Ms. Lima-Soares that that he would need to speak to her neighbors to confirm her residency. She responded with the question of whether the investigator would need to divulge to the neighbors her name or what the inquiry was about. The investigator explained that he would need to provide her neighbors with only her name and the information that she was applying for a police officer position with the Somerville Police Department. The investigator then asked Ms. Lima-Soares if there was a reason or any type of issue that would explain why she did not want the investigator to speak with her neighbors to confirm the information. She told the investigator that there wasn't any type of issue, but that she is a private person and does not like everyone knowing her personal business. (Respondent Ex. 1).

41. As part of NWI's investigation, their investigator spoke to neighbors of Ms. Lima-Soares. One such neighbor was Mr. P[4] and his girlfriend. During their conversation on February 11, 2019, they verified that Ms. Lima-Soares was indeed a resident at the address she provided at the relevant times. (Respondent Ex. 1).

42. When the NWI investigator explained to Mr. P the purpose of their inquiry, Mr. P immediately became somewhat irate when Ms. Lima-Soares' name was mentioned and the fact that she was applying for a position as a police officer for the City. Both Mr. P and his girlfriend went on to complain about Ms. Lima-Soares' character for approximately twenty (20) minutes. Mr. P did most of the talking for the couple, stating that he disliked the candidate very much. They both stated that Ms. Lima-Soares does not get along with many of her neighbors because she is always causing problems and acts as if she has authority over all the neighbors on the street. Mr. P further stated that he has heard the candidate tell

3. The principal of St. Catherine's school is a cousin of Deputy Carrabino. (Testimony of Carrabino).

4. Although the City has made the Appellant aware of the neighbor's full name, for purposes of the recorded hearing and this Decision, the neighbor's identity has been kept confidential.

people several times that she is a police officer. They stated that she has followed the girlfriend along the street with a camera filming her. (Respondent Ex. 1).

43. The interview panel asked Ms. Lima-Soares whether or not she had any prior issues with her neighbor. In her interview, Ms. Lima-Soares denied any contentious relationship with Mr. P and said she never interacts with him one-on-one. (Joint Ex. 1).

44. In her interview, Ms. Lima-Soares stated that she took pictures of some flooding in the street for insurance purposes. (Joint Ex. 1).

45. At the hearing, Ms. Lima-Soares stated that she may have captured Mr. P or his girlfriend while taking pictures for flood insurance purposes but was unsure how many pictures they may have appeared in. (Testimony of Appellant).

46. In both her interview and her testimony at the appeal of this matter, Ms. Lima-Soares stated that the only interaction she ever had with Mr. P was when Mr. P became very angry that her father had parked his vehicle in front of his yard while trying to offload groceries. Ms. Lima-Soares indicated that her involvement in that situation was simply to de-escalate it, nothing more. (Joint Ex. 1; Testimony of Appellant).

47. The Appellant told Ms. Cooper in the interview that Mr. P had mental health issues and a criminal history and that the Cambridge Police were familiar with him. Deputy Carrabino looked further into that allegation after the interview and nothing was found to substantiate Ms. Lima-Soares' allegation. (Testimony of Cooper; Testimony of Carrabino).

48. After Ms. Lima-Soares' interview, the panel received a written statement from a current Somerville Police, Officer 1.[5] (Respondent Ex. 5).

49. Since it was received after the interview, the panel did not have the opportunity to ask Ms. Lima-Soares about Officer 1's statement. (Testimony of Cooper)

50. Officer 1 allowed his statement to be used by the City at the Civil Service appeal hearing despite his wife's fear of retaliation from Ms. Lima-Soares because Officer 1 believed it was the right thing to do ultimately. Ms. Lima-Soares and Officer 1 both have children at the same school. (Testimony of Carrabino).

51. Deputy Carrabino testified that he felt the statement written by Officer 1 was significant because Officer 1 was so concerned about Ms. Lima-Soares' candidacy that he wrote it despite the fear of retaliation. (Testimony of Carrabino).

Somerville Auxiliary Police

52. In the "Civil Service Employment" section of her Application, Ms. Lima-Soares did not indicate that she either applied or began an application process with the Somerville Auxiliary Police Department in response to any questions. She did, however, indicate that she applied and then withdrew her application from the City of Cambridge in 2018. (Joint Ex. 2).

53. In her interview and in her testimony at the appeal hearing, Ms. Lima-Soares testified that she did not apply to the Somerville Auxiliary Police Department in 2016. She stated that she inquired and picked up an application, but because her questions and phone calls went unanswered, she did not continue with the process. (Jt. Ex. 1; Testimony of Appellant).

54. In 2016, Ms. Lima-Soares attended an orientation for the Somerville Auxiliary Police, she signed a release for the SPD to do a background check, and, thereafter, her CORI and driver history were retrieved by the SPD due to her interest in applying to the Department. (Respondent Ex. 4).

55. The Somerville Auxiliary Police Department has since disbanded in 2018 and the interview panel was unable to locate any application for Ms. Lima-Soares for the Auxiliary Department. (Testimony of Carrabino).

56. Although there is no application, documents produced by the City show that Ms. Lima-Soares was rejected by the Auxiliary Police for an incomplete application and poor driving record. (Testimony of Carrabino; Respondent Ex. 4).

Information Regarding Other Candidates

57. All candidates underwent an interview with the interview panel. Every candidate was asked questions relative to each page of their Application and went through the entirety of their background investigation. Lastly, each candidate was given the same set of standard questions as every other candidate. The audio recording of each candidate's interview was admitted into evidence at the hearing of this matter. All three interview panelists took lengthy notes on each candidate and all of their notes were admitted into evidence at the hearing of this matter. Additionally, all of the candidates' applications, references, credit histories, and background investigator summaries were entered into evidence. (Joint Ex. 8; Appellant's Ex. 7-14; Respondent Post-Hearing Ex. 2 and 3).

58. Ms. Cooper and Deputy Chief Carrabino were not concerned with other candidates admitting to using marijuana in their past on their written application because it is legal in Massachusetts, although it is still illegal at the federal level. They explained that the question is in the application to gauge honesty of the applicant and to discern if there are any deeper issues. (Testimony of Cooper; Testimony of Carrabino; Appellant's Ex. 7-14).

59. Every prospective candidate's Application includes a standard question that asks whether any of the candidate's relatives work for the City. As Ms. Cooper testified, the City always wants to know where there is a conflict of interest and strives to avoid them. Candidate A's father is a firefighter in the City of Somerville.

5. Although the City has made the Appellant aware of the Officer's full name, for purposes of the recorded hearing and this Decision, the officer's identity has been kept confidential.

Candidate B has a relative who works for the City, as well. Ms. Cooper testified that she does not know Candidate A's father's rank in the fire department, nor does she see him frequently at work in her capacity as Human Resource Director. (Testimony of Carrabino; Testimony of Cooper; Appellant's Exhibits 7-14).

60. In his application for reserve police officer, Candidate A did not accurately indicate that he had left two recent employers without giving proper notice. This question is asked in the application to determine whether a candidate can properly follow protocol. Candidate A explained to the background investigator that he left the bank because he wanted to focus on the hiring process for a law enforcement position. In his interview, Candidate A stated that he believed he had given Partners two weeks' notice before leaving. He worked there for less than a month, from November 12, 2018 to December 3, 2018. Following the interview, Candidate A contacted Ms. Cooper via email and told her that he searched his emails and could not find any notice, which led him to conclude that he must not have given the proper notice. He apologized and explained that it must be his error and that he did not give the proper notice to that employer. (Appellant's Ex. 7, 7A, 7B,15; Joint Ex. 8; Testimony of Carrabino; Testimony of Cooper).

61. In determining Candidate A's suitability, the panel considered the fact that Candidate A did not properly disclose this information in the employment section of the application. Deputy Carrabino's scribbled the word "lie" on the background investigator's notes relative to Candidate A's explanation about giving notice for these two jobs. Deputy Carrabino explained that it is important for a police officer to always tell the truth no matter what. He explained that the fact pattern in this instance "was not a huge deal" as it related ultimately to Candidate A's candidacy, additionally because he apologized and took full responsibility for it. (Testimony of Carrabino; Testimony of Cooper).

62. Candidate A was asked in his interview about answering "No" to the question regarding whether he had ever been counseled at work about tardiness, or otherwise. One of his employers had indicated that he had been verbally reprimanded for being tardy. Candidate A apologized, took responsibility for his actions and explained the situation. (Joint Ex. 8; Appellant Ex. 7; Testimony of Carrabino; Testimony of Cooper).

63. Candidate A worked for the City in the summer jobs program as a high school student. His supervisor for the summer job was not contacted to discuss Candidate A because, as Ms. Cooper explained in her testimony, the City does would not typically contact a supervisor for a paid summer job during high school. Candidate A was not a current employee of the City at the time of his candidacy, either. (Testimony of Cooper; Appellant Ex. 5).

64. Ms. Lima-Soares was not bypassed by Candidate A, as he appeared higher on the certification. She was only bypassed by three candidates, Candidate E, Candidate F, and Candidate G. (Stipulated Fact).

LEGAL STANDARD

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient" and upon "failure of proof by the [appointing authority], the commission has the power to reverse the [bypass] decision.") The governing statute, G.L. c. 31, § 2(b) gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997) The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policyconsiderations by an appointing authority"; however, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.". *Id*. *See also Town of Brookline* v. *Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law). That said, "[i]t is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

The Civil Service Commission's core mission is to ensure that Appointing Authorities, as part of a fair and impartial hiring process, offer valid reasons for bypassing a candidate in favor of lower-ranked candidates. As part of that review, the Commission must consider whether there is any evidence of personal or political bias by the Appointing Authority. Here, I have found none. Both Candace Cooper, the Director of Human Resources for the City, and Deputy Chief Stephen Carrabino were good witnesses. They had a command of the facts and clearly recalled this hiring process and how it unfolded. They were consistent with one another and the concerns they articulated. I do not find that either of them had any personal animus against the Appellant.

The panel provided Ms. Lima-Soares over two and half hours of their time to go through her application, her background investigation, and the standard questions. I do not find that they asked leading or "gotcha questions," as the Appellant alleged in her brief. The interview panelists were not predisposed to bypassing Ms. Lima-Soares nor did they develop any animus or bias against Ms. Lima-Soares that factored into their decision to bypass her for appointment. There is no evidence to show that any candidate was chosen due to familial history, due to their age or gender, as alleged by the Appellant. Rather, the panelists testified credibly that they had serious concerns regarding many aspects of Ms. Lima-Soares' background, including her prior job as a crossing guard with the City, her tax and financial history, unsolicited comments from concerned citizens relative to her candidacy, and her candor relative to whether or not she applied to the Somerville Auxiliary Police Department.

For two years, Ms. Lima-Soares was supervised by Officer Sean Sylvester as a crossing guard for the City of Somerville. Officer Sylvester testified that he had concerns with Ms. Lima-Soares' ability to respect the chain or command and to following directives. I credit his testimony. Ms. Lima-Soares' core responsibility as a crossing guard was to facilitate the crossing of children safely from one side of the street to another. Officer Sylvester believed Ms. Lima-Soares became repeatedly distracted from that main responsibility and began focusing on whether there was suspicious drug activity in the area.

The interview panel was concerned that Ms. Lima-Soares was overreaching her authority as a crossing guard and not playing her proper role. The panel discussed this situation with Ms. Lima-Soares in her interview. They noted that she did not indicate in her application that she had received counselling from a prior employer. In her interview, she repeatedly stated that she never received any counselling from Officer Sylvester. She acknowledged the basic underlying facts—that she had seen what appeared to be drug activity, that she had reported it several times to Officer Sylvester, that he told her to contact the drug unit, and that she had indeed contacted that unit multiple times—but she never admitted that Officer Sylvester had counselled her that she did not need to continue to report this activity, that the matter was being dealt with, and that she must focus more on her responsibility of crossing children. The panel found her responses in the interview on this topic to be disingenuous and inconsistent. At no time did she take any responsibility for her own actions nor did she appear to reflect on her behavior or decisions. The panel was reasonable in its concern that she had conflicts with her supervisor during her tenure as a crossing guard and failed to obey her superior's directives and follow the chain of command.

The Appellant points to Candidate A and his failure to disclose in his Application that he left two prior jobs without giving the proper two weeks' notice and his failure to note that he received a verbal reprimand for being tardy to his job at a sporting good store. Both Ms. Lima-Soares and Candidate A did not disclose these particular details of their employment history and the interview panel considered the facts of each candidate's employment history, taken in conjunction with the entirety of their Application, background investigation, and interview. In their discretion, the interview panel did not view Candidate A's circumstances to rise to the level of severity of Ms. Lima-Soares' situation, since Candidate A's issue involved failure to give proper notice and one instance of tardiness, whereas the Appellant's involved failure to obey directives and subordination. Candidate A owned up to his non-disclosure and apologized. Ms. Lima-Soares continued to deny she was ever counselled and failed to take any responsibility for her actions. Unlike Ms. Lima-Soares, the City did not conclude that Candidate A had failed to pay his tax returns, had filed for bankruptcy, had negative feedback from the community, etc. I do not find any evidence to support the allegation by the Appellant that Candidate A was given a conditional offer of employment because his father is a firefighter in the City. Further, Candidate A did not bypass the Appellant, as his name appeared higher on the certified list.

The City also points to Ms. Lima-Soares' financial history, to include filing for bankruptcy in 2017 and failure to file federal tax returns, as reason why it determined she was unsuitable for the position of permanent reserve police officer. Municipalities often take candidates' financial histories into consideration when determining suitability for a police officer position. *See Pena* v. *City of Lawrence,* G1-15-84 [28 MCSR 617 (2015)]; *Conley* v. *City of New Bedford*, G1-14-224 [29 MCSR 477 (2016)]. The first concern the City had was Ms. Lima-Soares' 2017 bankruptcy filing which appeared on her credit history, of which Ms. Lima-Soares does not dispute. Pursuant to 11 U.S.C. 525, "… a governmental unit may not… deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act… *solely* because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act…. (emphasis added). The City cites to the 2017 bankruptcy in its bypass letter as one reason for bypass; yet this is not the City's sole reason for failing to hire Ms. Lima-Soares. Had this been the sole reason for bypass, the City would not have met its burden; however, such is not the case, as there are numerous other reasons for bypass delineated in the City's bypass letter.

The City points to Ms. Lima-Soares' failure to pay federal income tax during the years 2011-2015 as an additional reason for bypass. The City notes that her failure to pay these taxes was concerning and her responses to questions regarding this issue put her credibility in doubt. The City was not convinced that she was not required to file taxes, since she did not file a Schedule C (for independent contractors/business owners) so there was no accounting for the money that was coming in or going out. The City was reasonable in its concern that she failed to file federal taxes, thereby failing to adhere to federal law.

The Appellant, in her brief, attempts to correlate Ms. Lima-Soares' failure to pay federal income tax to certain candidates' admitted prior marijuana use. Since marijuana use and failure to

pay income tax are federal crimes, the Appellant contends that the City should not have given a conditional offer of employment to anyone who admitted using marijuana. The City, in its discretion, views the issue differently than the Appellant. The City testified that the question about marijuana use in the Application is asked to gauge the candidate's level of honesty and to determine if there are any larger issues at play. The City noted that marijuana use is legal in the state of Massachusetts and it did not equate an admission to prior marijuana use to that of failure to pay federal income taxes.

The City's bypass letter also contends that Ms. Lima-Soares failed to disclose that she had previously applied to the Somerville Auxiliary Police Department. The City has not proven, by a preponderance of the evidence, that Ms. Lima-Soares actually fully applied to the Somerville Auxiliary Police. There is evidence that she made numerous inquiries to the Department, her CORI was checked, her driver history was checked, an investigator was assigned to undertake a background investigation, and a decision appears to have been made that the Auxiliary Police would not hire Ms. Lima-Soares due to her driver history and an *incomplete application*; however, the City was unable to produce the application. Additionally, Ms. Lima-Soares denies that she ever passed in an application. For these reasons, the Commission does not sustain this particular reason for bypass.

Lastly, the final reason for bypass was the negative input by the community, specifically by Ms. Lima-Soares' own neighbor, Mr. P. Initially, the City sought information from Mr. P through a residency check. When Ms. Lima-Soares was notified by the investigator that he was going to speak to her neighbors, she showed some concern and wondered if the investigator had to reveal her identity or the reason for his inquiry about her residency, leading the investigator to ask Ms. Lima-Soares whether she had a reason to be concerned with him speaking to her neighbors. Her residency was verified by Mr. P, yet he became irate and stressed repeatedly that she should not become a Somerville Police Officer, that she does not get along with her neighbors, that she tells others on the street that she is a police officer, and that he feared retaliation should she become a police officer.

When the panel asked Ms. Lima-Soares about her relationship with Mr. P, she denied any contentious relationship and indicated that she never interacts with him one-on-one. The only time she recalled speaking with him was when she tried to de-escalate a situation where Mr. P was angry at her father for parking in front of his house. Ms. Lima-Soares denied that she ever took pictures of the couple in order to harass them, but she did confirm that she has taken pictures outside to document flood damage and Mr. P and his girlfriend may have accidentally been in a picture or two. Although she claims to not know Mr. P, she did tell the interview panel that he has mental issues and that the Cambridge Police are familiar with him. Following the interview, the City investigated further and did not confirm Ms. Lima-Soares' allegations about Mr. P's criminal involvement with the police, further leading the City to question her credibility or truthfulness on this topic.[6] Throughout the interview, the panel felt Ms. Lima-Soares was "trying to be artful not owning up to things…trying to work the corners instead of owning the situation."

In summary, the interview panel concluded that the City would be taking too much of a risk in granting Ms. Lima-Soares a conditional offer of employment. Absent evidence that the Appointing Authority acted in bad faith, the City is afforded deference in its judgment to bypass the Appellant for valid reasons. I carefully considered whether a fair, thorough, and impartial review process has been undertaken by the City, and whether the City has shown, by a preponderance of the evidence, that there was reasonable justification to bypass Ms. Lima-Soares for her insubordination and failure to follow directives as a crossing guard, her poor relationship with certain community members, and her failure to file federal tax returns as a business owner, in conjunction with her lack of candor relative to these three issues. I find that the City has met that burden of proof with regards to these three (3) reasons for bypass. The City failed to meet its burden of proof as it relates to the allegation that Ms. Lima-Soares failed to disclose her application to the Somerville Auxiliary Police, since the City failed to produce any such application.

For all of the above reasons, the Appellant's appeal under Docket No. G1-19-150 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

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* * * * * *

6. The City also presented evidence of a letter written by a fellow Somerville Police Officer, Officer 1, which voiced his concern about the City hiring Ms. Lima-Soares. This letter was sent to the Department after Ms. Lima-Soares' interview, and therefore she was not able to refute the contents of the letter. This letter was received prior to the bypass decision, however. The Commission did not consider the contents of this letter in its decision.

STEPHEN McCARTHY

v.

HUMAN RESOURCES DIVISION

B2-21-003

June 3, 2021
Christopher C. Bowman, Chairman

Examination Appeal-Promotion to Police Lieutenant-Experience Credit for Service as a Community College Campus Police Officer—Consistent with prior decisions, the Commission affirmed the denial of experience credits on a police lieutenant promotional exam for time served as a Bunker Hill Community College campus police officer since this does not constitute service in a regular police force.

DECISION ON MOTION FOR SUMMARY DECISION

On December 28, 2020, the Appellant, Stephen McCarthy (Appellant), a police sergeant in the Waltham Police Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to not award him 2 additional points on a police lieutenant examination for 25 years of service, pursuant to G.L. c. 31, s. 59. At issue is whether time spent as a campus police officer at Bunker Hill Community College should count toward this 25 years of service.

2. On February 9, 2021, I held a remote pre-hearing conference via Webex which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. On September 19, 2020, the Appellant took a promotional examination for Police Lieutenant.

B. On November 10, 2020, the Appellant received his score of 87.

C. The Appellant did not receive 2 additional points under Section 59 for 25 years of service as HRD did not count the Appellant's time in which he served as a Bunker Hill Community College campus police officer.

D. On December 11th, 17th and 18th, 2020, the Appellant filed an appeal, contesting HRD's decision not to award him 2 additional points for 25 years of service provided for under Section 59.

E. On December 18, 2020, HRD denied the appeal.

F. On December 28, 2020, the Appellant filed a timely appeal with the Commission.

G. On December 15, 2020, an eligible list for Waltham Police Lieutenant was established. The Appellant is tied for 7th on the eligible list.

4. HRD argues that this is a settled matter based on prior Commission decisions, including *Ralph* v. *Human Resources Division*, 32 MCSR 73 (2019), affirmed by the Superior Court (*see Ralph* v. *Civil Service Comm'n*, Superior Court Civil Action No. 1985CV00397 (February 25, 2020), under appeal in the Appeals Court.

5. At the pre-hearing conference, the Appellant was not able to point to any factors that would distinguish his appeal from prior Commission decisions regarding this issue.

6. As referenced and agreed to at the pre-hearing, HRD had 30 days to file a Motion for Summary Decision and the Appellant had 30 days thereafter to file a reply.

7. HRD filed its motion on March 10, 2021. The Appellant did not file a reply .

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See*, *e.g*., *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

Section 2(b) of G.L. c. 31 addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia;* "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record." *Id*.

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations … ".

Section 59 of G.L. c. 31 provides in relevant part that:

"Notwithstanding the provisions of any law or rule to the contrary, a member of a regular police force or fire force who has served as such for twenty-five years and who passes an examination for promotional appointment in such force shall have preference in promotion equal to that provided to veterans under the civil service rules."

ANALYSIS

Based on the undisputed facts, and for the reasons cited by HRD in their motion for summary decision, the Appellant's appeal is dismissed.

In *Ralph*, the Commission considered whether an officer's former service as a UMASS Lowell campus police officer in 1992-1993 should be credited toward the 25-year promotional preference. The Commission concluded that "[t]hese limited grants of police power are essentially no different from the limited, rather than general, police powers that are granted to many other persons who are not, thereby, deemed 'regular' police officers." *Id*. (citing G.L.c.22C, §56 et seq; *Commonwealth* v. *Mullen*, 40 Mass. App. Ct. 404, *rev.den*. 423 Mass. 1105 (1996) (cataloguing statutes providing limited grants of police powers)). The Commission found that his employment on the UMASS campus police was not on "a regular police force" and "HRD was justified to conclude that his employment at UMass Lowell did not qualify for creditable time toward the 25-Year Promotional Preference." *Id*.

HRD was justified in not crediting the Appellant's time as a Bunker Hill Community College campus police officer from 1994-1996 toward the 25-Year Promotional Preference as this was not service as "a member of a regular police force" as required by Chapter 31, § 59. As a campus police officer, and particularly during the time frame in which he served,[1] the Appellant was not performing the same work as a member of a regular police force.

Furthermore, the Appellant's experience occurred on a community college campus, which the Commission has suggested would be less likely to rise to the level of a regular police force. *Arakelian* v. *Human Resources Division*, 30 MCSR 253 n.5 (2017) ("The level of inquiry regarding the experiences of campus police at state community colleges may or may not be different from the experiences of state University campus police officers.").

CONCLUSION

For all of the above reasons, HRD's Motion for Summary Decision is allowed and the Appellant's appeal under Docket No. B2-21-003 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Stephen McCarthy
[Address redacted]

Emily Sabo, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

KRISTEN D. MURPHY

v.

HUMAN RESOURCES DIVISION

B2-21-013

June 3, 2021
Christopher C. Bowman, Chairman

Examination Appeal-Promotion to Police Lieutenant-Calculation of Work Experience—The Commission dismissed an examination appeal from a Milton police sergeant seeking promotion to lieutenant after finding that HRD had, in fact, double counted her work experience in calculating her E&E credit and that her score should be adjusted downward and not upward.

DECISION ON MOTION FOR SUMMARY DECISION

On January 4, 2021, the Appellant, Kristen D. Murphy (Appellant), a Milton Police Sergeant, filed an appeal with the Civil Service Commission (Commission), contesting her education and experience (E&E) score on a police lieutenant examination administered by the state's Human Resources Division (HRD).

2. On February 16, 2021, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. On September 19, 2020, the Appellant took the police lieutenant examination.

B. On November 10, 2020, the Appellant received her score from HRD: Written Score of 85; E/E Score of 94.3 and a Total Score of 87.

C. The Appellant filed a timely appeal with HRD contesting her E/E score.

D. An eligible list for Milton Police Lieutenant was established on 12/15/20.

1. *See Ralph*, 32 MCSR 73 (discussion of 2014 legislative changes and how they could not be read to apply to service at UMASS Lowell campus in 1993).

E. The Appellant is ranked second on the eligible list.

4. As part of the pre-hearing conference and a written submission by the Appellant, the Appellant stated that, despite having two additional years of experience since this promotional examination was administered in 2018, her E/E score decreased from 94.80 to 94.30. She also questioned, specifically, whether she received full credit on Question 9 of the E/E portion of the examination.

5. At the pre-hearing conference, counsel for HRD offered to have HRD conduct a further review of the Appellant's E/E submission and provide a detailed explanation of their findings.

6. I informed the parties that, upon receipt of HRD's findings, further orders would issue regarding the procedural next steps of this appeal.

7. On February 26, 2021, counsel for HRD reported that:

> "In asking the Civil Service unit to review Ms. Murphy's E&E score, I have found out more information. At the pre-hearing, Ms. Murphy disclosed that she had received a 94.3 for her E&E score and that she had received a 94.8 for her E&E score in 2018. In taking a closer look, Ms. Murphy was credited with the points that she claimed for her E&E score, which double counted her time, as opposed to the amended score. The questions, including question 9, state that experience cannot be used, which has been given credit in a previous category. The points she claimed for her E&E score was transposed rather than her corrected score. Her correct E&E score in 2018 was 89.4, and in 2020 was 90.4. This does not impact her placement on the Milton list. The Civil Service unit also reviewed the scores of the other two individuals on the Milton list and their scores are correct. As this doesn't change her placement on the list at this time, we are not asking to adjust Ms. Murphy's score."

8. In response, the Appellant indicated that she would not be withdrawing her appeal and that she wanted a more detailed explanation from HRD.

9. On April 5, 2021, HRD filed a Motion for Summary Decision. As part of that motion, HRD offered the following additional information:

> "The claim instructions specifically stated:
>
> POLICE DEPARTMENTAL PROMOTIONAL EXPERIENCE CLAIM
>
> INSTRUCTIONS: CREDITING WORK EXPERIENCE: In this section you rate your work experience as of the date of the examination based on type, amount, and recency. After you have read the instructions, read the description of work in each category. Begin completing the claim with the category corresponding to the highest rank of your work experience and continue working down through the claim. Do not rate any category in which you have less than one month of experience and do not indicate the same work experience in more than one category. In regards to incomplete full-time months, 16 or more work days will equal a full month. . . . NO "DOUBLE COUNTING": Do not rate any category in which you have less than one month (16 or more work days) of experience and do not indicate the same work experience in more than one category. . . . SELECT "YES" TO INDICATE YOU HAVE READ AND UNDERSTOOD THESE INSTRUCTIONS.
>
> Upon review of her appeal, in 2018 and 2020, the Appellant was credited with the score she claimed, which double counted her time served, rather than her amended score that properly accounted for her experience.
>
> For example, in her 2020 E & E claim, the Appellant claimed and was credited that she had 48 to 59 months of experience as a Police Sergeant in the specified department within 5 years of the examination date. In a subsequent question, she also claimed that she had 48 to 59 months of experience as a Police Officer in the specified department within 5 years of the examination date, despite the question specifically directing "Do not include experience for which you have given yourself credit in a previous category."
>
> The Appellant's claimed points for the E & E score were copied into her score field rather than her accurate, amended score.
>
> The Appellant' s correct, amended score in 2018 was 89.4, and in 2020 was 90.4.
>
> The Civil Service unit also reviewed the scores of the other two individuals on certification no. 07111, and confirmed that their scores are accurate."

10. The Appellant did not file a reply.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See, e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

Section 2(b) of G.L. c. 31 addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record." *Id*.

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations … ".

ANALYSIS

The Appellant has no reasonable expectation of prevailing on her appeal. HRD has provided a detailed explanation showing that, upon further review, the Appellant's score should not be adjusted

up, but, rather, adjusted *down*. The Appellant, despite being given the opportunity to do so, has not refuted HRD's reasonable and logical explanation for this outcome.

CONCLUSION

HRD's Motion for Summary Decision is allowed and the Appellant's appeal is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Kristen D. Murphy
[Address redacted]

Emily Sabo, Esq.
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* * * * * *

ANDREW M. TRAINOR

v.

HUMAN RESOURCE DIVISION

E-20-127

June 3, 2021
Christopher C. Bowman, Chair

***Non-Bypass Appeal-Veterans Preference-Active Duty-Conflicting Documentation*—**In this non-bypass equity appeal, Chairman Christopher C. Bowman remanded to HRD the issue of whether a candidate for original appointment to the Taunton Police Department qualified for a veteran's preference. The candidate had participated in the Navy's New Accession Training Program and it was unclear from conflicting testimony at hearing whether persons in that program are engaged in training for the entire duration of their contract or can be engaged in non-training active duty. In order to qualify for the preference, a candidate must have at least six months of active duty status.

INTERIM DECISION AND ORDERS

Pursuant to G.L. c. 31, § 2 (b), the Appellant, Andrew M. Trainor (Mr. Trainor), filed a non-bypass equity appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) that Mr. Trainor is not entitled to the veteran preference granted to veterans applying for civil service positions in Massachusetts. According to G.L. c. 4, § 7, clause 43:

> "Veteran" shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; ….

Furthermore, G.L. c. 31, § 1 further defines "Veteran" and maintains that (3) "veteran shall not include *active duty for training* in the national guard or air national guard or *active duty training as a reservist in the armed forces of the United States."* (emphasis added).

On August 17, 2020, I held a remote pre-hearing conference and on December 11, 2020, I held a remote full hearing via Webex videoconference.[1] A recording was made of the hearing via Webex. Both parties were provided with a link to access the recording, which the Commission has retained a copy.[2]

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

HRD submitted seven (7) exhibits (Respondent 1-7). Mr. Trainor submitted a series of documents requested by the Commission as a Post-Hearing Exhibit; (Appellant Post-Hearing Exhibit PH0001-0008). Based upon the documents entered into evidence, the testimony of:

Called by HRD:

- Keith Costello, HRD;

Called by Mr. Trainor:

- Andrew M. Trainor;
- Shana Michaud, U.S. Navy
- Sabrina Wadkins, U.S. Navy

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

FINDINGS OF FACT

1. Mr. Trainor is twenty-eight (28) years old and resides in Taunton. He has an associate's degree in business administration and a bachelor's degree in business management. As of the date of the hearing, he had been employed for one month as an HVAC technician. Prior to that he was a truck driver for an event planning company. (Testimony of Appellant)

2. Andrew M. Trainor signed a contract with the United States Navy on April 25, 2017. As part of the contract, he acknowledged that he was enlisting into the U.S. Navy Reserve for a period of eight (8) years, six (6) of which would be in an active drilling status and the remaining two (2) years in the non-drilling individual Ready Reserve. He enlisted with the following guarantees and understanding that he was enlisted under the provisions with the options (1) New Accession Training Advanced Technical Field Aircrewman (NAT/AIRC) Program; and (2) NAVOPSPTCEN Quincy UIC 68986. (Appellant Post-Hearing Exhibit, PH008).

3. As part of the April 25, 2017 contract with the Navy, Mr. Trainor also acknowledged that the Navy Reserve will order him to Recruit Training, Class A and Class C Schools (if necessary) … under the Initial Active Duty for Training (IADT) orders. (Appellant Post-Hearing Exhibit, PH008).

4. Mr. Trainor attended Bootcamp from January 18, 2018 to March 2018 in Chicago, Illinois. Thereafter, he attended the Naval Aircrewman School and "A" School from June 2018 to July 31, 2018 in Pensacola, Florida. Thereafter, he reported to the VR-56 military base in Virginia Beach from August 1, 2018 to February 21, 2019. In February 2019, the Appellant reported to the Naval Operation Support Center in Quincy, MA where he was "detached from active duty." (Testimony of Appellant).

Appellant's Request for Veteran's Preference with HRD

5. On or about May 7, 2019, Mr. Trainor applied to HRD to take the civil service examination for police officer. Within his application to HRD, he indicated that he was looking to receive a veteran's preference for his military service. (Testimony of Costello; Respondent Exhibit 1).

6. Keith Costello (Mr. Costello) testified on behalf of HRD. He is a Program Coordinator III within the Civil Service Unit of HRD and has held this position for approximately one (1) month. Mr. Costello has been employed by HRD for four and a half years (4.5). (Testimony of Costello).

7. In his current position, Mr. Costello's primary duties are the administration of public safety exams for civil service positions. He is tasked with coordinating the entire scope of the exam, from setting dates to taking the applications and payments, setting exam locations, working exams, getting exam materials, scoring the exams, placing candidates on eligible lists, and notifying the candidates. (Testimony of Costello).

8. Additionally, Mr. Costello also verifies the record of service of candidates who were in the military and who indicate that they would like to receive a veteran's preference. HRD checks the dates the candidate provides affiliated to their active-duty period, such as date entered, separation date, and then dates such as foreign service, sea service and in-training time. Mr. Costello noted that *active duty for training* does not qualify under the Veteran's Preference as *active duty*, as defined by the statute.[3] (Testimony of Costello).

9. HRD undertook its typical review into whether or not Mr. Trainor was eligible for the veteran's preference. Mr. Trainor had provided HRD with his DD214 Form, which is a Certificate of Release or Discharge from Active Duty.[4] HRD approved Mr. Trainor's request and his veteran status was approved in June 2019.[5] (Testimony of Costello; Respondent Exhibit 3).

10. On or about November 25, 2019, the City of Taunton's Police Chief wrote a letter to HRD advising HRD that it was the City's belief that Mr. Trainor, whose name appeared with a veteran's preference on the City of Taunton's certification for police officer, had been mistakenly classified as a veteran for the purposes of the Veteran's Preference. (Respondent Exhibits 2 and 4).

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3. Mr. Costello testified that anyone "who is part of a regular component, regular Army, regular Navy, regular Air Force" who performs 90 days of active duty, since the United States is currently at war, is considered a veteran and will get veteran's status. For reservists, it is a little different—HRD must verify the activation. (Testimony of Costello).

4. The Certificate of Release or Discharge from Active Duty Form, commonly referred to as the DD214 Form, indicates the name of the service member, the department, component or branch of the military, and a complete record of service, which includes the date entered (this period), separation date (this period), net active service (this period), total prior active service, total prior inactive service, foreign service, sea service, and initial entry training, among other data. (Respondent Ex. 3).

5. Mr. Costello testified that he looked at the DD214 and made note of which branch of the military Mr. Trainor was in—the Navy. He also verified that Mr. Trainor was honorably discharged, according to the DD214.

11. The City's letter notes that Mr. Trainor entered Active Duty for initial entry training under the Navy's New Accession Training (NAT) Program. He served one year, one month and four days on Active Duty for training purposes. Upon completion of the training, he was released to the Navy Reserves. The City of Taunton formed the belief that this form of duty, under the NAT Program, does not meet the threshold requirements of 90-days active wartime military service for the purposes of veteran's preferences since it was for training. The City of Taunton requested that HRD adjust Mr. Trainor's position on the eligible list, thereby removing the veteran's preference. (Respondent Exhibit 4).

12. Once he received this letter from the City of Taunton, Mr. Costello checked Mr. Trainor's DD214 form again and concluded that he had made a mistake in classifying Mr. Trainor as a veteran. In section 12 of the DD214, it indicates that Mr. Trainor entered the Navy for this period on January 18, 2018 and separated from the Navy, this period, on February 21, 2019. His net active service for this period was calculated as 1 year, 1 month, 4 days. His initial entry training for this period of time was 1 year, 0 months, 25 days. The DD214 indicated that, for this period from January 18, 2018 to February 2019, Mr. Trainor was training for all but 10 days. (Testimony of Costello; Respondent Exhibit 3).

13. HRD rescinded Mr. Trainor's veteran's status and lowered his rank on the eligible list. The reason he was determined not eligible for veteran's status is because the DD214 Form did not indicate that Mr. Trainor had 90 days of active-duty service during that time period. (Respondent Exhibit 2).

Additional Information Provided to HRD - DD215 Form

14. Thereafter, HRD received information from Mr. Trainor regarding the issue of veteran preference. Mr. Trainor submitted a DD215 Form, which is a military form that corrects a prior DD214 Form. This form was dated February 24, 2020. (Respondent Exhibit 5).

15. This DD215 Form made a correction to Mr. Trainor's DD214 in section 12H, Initial Entry Training. The correction indicates that section 12H should read, "0 years, 06 months, 13 days" rather than the initial DD214, 12H section for Initial Entry Training, which read, "01 year, 00 months, 25 days." This modification to the DD214 changed the calculation of training time Mr. Trainor received from 390 days of training out of 400 days of net service to 199 days of training out of 400 days of net service. (Respondent Exhibit 5).

16. Mr. Costello reviewed the DD215 and concluded that the form did not change HRD's determination that Mr. Trainor was not eligible for the veteran's status under Massachusetts law because nothing in the document showed that his service was anything other than *training* time since he was part of the New Accession *Training* Program during this time, according to his orders. (Testimony of Costello; Respondent Exhibit 3).

17. Mr. Costello did not see anything in the DD214 or DD215 Form to indicate full-time activation for anything other than training. (Testimony of Costello; Respondent Exhibits 3 and 4).

18. When asked specifically if he had completed the NAT Program prior to his final day, February 21, 2019, the Appellant himself stated during his testimony, "I'm not sure if I technically completed, because I was still on my initial orders that I began with." (Testimony of Appellant).

Additional Information Provided to HRD - Letter Dated March 10, 2020; Testimony of Navy Personnel Officer Shana Michaud

19. In addition to the submission of the DD215 Form, HRD also received a letter written by S.L. Michaud, Personnel Officer Fleet Logistics Support Squadron 56, to the Chiefs of the Taunton Fire Department and Police Department. Within the letter, dated March 10, 2020, Personnel Officer Michaud indicates that she wanted "to clarify active duty status of AWF3 Andrew Trainor from the period of January 18, 2018 to February 21, 2019 under reference (a), AWF3 Andrew Trainor was gained to full active duty during this time and was NOT Selected Reserve Sailor completing ADT orders or inactive drills." (Respondent Exhibit 6).

20. This letter by Personnel Officer Michaud seemingly contradicts the DD214, which indicates that Mr. Trainor was training for 390 out of 400 days of net service from January 18, 2018 to February 21, 2019. (Respondent Exhibits 3 and 6).

21. This letter by Personnel Officer Michaud seemingly also contradicts the DD215, which indicates that Mr. Trainor was training for 199 out of the 400 days of net service from January 18, 2018 to February 21, 2019. (Respondent Exhibits 4 and 6).

22. Even though the March 10, 2020 letter apparently indicates that Mr. Trainor was active duty, in paragraph 2 of the Letter, Personnel Officer Michaud goes on to state that the "[N]ew Accession for Training program for Air Crew personnel includes many TDY stops to provide particular platform training that is required to be assigned to a C40 squadron. AWF3 Trainor *was part of this program* in which he maintained Active Duty status until he was transferred to the Naval Reserves on February 21, 2019." (Respondent Exhibit 6).

23. Navy Personnel Officer Shana Michaud testified at the hearing regarding this matter. She has been a member of the Navy for sixteen (16) years and her entire career has been spent as a Personnel Specialist. She is currently a Chief Petty Officer. In her role as a Personnel Specialist, she does everything from travel claims to preparing the DD214s. She writes orders for reservists to travel and she makes sure active duty personnel are paid. She spends 8-10 hours per day dealing with travel, with a travel budget of $15 million. (Testimony of Michaud).

24. Personnel Officer Michaud concluded that the initial separation document Mr. Trainor received (the DD214) was incorrect, so she was the one, in February of 2020, who asked for a correction from the personnel support detachment. The DD215 altered the training time in the DD214, which changed his period of training from 390 days out of 400 days net service to 199 days of training out of 400 days net service for that period. (Testimony of Michaud; Respondent Exhibits 3 and 4).

25. During her testimony at this hearing, Personnel Officer Michaud stated that Mr. Trainor was active duty from the moment he reported to VR-56 in Virginia, as she indicated in the March 10, 2020 Letter. She testified that he was not classified as training at that point and "that's the problem with this program"—the NAT Program. (Testimony of Michaud; Respondent Exhibits 6).

Testimony of Naval Aircrewman Sabrina Wadkins

26. Naval Aircrewman (AWF) Sabrina Wadkins also testified on behalf of Mr. Trainor at the hearing. She has been in the Navy for seventeen years (17) and currently works in the NATOPS Department, which is the administrative department of the Naval Aircrewman. She is chief of the administrative department that trains all the New Accession Training (NAT) sailors and her job is to ensure, administratively, that people get their training qualifications prior to going off on their active duty orders. (Testimony of Wadkins).

27. AWF Wadkins testified that once a trainee comes to the squadron in Virginia, like Mr. Trainor did under the NAT Program, they have already completed Bootcamp and "A" School, and, upon arrival, they start in the *training pipeline.* They are issued a PQR, Personal Qualification Standards, and they fly as a trainee and learn their expertise. They go through a "check ride," which is their qualification flight with an instructor to attain their qualifications. This takes about three (3) months. *Once they get qualified*, according to Wadkins, they are no longer considered a trainee, but their original orders do not stop—those orders continue. (Testimony of Wadkins).

28. AWF Wadkins indicated that Mr. Trainor got "qualified" on November 11, 2018 and he did not leave the squadron in Virginia until February 21, 2019. She testified that he was no longer a trainee for purposes of the G.L. c. 4, § 7, clause 43 (and G.L. c. 31, § 1) statutory 90-day veteran qualification period (i.e., between November 11, 2018 and February 21, 2019). She indicated that there is documentation to prove that November 11, 2018 was the date Mr. Trainor became qualified and, thus, no longer "in training". This document was provided by the Appellant, post-hearing.[6] (Testimony of Wadkins; Appellant's Post Hearing Exhibit, PH0001-0002).

29. AWF Wadkins reiterated, "We don't give them a new set of orders saying they're active duty status because they fall under an entire set of orders they receive." (Testimony of Wadkins).

30. When questioned by me about the November 11, 2018 date and what being "qualified" meant relative to active duty, Mr. Trainor's first witness, Personnel Officer Michaud stated, "The November 11th date is not a solid date which would alter any sort or part of his comp or his orders." (Testimony of Michaud).

31. Under cross examination, AWF Wadkins was asked if Mr. Trainor would have the same status in the NAT Program as someone who did not do the program, who is not in the Reserves—say someone who just walked off the street and joined the Navy—are they in the same position? Wadkins stated, "On paper, no. The training pipeline is still the same, but per our squadron, he is qualified. So on his orders it still shows him as a New Accession trainee, but technically, he is qualified." (Testimony of Wadkins).

32. On cross examination, AWF Wadkins was asked about the discrepancy between the DD215, which indicates that Mr. Trainor was six (6) months active duty, and what was testified to at the hearing—that it was actually just 103 days—which is roughly 3 months—beginning on November 11, 2018 to February 21, 2019. AWF Wadkins stated, "We say 6 months of active duty because that is when he physically checked into the command. Once he checks in, he is considered active duty in the command. The schooling was over—now—it's just in-house training." When asked to clarify if Mr. Trainor was *training* since she seemed to acknowledge that, AWF Wadkins stated: "Yes, it's training." (Testimony of Wadkins).

APPLICABLE LAW

General Law c. 31, § 2(b) authorizes appeals to the Commission from persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, in relevant part, as follows:

> "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

ANALYSIS

HRD initially authorized Mr. Trainor's request for a veteran's preference. Following receipt of a letter from an Appointing Authority—the City of Taunton Police Chief—HRD more carefully reviewed Mr. Trainor's DD214 and concluded that they had mistakenly granted Mr. Trainor the veteran's preference since he had not achieved 90 days of active duty status. HRD maintained that Mr. Trainor, during the relevant period of time, was activated for duty for training purposes only, as evidenced by his orders from the Navy and his participation in the NAT program—which HRD maintains is a strictly a training program from beginning to end.

I heard testimony from four witnesses, one for the Respondent and three for the Appellant. The testimony from each witness was helpful at times and further confused the issue at other times. Each witness was diligent in their testimony and credible, yet no one

6. In a Memorandum provided by the Appellant as a post-hearing exhibit, dated November 25, 2018, Commanding Officer J.E. Strange of the Fleet Logistics Support Squadron 56, memorialized in writing that AWFAN Andrew Trainor met the requirements … and was designated as a Naval Aircrewman and as a Naval Warfare Specialist (NAWS) effective 11 November 2018. (Appellant's Post-Hearing Exhibit PH0001). In a second memo provided by the Appellant as a post-hearing exhibit, dated November 25, 2018, Commanding Officer J.E. Strange of the Fleet Logistics Support Squadron 56, memorialized in writing that AWFAN Andrew Trainor completed all pertinent training requirements … and was designated as Second Loadmaster… effective 11 November 2018. (Appellant's Post-Hearing Exhibit PH0002).

witness was able to make clear whether or not Mr. Trainor was ever considered *active duty* by the Navy, *active duty for training purposes*, or simply, *reserve training* during all relevant times. For instance, the DD214 indicates Mr. Trainor was training for 390 out of 400 net service days (January 18, 2018 to February 21, 2019.) The DD215 amended the DD214 calculations to training for 199 of the 400 days of net service; however, there was testimony by the Appellant's own witnesses that he was *training* during many of those 199 days listed in the DD215. I do not credit the DD215 as accurate based on the Appellant's witnesses' testimony.

Also entered into evidence was a letter written by Navy Personnel Officer Michaud, sent on March 10, 2020, after Mr. Trainor's veteran status was rescinded by HRD. Personnel Officer Michaud wanted to set the record straight, even in light of what the DD214 originally claimed and what the DD215 amended, that Mr. Trainor was to be considered active duty for the entire time he was at the squadron in Virgina—from January 18, 2018 to February 21, 2019. This letter seemingly indicates that Mr. Trainor was actually never training during that period of time—for over a year—which would seemingly easily qualify him for veteran status pursuant to Massachusetts law. However, this letter does not correspond with Ms. Michaud's own live testimony at the hearing—because she testified that he was training for many months during that time period, January 18, 2018 to February 21, 2019.

To make matters more complicated, another witness for the Appellant, AWF Wadkins (an administrator with the New Accession Training Program) testified that Mr. Trainor was actually activated for duty on a completely different date than what the DD214, the DD215, or what Personnel Officer Michaud's March 10, 2020 letter indicated. AWF Wadkins maintains that Mr. Trainor became active duty when he "qualified" for his position and cited to two memos written by Mr. Trainor's commanding officer. She testified that he became qualified on November 11, 2018 and remained at the squadron in Virgina until February 21, 2019—which would mean he was active duty for approximately 103 days, which may qualify him under the statute as having been active duty for a period longer than 90 days, during wartime.

What remains unclear is whether someone enrolled in the NAT Program can ever be credited with non-training active duty time or will their time in the program always be considered *active duty for training purposes* only. I have insufficient information to make this determination given the fact that the DD214, the DD215, the March 10, 2020 letter, the Appellant's post-hearing exhibit, and the Appellant's witnesses' testimony all give different dates and different hypotheses as to when Mr. Trainor should have been considered active duty. Given the potentially precedent-setting nature of this decision, and because the proper due diligence regarding this matter should be conducted by the Personnel Administrator, I am remanding this case back to HRD with the following orders:

1. Within sixty days, HRD shall investigate whether persons who participate in the United States Navy's New Accession Training program are engaged in training for the entire duration of their contract or if persons can be engaged in non-training active duty.

2. If it is determined that persons can be engaged in non-training active duty while enrolled in the NAT program, HRD shall seek clarification regarding how such non-training active duty time is tracked and verified.

3. The Appellant shall also have sixty days to obtain additional relevant information regarding the New Accession Training program (i.e.—from the U.S. Dept. of Veterans Affairs) related to questions referenced above and provide this information to HRD and the Commission.

4. HRD shall report its findings to the Commission, along with a detailed statement regarding whether this additional information impacts HRD's determination regarding the Appellant's application for veteran status.

SO ORDERED.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Andrew M. Trainor
[Address redacted]

Patrick Butler, Esq.
Labor Counsel
Human Resource Division
One Ashburton Place, Room 301
Boston, MA 02108

* * * * * *

MARK S. TURNER

v.

HUMAN RESOURCES DIVISION

B2-21-075

June 3, 2021
Christopher C. Bowman, Chairman

***Examination Appeal-E&E Credit-Failure to Complete Online Module*—**The Commission dismissed yet another appeal from a disappointed firefighter denied E&E credits on a promotional exam because he failed to complete the online component.

ORDER OF DISMISSAL

On April 1, 2021, the Appellant, Mark S. Turner (Appellant), a firefighter in the Town of Shrewsbury (Town), filed an appeal with the Civil Service Commission, contesting the decision of the state's Human Resources Division (HRD) not to award him any education and experience points on a recent promotional examination for fire lieutenant.

2. On May 18, 2021, I held a remote pre-hearing conference which was attended by the Appellant and counsel for HRD.

3. As part of the pre-hearing conference, the parties stipulated to the following:

A. The Appellant is a firefighter in the Town of Shrewsbury.

B. On November 21, 2020, the Appellant took the promotional examination for Fire Lieutenant.

C. The deadline for completing the Education and Experience (E&E) portion of the examination was November 28, 2020.

D. On January 19, 2021, HRD informed the Appellant that he had received a written score of 70; a 0 on the E/E portion for failing to complete the E/E portion; and a failing overall score.

E. On March 29, 2021, the Appellant filed an appeal with HRD that was not within the seventeen-day statutory deadline for filing such an appeal.

F. The Appellant filed an appeal with the Commission on April 1, 2021.

4. As part of the pre-hearing conference, I asked the Appellant if he had a confirmation email from HRD indicating that he completed the online E/E portion of the examination. The Appellant stated that he had a confirmation for applying for the examination and an auto-reply email from HRD when he submitted the supporting documentation.

5. The Appellant acknowledged that he did not initiate and/or complete the online E/E portion of the examination, but, rather, only sent in the supporting documentation.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See*, *e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record." *Id*.

Pursuant to G.L. c. 31, § 5(e), HRD is charged with: "conduct[ing] examinations for purposes of establishing eligible lists." G.L. c. 31, § 22 states in relevant part: "In any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held."

G.L. c. 31, § 24 allows for review by the Commission of exam appeals. Pursuant to § 24, "…[t]he commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator."

In *Cataldo* v. *Human Resources Division*, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations, including the type and weight given as 'credit for such training and experience as of the time designated by HRD'".

ANALYSIS

The facts presented as part of this appeal are not new to the Commission. In summary, promotional examinations, such as the one in question here, consist of two (2) components: the traditional written examination and the E&E component. HRD provides detailed instructions via email regarding how and when to complete the online E&E component of the examination. Most importantly, applicants are told that, upon completion of the E&E component, the applicant will receive a confirmation email—and that the component is not complete unless and until the applicant receives this confirmation email.

Here, it is undisputed that the Appellant sat for the written component of the fire lieutenant examination on November 21, 2020. He had until November 28, 2020 to complete the online E&E component of the examination. The Appellant acknowledges that he did not complete the E&E component of the examination. HRD has no record of the Appellant completing the E&E component, but, rather, only receiving supporting documentation.

While I am not unsympathetic to the Appellant's plight here, it is undisputed that the Appellant did not complete the E&E component of the examination. Further, he failed to file a timely appeal with HRD.

Consistent with a series of appeals regarding this same issue, in which applicants have been unable to show that they followed instructions and submitted the online E&E claim, intervention by the Commission is not warranted as the Appellant cannot show that he was harmed through no fault of his own.

For this reason, and because he failed to file a timely appeal with HRD, the Appellant's appeal under Docket No. B2-21-075 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Mark S. Turner
[Address redacted]

Sarah Petrie, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

DAVID ROLLINS

v.

MASSACHUSETTS PAROLE BOARD

G1-19-095

June 3, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Appointment as a Probation Officer-Former Weymouth Police Officer Forced to Resign-Inappropriate Use of CJIS Data-Attempted Initiation of Social Relations With Criminal Defendant-Brady Rule-Poor Judgment—In a decision by Commissioner Cynthia A. Ittleman, the bypass by the Massachusetts Parole Board of a former Weymouth police officer seeking appointment as a parole officer was affirmed on the grounds that his employment history showed a lack of judgment and an inability to separate his personal and professional lives. The candidate had been forced to resign from the Weymouth Police Department after an investigation revealed he had attempted to initiate a social relationship online and by text with a female criminal defendant being prosecuted for OUI and had made inappropriate use of CJIS data.

DECISION

On April 9, 2019, David Rollins ("Rollins" or "Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Parole Board ("MPB" or "Parole Board") to bypass him for original appointment to the position of Field Parole Officer A/B ("FPO A/B"). On June 18, 2019, a pre-hearing conference was held at the offices of the Commission, which was followed by a full hearing at the same location on August 16, 2019.[1]

The hearing was digitally recorded.[2] The parties submitted post-hearing briefs on September 20, 2019. For reasons explained below, I conclude that the City's bypass decision should be upheld.

FINDINGS OF FACT

Sixteen (16) exhibits were entered into evidence by the Respondent and one (1) exhibit was marked for identification at the hearing. Pursuant to my request, the Respondent provided additional documents after the close of the hearing, including a Quincy District Court docket sheet, a Weymouth Police Department Statement of Facts in support of its Application for a Criminal Complaint against Ms. A, and a Nolle Prosequi filed by the Norfolk County District Attorney's Office dated June 20, 2017. (PH Ex. 1). Also pursuant to my request, the Appellant provided a copy of a Massachusetts Appeals Court case regarding random queries of

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

police into RMV information. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority

- Kevin Keefe, Chief of Field Services

For the Appellant

- David Rollins, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant has a bachelor's degree in criminal justice. He served in the United States Marine Corps for four years and seven years in the United States Marine Corps Reserves. His military service includes one year in Iraq. He was honorably discharged in 2010. (Appellant Testimony)

2. The Appellant has been employed with the Massachusetts Department of Correction (DOC) as a Correction Officer I (CO I). He served as a police officer for the Town of Weymouth's Police Department (WPD) from June 2011 to July 2017. After resigning from the WPD, he worked with the Department of Homeland Security and as a mail carrier for the United States Post Office. (Ex. 5; Appellant Testimony).

Employment with WPD

3. The Appellant received letters of commendation while working for the WPD, one for a response during an arrest of an armed felon and the other for his response to an armed robbery investigation. (Ex. 7).

4. Two incidents relevant to this appeal occurred while the Appellant was a police officer at the WPD, both involving his aunt's friend, Ms. A. While on duty near a business that had been recently broken into, the Appellant reviewed license plates on his mobile data laptop. He reviewed as many as fifty plates during this overnight shift. One of the license plates he "ran" belonged to Ms. A. He did not know Ms. A lived in the area and did not know what her car looked like. (Appellant Testimony).

5. The Appellant and Ms. A, while not "Facebook Friends," had communicated through Facebook messaging in 2010. (Ex. 9A; Appellant Testimony).

6. On November 21-22, 2014, the Appellant used Facebook to message Ms. A as follows:

> Appellant: "I think I passed you on Water Street the other night. I work for Weymouth Police.
>
> Ms. A: Oh, how did you know it was me?
>
> Appellant: I happened to run your plate for some odd reason lol. I usually run everyone's plates. I was scoping out [a business] that's across the street from your apartment complex. I've been catching suspicious people walking in the back of that business at night. Nothing to worry about though.
>
> Ms. A: Oh geez what night was it?...
>
> Appellant: A couple of nights ago. I'm like a ninja lol! I creep in and out of buildings with my lights off. You won't see me [emoticon]. I thought I would say hi. I'm []'s nephew btw.
>
> Ms. A.: Oh you're a sneaky cop! Lol. Yes I remember that you are her nephew.
>
> The Appellant: I'm also currently single- [emoticon] just sayin. Lol.
>
> November 22, 2014
>
> Appellant: Would you like to get dinner sometime?
>
> Ms. A. Oh thank you for the offer. I'm kinda seeing someone right now.
>
> Appellant: OK, no problem. Have a nice weekend!" (Exs. 9 and 9-A).

7. The second incident relevant to this appeal occurred approximately two years later in March 2016. The Appellant noted someone driving erratically while driving to work and notified the WPD. (Appellant Testimony; Ex. 15). The operator of that vehicle was Ms. A, which the Appellant learned after two other officers arrested her and brought her into the station where the Appellant saw her. (Appellant Testimony; PH Ex. 1).

8. After this incident, in February and March 2016, the Appellant contacted his aunt through Facebook to tell her about Ms. A's incident. In this communication, he told her he was looking out for public safety when he had reported the erratic driving and asked how Ms. A was doing. (Appellant Testimony; Exs. 9 and 9A). The Appellant explained to his aunt that he could not discuss the specifics of Ms. A's case. (Appellant Testimony; Exs. 9 and 9A).

9. On May 31, 2016, Ms. A asked the Appellant's aunt if the Appellant would "convince judges" to reduce the charges against her. The Appellant's aunt conveyed Ms. A's request to the Appellant, who told her he could not discuss the case with her. (Ex. 10; Appellant Testimony).

10. In February 2017, approximately one year after Ms. A was charged, the Appellant learned he was subpoenaed to be a witness in Ms. A's criminal case. He spoke with the ADA who was handling Ms. A.'s case to tell him there might be a conflict of interest, based on his friendship with Ms. A, if he were to testify in Ms. A's criminal case. The Appellant understood that the Assistant District Attorney had the responsibility to subpoena witnesses but believed his testimony might not be necessary, based on his knowledge of the law of operating under the influence. (Appellant Testimony).

11. In the morning of March 29, 2017, the Appellant messaged Ms. A.:

> Appellant: "Good morning. I honestly didn't know you were driving on the road I was in my personal vehicle and was looking out for public safety. I asked the ADA if it would be possible for me not to testify against you since we know each other (possibly friends) and because your [sic] good friends with my aunt… I'm sorry things turned out the way they did. Please don't mention this to anyone." (Exs. 9 and 9A).

Later that evening, after Ms. A had returned his message to thank him, the Appellant responded:

> Appellant: "Well, I'm here for you as a friend. Like I said, I will push the ADA to stop me from testifying hun (sic). Here's my cell if you need anything. I love my aunt [] and I would do anything to help her or her friends out. You're a good person and I'm not talking to you as a cop." (Exs. 9 and 9A).

12. The Appellant was in court for Ms. A's case on the day he was subpoenaed. (Appellant Testimony).

13. Approximately two months later, after having no conversation with Ms. A, the Appellant messaged Ms. A on May 15, 2017, telling her, "I just saw you pop up on my match.com matches. This online dating is frustrating lol. Anyway I hope you are doing OK." (Ex. 9, 9A). Ms. A responded that she had not expected the Appellant to be in court, and the Appellant explained that he needed to be in court because he was subpoenaed although "he would prefer not to". He told Ms. A that he empathized with her situation and felt bad, telling her, "The situation does not define who you are. You're still a beautiful person inside and out." (Exs. 8, 9 and 9A; Appellant Testimony).

14. The Appellant sent a "Friend" request to Ms. A around this time. Ms. A responded that she would accept his request after the trial was over and the Appellant responded that he agreed, then stated, "Maybe I can take you out for coffee when this is all over." (Ex. 9A).

15. The Appellant knew at the time of writing these messages that communicating with a defendant in a criminal trial was not a good idea. Although his communication with Ms. A was intended to be "cordial," he later realized later that Ms. A could have understood the request to go out for coffee to be a request for a date. (Appellant Testimony).

16. A short time before Ms. A's trial in June 2017, Ms. A's attorney contacted the District Attorney's office about the Facebook messages between the Appellant and Ms. A. The D.A.'s office reviewed the messages between the Appellant and Ms. A, discussed them with members of the WPD and determined that the messages left the impression that the Appellant was "attempting to ingratiate himself with Ms. A and manipulate the trial outcome." (Ex. 11).

17. The Norfolk County District Attorney's Office sent WPD a notification on July 10, 2017 stating that that it "would not be utilizing Officer David Rollins as a witness in any further proceedings requiring his testimony."[3] (Ex. 11)(emphasis added). This decision was made based on the Appellant's actions in Ms. A's case. The July 10, 2017 notification further state that, " … as a direct result of Rollins' conduct, the case [against Ms. A] was dismissed." (*Id.*)(emphasis added).

18. On the night of July 13, 2017, the Appellant arrived for his overnight shift, where he was met by multiple superior officers and investigators who told the Appellant that he had been placed on paid administrative leave. (Appellant Testimony). On July 14, 2017, the WPD wrote a memo to the Appellant stating that the Department had initiated an investigation into allegations against him and that he was being placed on paid administrative leave. (Ex. 14).[4]

19. Later on July 14, 2017, officers from the Weymouth Patrolman's Union visited the Appellant at his home to urge him to resign. The Appellant learned that the District Attorney's Office had written a letter regarding his communications with Ms. A during the pendency of her criminal trial. Union officers also told the Appellant that it would be best to resign because he could be criminally charged based on his use of criminal records and his alleged attempts to influence a criminal case. (Appellant Testimony). The Appellant signed a letter of resignation, which the union officers had prepared for him, that same day. (*Id.*; Ex. 13).

20. The Appellant did not speak to an attorney or contest the WPD's investigation or the actions of the Weymouth Patrolman's Union at the time he resigned because he wanted a "fresh start." (Appellant Testimony).

21. The WPD had conducted an internal investigation of the Appellant's actions. The investigation included interviews with multiple staff, Ms. A and a review of the documentation. The Internal Investigation Report stated that the Appellant's actions regarding Ms. A violated the following:

- WPD Policies and Procedures Section 26-3 Code of Conduct, sections of which include G.L. 268A, §§2-3 and G.L. 268 §13B (witness intimidation, public corruption);
- WPD Court Policy and Procedures Section 41-9 (officers shall cooperate with prosecutors to ensure impartial prosecution of all offenders; officers shall testify truthfully);
- WPD Rules and Regulations Section G (running license information and contacting defendant); and
- Telecommunications/Computer Systems 11.42 (running license information and contacting defendant). (Ex. 14).

22. The WPD report stated that even if the Appellant's "query of [Ms. A's] registration through the RMV was initially random and lawful, as soon as he looked her up on Facebook, sent her messages, identified himself as a police officer, and asked her out on a date, the initial query became improper and unlawful… This investigator finds that there is clear and convincing evidence to prove that Officer Rollins, an experienced 3 year police veteran at the time, knew or should have known that his actions ... violated his professional responsibilities." (Ex. 14).

23. Prior to resigning, the Appellant did not see the WPD investigation report explaining the reason he was asked to resign. (Appellant Testimony). There is no indication that the WPD interviewed the Appellant in connection with its investigation of

3. The Appellant had not seen this letter at the time of his resignation. (Appellant Testimony).

4. It is uncertain when the Appellant received the paid administrative leave memo.

the Appellant's conduct in connection with the criminal charges against Ms. A. (Keefe Testimony).

Application to the Parole Board

24. On June 30, 2018, the Appellant took the Civil Service Examination for FPO A/B. (Stipulated Facts).

25. In the fall of 2018, the Parole Board requisitioned 21 FPO positions. (Keefe Testimony). The Appellant was ranked Number 12 on Certification 05894 dated November 1, 2018. (Ex. 3).

26. The duties of a FPO include conducting home and work pre-parole investigations; having face-to-face contact with parolees; monitoring parolees' behavior and conduct in the community; providing for public safety through services to parolees; obtaining evidence and preparing parole violators; facilitating the reintegration of parolees into a non-institutional environment through counseling, guidance, cooperation with Re-Entry Officers, and referrals to community services; conducting drug and alcohol testing of parolees, enforcing curfews, and conducting assessments of parolees. It is vital for the parole officers to maintain professionalism with parolees. (Ex. 1; Keefe Testimony).

27. The Parole Board's hiring process includes an initial three-person panel interview and background investigation, which includes a home visit, reference checks, verification of employment, and questions to the applicant if issues arise. The Chief and Deputy Chief of Field Services review the investigations and determine which applicants will receive second interviews. (Keefe Testimony).

28. The Assistant Parole Supervisor, and two field parole officers (the panel) interviewed the Appellant on December 6, 2018. The panel rated the Appellant's answers to questions on a 1-4 scale, with 1 being below average and 4 being excellent. They scored the Appellant 3's and 4's on education, awards, achievements, volunteerism, problem solving, and in all areas of skills and attributes such as communication skills and demeanor and attitude. The notes from the interviews reflect the Appellant's awards and achievements in the military, his ability to deescalate a potential conflict or violent situation, and significant career accomplishments such as stopping an armed robbery while a police officer in Weymouth. The panel gave the Appellant low marks (1's) on current/most recent employment work experience and current/most recent work accomplishments. (Ex. 4).

29. On January 15, 2019, the MPD conducted a home visit with the Appellant. During the home visit, the Appellant provided two letters of reference and his personnel file from WPD, which included the Notice of Administrative Leave and resignation letter. The Appellant explained at that visit that he had been a witness to a crime and that his aunt had asked him to drop or reduce the charges for the defendant. (Ex. 5)

30. After the Appellant signed a waiver for the WPD, the Parole Board's background investigator spoke to the WPD about the Appellant's resignation. (Ex. 5; Appellant Testimony). The Parole Board's background investigation report states,

> An investigation was initiated after a female defendant who had been arrested by Weymouth Police for driving under the Influence. The Defendant stated that [the Appellant] had contacted her online and suggested he would not testify against her if she entered a dating relationship with her. When the Norfolk County District Attorney's Office found out these allegations an investigation was opened. The Norfolk County District Attorney's Office had to dismiss the charges against the female defendant. Norfolk County District Attorney's Office also considered filing criminal charges against subject. At this time Norfolk County District Attorney's Office notified Weymouth Police that [the Appellant] would no longer be a suitable witness in any criminal cases. (Ex. 5) (emphasis added).[5]

31. The background investigation included the fact that the Appellant has no criminal history, earned a bachelor's degree in criminal justice, and that the Appellant's references characterized the Appellant "a stand-up guy" and "one of the best guys he ever had." (Ex. 5).

32. The Appellant's second interview occurred on February 6, 2019 and was conducted by Mr. Keefe and the then-parole supervisor. The Appellant told the interviewers that he was put on administrative leave at the WPD and that the union told him to resign that day. The Appellant offered to provide the Facebook messages for Mr. Keefe to review. (Ex. 6; Keefe Testimony).

33. The Appellant provided Mr. Keefe with some of his Facebook messages between Ms. A and himself via email. (Ex. 8, 9 and 10; Appellant Testimony; Keefe Testimony). He also sent his Facebook messages to his aunt about Ms. A. The Appellant explained in his email that he had reached out to Ms. A in 2016 only after Ms. A had contacted his aunt, and that he would have fought this incident had he spoken to a lawyer or known about an appeal process. A letter of support written by his aunt was attached to the email. (Ex. 8).

34. When Mr. Keefe reviewed the Facebook messages between the Appellant and Ms. A, he found them to be concerning because the Appellant was clearly a witness in a criminal case; the Appellant's communication with the criminal defendant was improper; the Appellant had initiated that communication; that, as a police officer, the Appellant had the obligation to testify but tried not to; and that the Appellant called Ms. A. "beautiful" and "hun," assuming an appearance of familiarity that Mr. Keefe believed to be inappropriate. Mr. Keefe questioned the Appellant's ability to maintain his obligations as a parole officer since parole officers frequently do come across people they know and must maintain their professional obligations. Parole officers must occasionally testify in court and Mr. Keefe was also concerned that the Appellant would not be able to fulfill that part of the job duties. Mr. Keefe believed

5. The underlined text of the Parole Board's background investigation report quoted here is similar to the wording in the D.A.'s July 10, 2017 letter to the WPD (Ex. 11), noted in Fact 17 *supra*.

that the messages showed the Appellant lacked good judgment and that the communications were a "significant red flag" compared to the other candidates. He made this conclusion after reading the messages prior to receiving the investigative report from the WPD in late February 2019. (Keefe Testimony).

35. The Parole Board bypassed the Appellant for a position as FPO based on his negative work history. (Keefe Testimony). The notification of bypass informed the Appellant that fifteen applicants bypassed the Appellant and stated that the Appellant, although he had several positive attributes such as military awards and police commendations, was not selected because of the circumstances related to his resignation from the WPD stating:

> "Prior to being placed on Administrative Leave, the Norfolk County District Attorney's Office notified the Weymouth Police Department that the candidate would no longer be suitable to testify in criminal matters, due to his involvement with a defendant who had been charged with Operating Under the Influence of Liquor. The candidate, while en route to his shift at the Police Department in February 2016, had witnessed the defendant driving erratically and called it in to the station, resulting in an arrest. After the arrest, the candidate discovered that the defendant was a friend of his Aunt. He provided the Chief of Field Services with copies of text messages with his aunt, as well as Facebook messages with the defendant, in support of his assertion of no wrongdoing on his part. However, the Facebook messages include inappropriate communications in which he discusses efforts to convince the Assistant District Attorney that he is not required to testify, as they are "friends." He also refers to the defendant as "a beautiful person, inside and out" and mentions seeing her profile on Match.com The District Attorney's Officer ultimately dismissed charges against the defendant. The Weymouth Police Department provided a copy of its investigation into the matter, which included findings that the candidate had originally run the defendant's motor vehicle license plate in 2014 and reached out to her to see if she would be interested in dating. The Weymouth Police Department found that the candidate's use of CJIS data was a violation of departmental rules and DCJIS regulations. Parole Officers must display a high level of trustworthiness, discretion and responsibility in the performance of their duties. As a police officer, this candidate failed to meet the requisite qualities required for the position." (Ex. 15).

36. The candidates who ranked lower than the Appellant on Certification 05894 (Applicants A-O) had no prior negative work history. No candidate had an outstanding issue on his or her background investigation report.[6] (Ex. 16, A-O).

LEGAL STANDARD

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991)(bypass reasons "more probably than not sound and sufficient" and upon "failure of proof by the [appointing authority], the commission has the power to reverse the [bypass] decision."). The governing statute, G.L. c. 31, § 2(b) gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 426 Mass. 1102 (1997). The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority"; however, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.". *Id*. *See also Town of Brookline* v. *Alston*, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law). That said, "[i]t is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

Within this framework, disputed facts regarding alleged prior misconduct of an applicant must be considered under the "pre-

6. For purposes of this summary, candidates who bypassed the Appellant are named according to their civil service rank. Candidate 13, a veteran, held a Bachelor's degree, had continuous law enforcement experience, and no negative work history. Candidate 16, a veteran, held a Bachelor's degree, worked as a correctional officer, and had no negative work history. Candidate 20, a social worker, was a veteran, held a Master's degree and had no negative work history. Candidate 21, a veteran, had eighteen years of continuous service in the criminal justice system with no negative work history. Candidate 23, a veteran, had a combination of law enforcement experience, education, and special skills and had no negative work history. Candidate 26 held a Master's degree and had a record of "outstanding" work performance, with no negative employment history. Of the four candidates who ranked 30, one had recent and relevant experience, with no negative work history; one had advanced education and licensing, with recent relevant experience, with no negative work history; one had a Bachelor's degree, had worked closely with Field Patrol Officers regarding victim-related issues, with no negative work history; and one had a combination of education, criminal justice experience, with no negative work history. Of the two candidates ranked 38, both held a Bachelor's degree, one had a combination of education and social work history, one had experience dealing with inmates, and both had no negative work history. The first of two candidates ranked 42 held a Bachelor's degree had a broad base of experience dealing with youthful offenders, inmates, probationers, with no negative work history. The second candidate ranked 42 held a Master's degree, had continuous experience in law enforcement and security, and experience with parole-related matters, with no negative work history. Candidate 47 held a Master's degree, multiple certifications, and broad, continuous experience in counseling, criminal justice, and law enforcement, with no negative work history.

ponderance of the evidence" standard of review as set forth in *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461 (2019), as noted above, in which case the SJC upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. *Id*. at 478-79.

ANALYSIS

The Parole Board has shown by a preponderance of the evidence that there was reasonable justification to bypass the Appellant. The MPB conducted two interviews with the Appellant.

The Parole Board determined that the Appellant did not possess the high level of trustworthiness, discretion and responsibility in the performance of duties required of FPO A/B's. The Appellant's non-consideration letter cites to the Norfolk District Attorney's decision that the candidate would no longer be suitable to testify in criminal matters; WPD's investigation of the Appellant's Facebook messages with Ms. A including inappropriate communications about the ADA as well as inappropriate referrals to Ms. A. as a potential social partner through Match.com; and WPD's finding that the Appellant's use of CJIS data for this purpose was a violation of departmental rules and DCJIS regulations. The Appellant disputes the facts underlying these three reasons for bypass.

The Appellant argues that he did not intend to influence Ms. A's trial in 2016 and that he did not use his position as a police officer to gain favor with Ms. A. When he had asked her out on a date in 2014, he accepted her denial and spoke to her through Facebook messaging in 2016 to be "cordial."

Regardless of the Appellant's intentions, the appearance of impropriety regarding Ms. A's alleged criminal conduct is incontrovertible. The Appellant contacted Ms. A to explain he did not know he had reported her erratic driving, telling her that he would "do anything" for his aunt and his aunt's friends. The Appellant knew Ms. A was a criminal defendant in a trial yet the Appellant discussed the trial with her, explaining that he would "push" the ADA to allow him to not testify. He told Ms. A multiple times of his preference not to testify. He told Ms. A to "not tell anyone" about their conversation. These conversations show the Appellant was trying to ingratiate himself with Ms. A through his position as a police officer. These improper statements by a police officer to a criminal defendant *during the criminal proceedings* caused the D.A.'s office to cease prosecution. Put another way, the D.A. was unable to charge Ms. A with operating under the influence solely because of the Appellant's communications with Ms. A. That the Norfolk District Attorney's Office decided to categorically exclude the Appellant from testifying in any further cases because of these messages, and that the Parole Board independently viewed the messages to see whether that office's determination was grounded in fact are justifiable reasons for the Parole Board to exclude the Appellant from consideration.

Other messages to Ms. A also provide reasonable justification for bypassing the Appellant because, as Mr. Keefe testified, the messages demonstrate the Appellant's lack of maintaining professional boundaries with a person within the criminal justice system. For instance, Mr. Keefe noted that the Appellant told Ms. A, "I'm here for you as a friend." He called her "hun" and provided his cell phone number if Ms. A "need[ed] anything." He also stated, "You're a good person and I'm not talking to you as a cop" and that she is "a beautiful person inside and out." The Appellant had initiated conversations with Ms. A, even reaching out to her after a period of no contact to let her know that she had "popped up" on a dating website. Mr. Keefe found these communications, in addition to a "Facebook friend" request, to be troubling for their assumed familiarity with Ms. A, and are even more troubling because they were written while Ms. A was a criminal defendant and the Appellant was a material witness in her case.

The Appellant did not limit his online conversations about Ms. A's arrest to Ms. A. He also wrote to his aunt, who worked with Ms. A, to tell her that Ms. A had been arrested and to ask how Ms. A was doing. He was privy to this knowledge solely because of his position as a police officer and shared that information with the defendant's work colleague. He did this in such a way as to appear to gain information about Ms. A's well-being. Even if the Appellant later told his aunt that he could not discuss the case, his initial contact with his aunt to discuss Ms. A gives the appearance that the Appellant attempted to remain in contact with Ms. A through his aunt, who worked with her and would know "how she was doing."

The Parole Board found that the Appellant's use of the CJIS system that occurred in 2014, while the Appellant worked for WPD, was also a reason to bypass the Appellant. The parties stipulated that officers may randomly check license plates for criminal justice purposes.[7] The act of finding Ms. A's registration information during a random search, however, is not the problem here. The information from CJIS may only be used for express reasons, none of which include contacting the driver and informing her he ran her plate in a location near her apartment.[8] In 2014, the Appellant messaged Ms. A to tell her he "ran her plates," that he was a police officer, and in the same discussion asked her to go on a date with him. In those messages, he appeared to have flaunted his position and used information he gained from being a police officer to have an excuse to contact Ms. A and ask her on a date. It may be that seeing her registration while engaging in legal, criminal justice employment duties was unrelated to the Appellant's contact with Ms. A, as the Appellant argues, but when Ms. A asked how the Appellant knew he had seen her drive by, he told her he was a police officer and had accessed her information while at work. Mr. Keefe's determination that the Appellant showed a lack of judg-

7. Random inquiries to the DMV are permissible. *Comm.* v. *Starr*, 55 Mass. App. Ct. 590, 594 (2002) ("police-instigated search of registration data does not implicate a privacy right.").

8. The CJIS shall only be accessed for authorized criminal justice purposes, including: (a) criminal investigations, including motor vehicle and driver's checks; (b) criminal justice employment; (c) arrests or custodial purposes; (d) civilian employment or licensing purposes as authorized by law and approved by the FBI; and (e) research conducted by the [criminal justice agency]. 803 CMR 7.09 (2).

ment in using CJIS this way is reasonable justification to have bypassed the Appellant, particularly when all of the Appellant's messaging history with Ms. A is viewed in its entirety.

When Mr. Keefe questioned the circumstances of the Appellant's resignation from the WPD, he provided the Appellant the opportunity to explain the situation. After the Appellant provided Facebook messages underlying WPD's allegations against him, Mr. Keefe carefully reviewed those. The partial messages that Mr. Keefe saw, in addition to the ones included in Ex. 9A, were enough to cause significant concern about the Appellant's ability to separate his personal and professional lives. This "red flag" was enough to outweigh the Appellant's positive attributes.

The Parole Board has articulated specific, rational reasons supporting their conclusion, after a thorough and impartial hiring process, that the Appellant's work history had negative aspects that overwhelmed his positive attributes. The Parole Board has shown by a preponderance of evidence that there was reasonable justification for bypassing the Appellant.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-19-095 is hereby ordered ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on June 3, 2021.

Notice to:

David P. Cortese, Esq.
Law Office of David P. Cortese, P.C.
426 Pakachoag Street
Auburn, MA 01501

Courtney E. Doherty, Esq. Counsel
Massachusetts Parole Board
12 Mercer Road
Natick, MA 01760

* * * * * *

In Re: REQUEST BY: MICHAEL WANDELL for the Civil Service Commission (Commission) to investigate whether the State's Human Resources Division (HRD) was justified in allowing the Town of Wilmington's request to extend the eligible list for police sergeant

I-21-074

June 3, 2021
Christopher C. Bowman, Chairman

Investigation Request-Wilmington Police Sergeant List Extension—The Commission declined to initiate an investigation into the decision of HRD to allow the extension of a Wilmington eligible list for promotion to police sergeant after the Appellant did not identify any alleged personal or political animus that warranted such an investigation.

RESPONSE TO REQUEST FOR INVESTIGATION

On April 1, 2021, Michael Wandell (Mr. Wandell), a police officer for the Town of Wilmington (Town), pursuant to G.L. c. 31, § 2(a), filed a request for investigation with the Civil Service Commission (Commission), asking the Commission to open an investigation regarding whether the state's Human Resources Division (HRD) was justified in allowing the Town of Wilmington's request to extend the eligible list for police sergeant.

2. On May 18, 2021, I held a show cause conference via videoconference which was attended by Mr. Wandell, counsel for the Town, the Town's Police Chief, the Town's Deputy Police Chief and the Assistant Town Manager/Director of Human Resources.

3. For all of the reasons discussed at the Show Cause Conference, including that the Appellant did not identify any alleged personal or political animus regarding the decision to extend the eligible list, the Commission will not open an investigation regarding the extension through July 2, 2021.

4. For the reasons discussed at the Show Cause Conference, if any names remain on the eligible list beyond July 2, 2021, the Petitioner may renew his request for investigation regarding HRD's decision to extend the list through February 1, 2022.

For these reasons, CSC Tracking No. I-21-074 is ***closed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 3, 2021.

Notice to:

Michael Wandell
[Address redacted]

Joseph S. Fair, Esq.
KP Law
101 Arch Street
Boston, MA 02110

Melissa Thomson, Esq.
Human Resources Division
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Boston, MA 02114

* * * * * *

JOSEPH BRANGWYNNE, DAVID FEYLER and WILLIAM KING

v.

HUMAN RESOURCES DIVISION

E-21-092

June 17, 2021
Christopher C. Bowman, Chairman

Non-Bypass Appeal-Extension of Eligibility List-Billerica Fire Captain—The Commission declined to intervene at the premature request of three Billerica firefighters seeking an extension of the current captain's promotional list where two of them would be tied for second on the current list, slated to expire in November of 2021, and therefore eligible for appointment.

ORDER

On April 27, 2021, Joseph Brangwynne, David Feyler and William King (Appellants), all members of the Town of Billerica (Town)'s Fire Department (BFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission) stating: "*Smith* v. *Billerica* (G2-18-079) ordered the promotional list for fire captain, established 4/11/2017, remain active until Smith was promoted or bypassed. Smith was promoted 4/20/21. We are requesting the subsequent list held in abeyance now receive an adequate length of certification."

On June 8, 2021, I held a remote pre-hearing conference which was attended by Appellants Brangwynne and King and counsel for the state's Human Resources Division (HRD).

The following facts are not in dispute:

1. On December 20, 2018, the Commission, after concluding that the bypass of then-Lieutenant Jason Smith was not justified, issued a decision allowing Lt. Smith's appeal and ordered appropriate remedial relief. (*Smith* v. *Billerica*, 31 MCSR 400 (2018)); affirmed by the Superior Court on November 4, 2020 (*Billerica* v. *Smith*, Middlesex Sup. Crt. No. 2019-00176 (2020)).

2. The Commission's decision in *Smith* ordered in part that the eligible list for Fire Captain in place at the time, which had been established on April 11, 2017, remain in place until Smith was subsequently promoted or bypassed for the next Fire Captain vacancy.

3. On April 2, 2021, Smith was promoted to the next available vacancy for Fire Captain.

4. But for the Commission's order, a new eligible list would have been established on July 1, 2019.

5. Concurrent with the promotional appointment of Smith, the new eligible list is now effective April 2, 2021.

6. Appellants Brangwynne and Feyler are tied for second on the new eligible list and Appellant King is ranked fourth.

7. Other than the vacancy filled by Smith, no other Fire Captain vacancy has occurred in the BFD since July 1, 2019, when the new eligible list would have been established had it not been for the remedial relief ordered by the Commission in *Smith*.

DISCUSSION/ANALYSIS

As part of the pre-hearing conference, the Appellants indicated that they were primarily seeking a clarification regarding when the "new" eligible list would expire and, depending on the expiration date, whether and how an extension could be granted.

Section 25 of G.L. c. 31 states in relevant part that:

> " … Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established …"

Generally, HRD has a longstanding practice of revoking an eligible list two (2) years after it was established unless no new eligible list has been established, in which case HRD extends the eligible list to three years from the first day of the month in which the underlying promotional examination was given. Here, in which no new eligible list has been established, that would result in the eligible list for Billerica Fire Captain expiring on November 1, 2021.

I see no reason at this time for the Commission to intervene in regard to the November 1, 2021 expiration date. Setting aside the one vacancy which was the subject of the appropriate remedial relief in the *Smith* decision, there have been no other vacancies for which the Appellants should have been considered had the eligible list been established on July 1, 2019. The Appellants referenced

a potential vacancy occurring in July 2021. If that should occur, two of the Appellants, currently tied for second on the eligible list, would be eligible for consideration consistent with the 2N+1 statutory formula.

Further, any intervention by the Commission at this time would be premature. Any request for an extension of the eligible list from the current expiration date of November 1, 2021 would need to be initiated by the Town and reviewed by HRD.

CONCLUSION

For all of the above reasons, the Appellants' appeal under Docket No. E-21-092 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

Notice to:

Joseph Brangwynne
David Feyler
William King
[Addresses redacted]

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street—Suite 600
Boston, MA 02114

* * * * * *

BRANDON JOSEPH CASTATER

v.

BOSTON POLICE DEPARTMENT[1]

G1-18-027 and E-18-028

June 17, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment to the Boston Police Department-Criminal History-Fighting-Violence-Withdrawal of Academy Sponsorship—Hearing Commissioner Cynthia A. Ittleman denied the appeal of a candidate for original appointment to the Boston Police Department who was forced to withdraw from the Academy after the City belatedly took into account two criminal charges against him suggesting a proclivity to violence and poor anger management. Although the charges from both incidents had been dismissed, the Boston Police Incident Reports told of the candidate throwing a drunk to the pavement, causing him traumatic brain injury, and beating an ex-girlfriend's brother with a bat.

DECISION

On February 27, 2018, Brandon Joseph Castater (Appellant or Mr. Castater), pursuant to G.L. c. 31, § 2(b), filed two (2) appeals with the Civil Service Commission (Commission): a bypass appeal, docketed as G1-18-027, and an equity appeal, docketed as E-18-028, contesting the decision of the Boston Police Department (Department). A pre-hearing conference was held on March 20, 2018, after which Commission Chair Christopher Bowman issued a procedural order memorializing the parties' mutual agreement that the matter would go forward as a bypass appeal. I held a hearing on May 30, 2018 at the offices of the Commission.[2] The hearing was digitally recorded and the parties were given a CD of the recording.[3] Both parties submitted proposed decisions. As noted herein, based on the facts and the applicable law, the appeal is denied.

FINDINGS OF FACT

Fifteen (15) Joint Exhibits were entered into evidence at the hearing and one (1) Exhibit was entered into evidence on behalf of the Appellant. Based on the documents submitted, the testimony of the following witnesses:

Called by the Boston Police Department:

- Sgt. Det. Gary Eblan, Boston Police Department
- Superintendent Frank Mancini, Boston Police Department

Called by Brandon Castater:

1. Attorney Katherine Sarmini Hoffman represented the Boston Police Department at the time of the hearing in this case but no longer works at the Boston Police Department.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss 1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

3. 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

- Brandon Castater, Appellant
- Ms. A
- Ryan Hewett

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

Prior Hiring Cycles

1. In 2015, Mr. Castater, after taking and passing a civil service examination, undergoing a background investigation, passing the medical screening and completing the physicial abilities test, was appointed as a Boston police officer, subject to completing the Police Academy. (Stipulated Fact).

2. Due to an injury, Mr. Castater withdrew from the 2015 Academy. (Stipulated Fact).

3. On February 22, 2017, HRD, at the request of the Boston Police Department, sent Certification No. 04401 to the Boston Police Department. (Stipulated Fact).

4. Mr. Castater was tied for 71st of those who signed the Certification. Of the one hundred twenty (120) candidates that were selected for appointment by the Boston Police Department, sixty-two (62) were ranked below Mr. Castater. (Stipulated Fact).

5. Following a background investigation conducted by Detective Molwyn Shaw, Detective Shaw presented his report of Mr. Castater's background to the "round table" of Department officials. Thereafter, Mr. Castater was given another conditional offer of employment from the Department and was again enrolled in the Police Academy in September 2017. (Stipulated Fact).

6. During the course of discovery in another case (either an arbitration or another civil service appeal) and *after* Mr. Castater had already entered the Boston Police Academy in 2017, the Department re-reviewed Mr. Castater's 2015 and 2017 background investigation and determined that it was necessary to *further* investigate two (2) incidents involving Mr. Castater, which were described in a 2009 Boston Police Incident Report and a 2011 Boston Police Incident Report. (Joint Exhibits 2 and 3; Testimony of Eblan; Testimony of Mancini).

7. Superintendent Frank Mancini testified on behalf of the Department at the hearing of this matter. He leads the Boston Police Department's Bureau of Professional Development, which oversees the Internal Affairs Unit, the Anticorruption Unit, and the Recruit Investigations Unit (RIU). As a result of discovery in another case, referenced above, Superintendent Mancini was directed to conduct a review of the prior (2015 and 2017) background investigations that the Department undertook of Mr. Castater, specifically focused on two incidents of alleged violence that were detailed in the 2009 Incident Report and the 2011 Incident Report. (Testimony of Mancini).

8. Superintendent Mancini ordered Sgt. Det. Gary Eblan (Sgt. Det. Eblan) to undertake the review of Mr. Castater's two prior background investigations in early January 2018. (Testimony of Eblan and Mancini). Sgt. Det. Eblan has been employed by the Department since 1989 and earned his Sergeant Detective rating in 2015. He has been the Recruit Investigations Supervisor since November 2017 and reports to Deputy Superintendent Jeffrey Walcott and Superintendent Mancini of the Bureau of Professional Standards. Sgt. Det. Eblan was not part of the RIU when either of the two previous background investigations were conducted relative to Mr. Castater's candidacy. (Testimony of Eblan).

9. Previously, Sgt. Det. Eblan worked as a patrol officer in Dorchester, the Motorcycle Unit, the Youth Violence Strike Force Unit, and in the Anti-Corruption Division. Additionally, he has worked as an instructor at the Boston Police Academy (Academy), where he taught defensive tactics, use of force, and patrol procedures. He has developed an in-service use of force training for the entire Department. He has also served as the Registrar of the Academy. (Testimony of Eblan).

The 2009 Incident

10. As part of his investigation of the 2009 Incident, Sgt. Det. Eblan reviewed the 2009 Boston Police Incident Report, Mr. Castater's Board of Probation (BOP) Record, the court docket, the Computer Aided Dispatch (CAD) sheet which details the 911 call, and he interviewed percipient witnesses. Sgt. Det. Eblan noted that the CAD sheet was a new piece of evidence that the Department had not procured prior to his re-investigation. All other documents had been procured by the 2015 RIU background investigator (Detective Wayne Williams) and the 2017 RIU background investigator (Detective Molwyn Shaw). (Testimony of Eblan; Joint Exhibits 2, 3, 4, 5, 6, 7, 8, 9 and 11).

11. The court docket (#0907CR00532) indicates that Mr. Castater was arraigned in the Boston Municipal Court on September 18, 2009 on two (2) felony charges: Assault and Battery with a Dangerous Weapon and Breaking and Entering in the Nighttime with the Intent to Commit a Felony. The cases were disposed of by the Court on January 11, 2010, on the day of the scheduled jury trial, for want of prosecution. (Joint Exhibit 7).

12. As part of the *2015* RIU background investigation, Detective Williams requested that Mr. Castater provide an explanation about this incident in writing, asking him to explain what happened in his own words. Mr. Castater wrote: "In September 2009 I was summonsed to appear in the Boston Municipal Court for charges of assault and battery with a dangerous weapon and breaking and entering at night. To the best of my recollection I never testified or provided testimony in that instance, but I do vaguely remember being asked to publicly address the presiding judge…." (Joint Exhibit 5; *see* Fact 23 and Joint Exhibit 7 *infra* regarding the court record of the charges).

13. A police report written by Officer Creavin states that he and Officers Morano and Principe,

> " … responded to a R/C for a home invasion at [street address in Boston]. Upon arrival officers spoke to Mr. [A], who stated that his daughter, [Ms. A] and his son [son of Mr. A] had an argument earlier. [The son of Mr. A] then stated that [Ms. A's] ex-boyfriend, suspect Brandon Castater, who the daughter still talks to, barged in the house with 2 unknown friends and began to beat the victim [son of Mr. A] up, [Mr. A] stated that suspect had a small baseball bat that he was using to beat [son of Mr. A] over the head with. [Mr. A] grabbed one of the suspects to break up the fight. Suspects fled in a black Lincoln sedan. Suspect lives in unknown location in West Roxbury. When police and ambulance arrived at [street address] victim had already left the house. Officers searched area for victim and suspect to no avail. [Mr. A] advised to recontact 911 if son returns for medical attention. Officers observed turned over furniture, hole in kitchen wall, and a broken kitchen window with blood drops throughout the house to be further investigated by C-11 detectives. (sic)" (Joint Exhibit 2)(*see also* Joint Exhibit 9 and Testimony of Eblan)

14. Unlike the Recruit Investigations detectives in 2015 and 2017, Sgt. Det. Eblan actually spoke to each and every witness listed in the 2009 Boston Police Incident Report. Specifically, he spoke to the three (3) police officers listed in the report and persons who were at the scene of the alleged crime. (Testimony of Eblan; Joint Exhibit 12).

15. At the direction of Superintendent Mancini, Sgt. Det. Eblan spoke with Ms. A, Mr. Castater's ex-girlfriend, on January 11, 2018 by telephone about the 2009 incident at her father's house. Ms. A told Sgt. Det. Eblan that she does not recall calling Mr. Castater to come to her home that evening due to a fight with her brother. She also told Sgt. Det. Eblan that Mr. Castater typically would not let himself into her father's house, he would ring the bell to be let inside. (Testimony of Eblan; Joint Exhibit 12).

16. After this interview ended, Ms. A called Sgt. Det. Eblan back roughly five to ten minutes later. In this second phone conversation, Ms. A told Sgt. Det. Eblan that she remembered going to court with Mr. Castater but does not remember what happened. She remembered that she went to Mr. Castater's father's home after the incident and they took a picture of a bruise on her head but she did not remember how she got the bruise. (Testimony of Eblan; Joint Exhibit 12).

17. At the Commission hearing, Ms. A confirmed that a Boston Police detective called her in 2018 and asked her about the 2009 incident. She was wary that the detective was calling her out of the blue, asking about her relationship with her father, her brother, and Mr. Castater. After the phone call, she immediately called Mr. Castater and told him that she "wasn't the most forthcoming with him (Sgt. Det. Eblan) and he [Sgt. Det. Eblan] told me to call him back." (Testimony of Ms. A).

18. Ms. A admitted not being forthcoming the first time Sgt. Det. Eblan called her and that, when she called him back, she said that this time she was being honest with him. She also admitted in her second phone conversation with Sgt. Det. Eblan that she wants to see Mr. Castater become a police officer. (Testimony of Ms. A).

19. Sgt. Det. Eblan also spoke to Mr. A on the telephone relative to the 2009 Incident on January 12, 2018. Mr. A is Ms. A's father. Mr. A told Sgt. Det. Eblan that he recalled that his two children were having an argument that evening back in 2009, that he heard a lot of yelling and he went downstairs to calm everyone down. Mr. A said that he remembered seeing Mr. Castater leaving the house. He thought that Mr. Castater had come to his house with two other people but he was unsure. Sgt. Det. Eblan asked Mr. A if he saw Mr. Castater with a bat that night. Mr. A answered that he never saw him with a bat and did not even recall telling the officers that. He did not recall if his son was injured. He also told Sgt. Det. Eblan that when Mr. Castater was dating his daughter, Mr. Castater would often come into the house and would let himself in, that the doorbell didn't work, and that he rarely locked his door. When asked about damage to the house as a result of the 2009 incident, Mr. A said that he did not recall any hole in the wall or a broken window in connection with the reported breaking and entering in 2009. During their phone conversation, Mr. A also told Sgt. Det. Eblan that he thought that Mr. Castater would make a good police officer even though Sgt. Det. Eblan had never mentioned anything about Mr. Castater's application to the police Department during his phone call with Mr. A. (Joint Exhibit 12; Testimony of Eblan).

20. Sgt. Det. Eblan also contacted Mr. A's son, who is Ms. A's brother, who was cited in the 2009 Incident Report. During this January 12, 2018 phone call, Mr. A's son told Sgt. Det. Eblan that he had already spoken to a detective and said everything he had to say about this incident and that he did not want to talk about it again. Sgt. Det. Eblan asked Mr. A's son if Mr. Castater had a bat during the 2009 incident, as reported in the 2009 Incident Report. Mr. A's son denied that Mr. Castater had a bat during the 2009 incident. Asked if Mr. Castater entered his home with other people during the 2009 Incident, Mr. A's son said that he could not recall. In addition, Mr. A's son would not answer Sgt. Det. Eblan's question as to whether or not he and Mr. Castater got into a physical confrontation at the 2009 incident. Instead, Mr. A's son said, "I already told the detective what happened", alleging that it was all a big misunderstanding. Without any prompting, Mr. A's son added, "Castater would make a good Boston Police Officer" even though there had been no mention of Mr. Castater's application to the Department for a police officer position. (Joint Exhibit 12; Testimony of Eblan).

21. During the course of Sgt. Det. Eblan's investigation, Mr. Castater was notified on January 8, 2018 of a pending dismissal by the Department based on the incident reported in Boston Police Incident Report #090401300 and Boston Police Incident Report #110523084. Mr. Castater was given the opportunity to submit an explanation to the Department of those two incidents, which he did. (Joint Exhibits 1, 2, 3, 10 and 11).

22. In response to the notice of a pending dismissal, Mr. Castater provided a written statement dated January 8, 2018 to Department. In his January 8, 2018 written statement, Mr. Castater admitted that he went to his ex-girlfriend's home in the early morning of July 18, 2009, stating that he went there to help his ex-girlfriend because she said she had been hurt by her brother. Mr. Castater wrote that when he got there, he went right in through the front

door without ringing the bell because he thought he had permission to do so. Mr. Castater further wrote that his ex-girlfriend's brother and several of his friends began to punch and kick him, causing Mr. Castater to back out of the house and run away. Mr. Castater denied in his written statement that he went to Mr. A's house with friends or that he had a bat with him there. Further, he wrote that he was summonsed to court regarding the 2009 incident but asserted, "When I appeared in court, the charges were dismissed prior to arraignment." (Joint Exhibit 11; *see also* Testimony of Castater).

23. The certified court docket for this 2009 case (#0907CR00532) indicates that the felony charges of (1) Assault and Battery Dangerous Weapon and (2) Breaking and Entering in the Nighttime with the Intent to Commit a Felony were *not* dismissed before arraignment. Mr. Castater was indeed arraigned on the charges on September 18, 2009 at the Boston Municipal Court, wherein he was released on his own personal recognizance. A second court appearance, the Pre-Trial Conference, was held on October 23, 2009. A third court appearance, for a jury trial, was scheduled for January 11, 2010, four (4) months after arraignment. However, on the January 11, 2010 trial date both charges were dismissed for want of prosecution. (Joint Exhibit 7)

24. Following Sgt. Det. Eblan's investigation of this 2009 incident, he discussed his findings with Superintendent Mancini, his supervisor. Thereafter, Superintendent Mancini personally reviewed the 2009 Police Incident Report, Mr. Castater's 2015 and 2017 Department Recruit Files (including the two Privileged Confidential Memoranda (PCM) written by the 2015 and 2017 background investigators), the court dockets, Mr. Castater's supplemental explanation of the 2009 incident, Mr. Castater's written statement in the file from January 2018, and Sgt. Det. Eblan's lengthy and detailed report. (Testimony of Eblan; Testimony of Mancini).

25. Superintendent Mancini met with the Boston Police Commissioner thereafter and discussed the details of Sgt. Det. Eblan's report and informed him of the pertinent facts of the 2009 incident. Superintendent Mancini pointed out to the Police Commissioner that Mr. A initially told the police at the scene in 2009 that Mr. Castater brought two other people with him to enter Mr. A's house that morning and that Mr. Castater had a bat with him. He explained to the Police Commissioner that presently Mr. A cannot recall if Mr. Castater had a bat during the 2009 incident. (Testimony of Mancini).

The 2011 Incident

26. With respect to the 2011 incident, Sgt. Det. Eblan reviewed the incident report, court records, and spoke with percipient witnesses. Specifically, Sgt. Det. Eblan phoned the four (4) police officers listed in the 2011 Incident Report, the victim (Mr. H), a percipient witness (Mr. S), Ryan Howell who was with Mr. Castater that evening, and also two (2) women (Ms. D and Ms. S)[4] who were present with Mr. Castater during the incident.[5] (Testimony of Eblan; Joint Exhibit 12). Sgt. Det. Eblan also reviewed the report of a private investigator who had been retained by the attorney who represented one of the people with Mr. Castater at the 2011 incident and who was also criminally charged for the 2011 incident. (Joint Exhibit 11).

27. Sgt. Det. Eblan had a significant and detailed phone conversation with Mr. S about what he witnessed of the 2011 incident. Of his conversation with Mr. S, Sgt. Det. Eblan wrote,

> "Interview of Witness [Mr. S], on 1/11/18. Mr. [S] lives in … Maine. He was contacted at [a Maine phone number]. He remembered the incident and stated the following: On the night of the incident he was working as a doorman at the Cactus Club on Boylston St. when he was outside tending to his cleaning duties at the outside tables. He believed it was after midnight at the time **he observed the incident**. **The victim in the incident had too much to drink and was stumbling down Boylston St. He went on to say the victim wasn't violent and there were no words exchanged between the parties**. [Mr. S] stated to me there was no dialogue between the group and the victim, and **when the victim stumbled into the group one guy gave him a really big shove to the point that caused both his feet to come off the ground and he landed on his head knocking him unconscious and causing his head to bleed**. He stated all five individuals then **fled on foot**. He stated he held the victim by the head until the police and EMT's (sic) arrived. He didn't think the guy was going to make it. I asked what he meant by that and he said he thought the guy was going to die. He stated **the victim was not looking for a fight and there were no words exchanged between the parties**. I asked him if he spoke to a private investigator about the incident approximately four months later. He stated not in person but he did talk to an investigator on the phone. [Mr. S] thought the person he was talking to was a Boston Police Officer following up on the investigation. I asked if that lineperson told him he was a Boston Police Officer to which he replied 'I don't recall him telling him (sic) me was a Boston Officer but I thought that he was.' **I read the investigators (sic) report to him and asked him if it was accurate from his recollection of talking to this investigator. He stated it was not accurate**. The investigative report indicates [Mr. S] stated that he and the bar manager heard an argument outside and went to see what was happening. The investigative report goes on to say the kid who was alone, kept harassing the three guys and two girls and that he heard the guys ask the drunk kid several times to leave them alone. The report goes on to say the drunk kid wouldn't listen and kept harassing the group. This went on for several minutes. [Mr. S] stated **this is not what he told the investigator and not what happened**. The private investigator wrote that [Mr. S] stated he didn't push him very hard and that the drunk kid was on a portion of the sidewalk that was uneven and on a slight incline. The drunk kid lost his balance and fell back and hit his head. The investigative report indicates [Mr. S] stated if it were not for the defective sidewalk the kid would probably not have fallen down and that he just lost his balance. [Mr. S] told me **this is not**

4. All parties to this bypass appeal are aware of all of the witnesses' and co-defendant's full names and contact information; however, their identity will remain confidential for purposes of this written Decision and in the recording of this hearing. Those witnesses who testified at the bypass appeal hearing have voluntarily revealed their full identity and are referred to by their full name.

5. Sgt. Det. Eblan did not interview Mr. Castater or another friend, who was also a co-defendant, relative to this 2011 incident because the charges could be reinstated should the prosecutors so choose.

> **accurate** and that **both the guys (sic) feet came off the ground because of being pushed**.
>
> The investigative report states the investigator asked [Mr. S] if he had an opinion as to who was the aggressor in the incident and that [Mr. S] replied 'It was the drunk kid. He just would not leave the people alone. [Mr. S] stated to me that is **not accurate because the victim was not aggressive at all** and he was just stumbling up the street and when he stumbled into the group he was pushed down causing his injuries. He [Mr. S] stated he remembers being brought in a department cruiser to identify the group. He stated he stayed in the m/v and was able to identify the person responsible. He stated it was a female officer driving the cruiser and she drove him back to the Cactus Club. [Mr. S] was asked by the private investigator when the officers brought him to identify the person who pushed the drunk kid **if he recalled having an exchange of words with one of the five people that the police stopped on Haviland St. to which [Mr. S] stated 'No I was in the back seat of the police car with the windows rolled up**.' Note: There was an initial witness who stopped P.O. Moriarty to report this assault. This witness went down Haviland St. where Moriarty had the five suspects stopped and according to the 1.1 he identified suspect 1, Brandon Castater, and stated 'yup that's them right there'. According to the 1.1 the suspects yelled at the witness 'He started it' to which the citizen replied 'You slammed him to the ground'. This witness left the area without giving the officers his information. [Mr. S] did not know there was a second witness who identified the responsible party before he did and the words exchanged between them. **I asked [Mr. S] if he believed the private investigator took liberties with his recollection of the incident as to how his report was written and he stated yes, he did**."[6]

(Joint Exhibit 12) (emphasis added). (*See also* Joint Exhibit 3 and Testimony of Eblan)

28. Sgt. Det. Eblan interviewed Mr. H, the victim, on January 15, 2018 via telephone. Mr. H resides in California and indicated that he was in Boston on a business trip on the date of the 2011 incident. He indicated that his memory is not as good as it used to be before the incident. He remembers that he was walking back to his hotel and the next thing he can recall is waking up in the hospital with his head strapped to the bed in a head brace. When the back of his head hit the cement, it caused his brain to hit the front part of his skull, causing bleeding on the brain and severing his olfactory nerve so that he has lost his sense of smell. (Testimony of Eblan; Joint Exhibit 12).

29. Mr. H told Sgt. Det. Eblan that he had been in touch with the District Attorney's Office and that both the DA's Office and the victim-witness advocate were very helpful to him. They told him that his case did not go to trial because the witness was not able to appear because he lived out of state. Mr. H recalled that the witness lived in Maine. He told Sgt. Det. Eblan that he hopes that the person who did this to him will be brought to justice but understands that, without a witness, they probably would not be successful in court. (Testimony of Eblan; Joint Exhibit 12).

30. As noted in the 2011 Court Docket #1101CR00590, Mr. Castater was arraigned on September 27, 2011 in the Dorchester District Court and charged with a felony, Assault and Battery with a Dangerous Weapon, to wit—the sidewalk. After nearly ten (10) scheduled court appearances from 2011-2013, the case was scheduled for trial on January 7, 2013. On the trial date, the prosecution indicated that it was not ready for trial and the case was dismissed by the Court for want of prosecution. (Joint Exhibit 8).

31. In his January 8, 2018 written statement in response to the then-pending Department dismissal action, Mr. Castater wrote that in the early morning of September 26, 2011, he was walking with some friends and they saw a man who was very drunk. A short time later, Mr. Castater alleged in his written statement that he suddenly felt someone throw his arms around his shoulders from behind and that his immediate reaction was to turn around and push the person off of him. Mr. Castater wrote that "the man took one step back and fell off the curb hitting his head on the street as he fell. **He appeared to be unconscious**." (Joint Exhibit 11)(emphasis added). Mr. Castater reported that a bartender came outside and told him that he called an ambulance. Mr. Castater wrote that he left the area but he was soon stopped by a Boston Police Officer, was identified by a witness as the person who assaulted the drunken man and was placed under arrest along with one of his male friends. (*Id*.).

32. At the conclusion of his investigation, Sgt. Det. Eblan prepared a final, extensive investigative report describing his investigation of the 2009 and 2011 incidents and presented his report to Superintendent Mancini. (Joint Exhibit 12; Testimony of Supt. Mancini).

33. Superintendent Mancini acknowledged that there was no information "missing" from the prior RIU (2015 and 2017) investigations and that the Department could have gathered additional witness statements prior to 2018 but that the Department now wanted to know who initiated contact in these two violent altercations—was it an issue of self-defense—did Mr. Castater over-react—was he under the influence of alcohol? The Police Commissioner wanted to rely on more recent information and wanted to determine if there were any inconsistencies in the witness' recollections. The Police Commissioner "wanted to be sure to make the right decision." (Testimony of Mancini).

34. When Sgt. Det. Eblan's report was completed, Superintendent Mancini briefed the Police Commissioner regarding Sgt. Det. Eblan's investigation and findings. The Police Commissioner was deeply concerned by the Appellant's conduct in both the 2009 and 2011 incidents. Specifically, his concern lay in Mr. Castater's poor judgment, the level of alleged violence, and the use of excessive force. (Testimony of Mancini).

35. The Police Commissioner found that the witnesses' 2018 statements about the 2011 incident remained consistent with their prior statements and that the witnesses' 2018 statements about the 2009 incident were less consistent. The Police Commissioner was troubled by the undisputed fact that Mr. Castater did not stay

6. The reference to a "1.1" appears to be the form for filing police incident reports.

on scene during the 2011 incident to assist the victim, nor did he identify himself to police officers after exerting an inappropriate level of force against another individual. He was concerned that Mr. Castater may have an anger management issue as well. (Testimony of Mancini; Joint Exhibit 12).

36. The Police Commissioner made the decision to withdraw the Boston Police Department's sponsorship of Mr. Castater at the police academy. Superintendent Mancini agreed with the Police Commissioner's decision and explained that the "Police Commissioner wanted to rely on more recent information," to determine if there were "any inconsistencies," and "wanted to be sure the information was not erroneous, to be sure their stories hadn't changed—he wanted assurance because it is career changing." (Testimony of Mancini; *see also* Joint Exhibits 12, 13 and 14).

37. On or about February 13, 2018, Academy staff served in-hand to Mr. Castater a Separation Notice. The letter explained that Mr. Castater was notified on January 8, 2018 of a pending dismissal action based on the two Boston Police Incident Reports at issue. The Department noted that it had given Mr. Castater an opportunity to submit information relative to these two incidents described in the Incident Reports. The letter further noted that the Department conducted a further investigation into the two incidents. Based on the information Mr. Castater provided and the information in the Department's investigation, the Department withdrew its academy sponsorship of the Appellant effective February 13, 2018. (Joint Exhibits 11,13 and 14).

38. Included in the Commission's hearing record are the criminal records of twenty-three (23) Boston Police Academy recruits who were part of Mr. Castater's 2017 Academy class. (Appellant's Exhibit 1).

39. I have reviewed all of the twenty-three (23) criminal histories. Of the twenty-three, eighteen (18) of those recruits' criminal histories contain charges that do not allege violence and are not felonies.[7] (Appellant's Exhibit 1).

40. Five (5) other members of the same Academy class had a criminal history of the following misdemeanor offenses and one (1) felony offense that are generally considered violent offenses:[8]

> Candidate 1: 2006 Assault & Battery (Misdemeanor)
> Dismissed (p. 88)
>
> Candidate 2: 2001Assault & Battery on Police Officer & Resist Arrest (Misdemeanors)
> 3 months CWOF (p. 91)
>
> Candidate 3: 2014 Assault and Battery Dangerous Weapon (Felony)
> Nolle Prosequi (p. 93)
>
> Candidate 4: 2005Assault & Battery on Police Officer, Resist Arrest, Trespass, Disorderly Conduct (Misdemeanors)
> 1 year CWOF (p. 100)
>
> Candidate 5: 2003 Assault & Battery
> 1 year CWOF (p. 102)

(Appellant's Exhibit 1).

APPLICABLE LAW

The core mission of Massachusetts Civil Service Commission is to enforce "basic merit principles" for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. *See*, *e.g*., *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *MacHenry* v. *Civil Serv. Comm'n,* 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass. 1106 (1996). A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law'". *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971) and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient").

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. The Commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority" but, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 426 Mass. 1102 (1997) (emphasis added). The Commission's role, while important, is relatively narrow in scope: to review the legitima-

7. These eighteen (18) candidates' criminal histories contain misdemeanor charges, such as Operating with a Suspended License, Operating After Suspended Registration, Compulsory Insurance Violation, Disturbing the Peace, Minor in Possession of Alcohol, Attaching Wrong Motor Vehicle Plates, Trespassing, Leaving Scene of Property Damage, and Drinking Alcohol in Public. (Appellant's Exhibit 1).

8. Although these charges imply violence, there is no evidence in the record, such as police incident reports, regarding the matters that led to the criminal allegations, the candidates' age at the time of the offenses, or the candidates' reports of what occurred in each case.

cy and reasonableness of the appointing authority's actions. *See Falmouth* v. *Civil Serv. Comm'n,* 447 Mass. 814, 824-26 (2006). In doing so, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *City of Beverly* v. *Civil Serv. Comm'n,* 78 Mass. App. Ct. 182,188 (2010). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct.331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975); and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

ANALYSIS

The Civil Service Commission's mission is to ensure that Appointing Authorities, as part of a fair and impartial hiring process, offer valid reasons for bypassing a candidate in favor of lower-ranked candidates; in this case the analysis requires the determination of whether a municipal police department may withdraw its academy sponsorship of a selected candidate. As part of this review, the Commission must consider whether the Appointing Authority's actions were the result of personal or political bias against the Appellant. Here, the Commission has found none. Both Sgt. Det. Gary Eblan, Supervisor of the Recruit Investigations Unit, and Superintendent Frank Mancini, commander of the Bureau of Professional Development, were credible witnesses. They had a command of the facts and clearly detailed Mr. Castater's hiring journey and how the Department's concerns with his continued candidacy evolved. They were consistent with one another and the concerns they articulated on behalf of the Police Commissioner, the Appointing Authority. I do not find that either of them had any personal animus or political bias against the Appellant.

The Department was not predisposed to bypassing Mr. Castater, as evidenced by the fact that he was given a conditional offer of employment after two (2) prior background investigations, in 2015 and 2017. The Department witnesses credibly testified that, due to discovery in either an arbitration case or another bypass appeal, the Police Commissioner was made aware of Mr. Castater's criminal history and requested that his background be further investigated due to a deep concern about two prior incidents of alleged violence that resulted in three felony charges. The Commission recognizes that law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

> "Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities."

Police Comm'r v. *Civil Service Comm'n*, 22 Mass. App. Ct. 364, *rev.den*., 398 Mass. 1103 (1986).

The Commission recently addressed the interplay of G.L. c. 31 and G.L. c. 151B, §9 (4) in the case of *James Kerr* v. *Boston Police Department*, G1-16-096 [31 MCSR 25] (2018). Due to the tension between the prohibitions in 151B about the information that employers can request of applicants relating to criminal record information and the need for public safety agencies to conduct a thorough review of candidates, the Commission declined to settle the question of whether (or how) public safety agencies can use an applicant's prior criminal history that did not result in a conviction during the hiring process. The Commission did, however, state that the bypass of a candidate based upon a criminal history short of conviction will not be upheld unless the appointing authority conducted a "reasonably thorough review" which the Commission has consistently ruled should include an opportunity for the applicant to respond to his/her criminal record. This Commission has held that "an appointing authority may rely on information, including allegations of misconduct obtained from third-party sources, as the basis from bypassing a candidate providing it was lawfully obtained and subjected to an 'impartial and reasonably thorough' independent review." *Deterra* v. *New Bedford Police Department*, 29 MCSR 502 (2016), *quoting Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 189 (2010).

Further, although a criminal conviction is not necessarily a prerequisite to taking account of facts that tend to establish that a candidate has a history of misconduct, "the mere nature of charges brought, alone, do not provide the necessary foundation to justify a bypass." *Id*. at 20. Use of a criminal record, without a reasonably thorough review of the circumstances behind a criminal record print-out—particularly a single, stale offense that does not suggest a pattern of misconduct—is a problematic reason to bypass an otherwise qualified candidate. *Finklea* v. *Boston Police Dep't.*, 30 MCSR 93 (2017), *aff'd in relev. part, Finklea* v. *Civil Service Comm'n,* 34 Mass.L.Rptr. 657, *6 (2018); *Stylien* v. *Boston Police Dept*, G1-17-194, 12-13 [31 MCSR 154] (April 12, 2018).

In its recent decision in *Boston Police* v. *Civ. Serv. Comm'n and Gannon*, 483 Mass. 461 (2019), the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant.

Unfortunately, the Department performed an insufficient and overly cursory review of Mr. Castater's criminal history as part of the background investigation when he applied in 2015 and 2017. As a result of the insufficient review, Mr. Castater slipped through the cracks and made it through the round table discussions and was given a conditional offer of employment on *two* occasions. After Mr. Castater entered the Boston Police Academy in September 2017, the Police Commissioner was made aware of additional details of Mr. Castater's criminal history, causing great concern. The Police Commissioner took the appropriate step of having his Department thoroughly re-investigate the mul-

tiple criminal offenses with which Mr. Castater was charged. The Police Commissioner, in making that decision, wanted to rely on more recent information, to determine if there were any inconsistencies, and he wanted to be sure that the information contained in the Incident Reports was not erroneous and had not changed. As Superintendent Mancini stated, the Police Commissioner "wanted assurance because it is career changing."

The re-investigation involved interviewing every police officer involved in the 2009 and 2011 incidents, every witness, and every alleged victim, along with obtaining documentary evidence relative to the investigation, to include the newly obtained 911 CAD Sheet, and previously obtained certified court dockets, Mr. Castater's CORI, and the 2015 and 2017 Personal and Confidential Memoranda. Sgt. Det. Eblan undertook a thorough investigation and documented his findings in a lengthy report. Additionally, Mr. Castater was given the opportunity by the Department to refute the allegations made in the Boston Police Incident Reports and he wrote a lengthy memo in his defense. Mr. Castater's written memo, Sgt. Det. Eblan's detailed and thorough report, and all relevant documents were reviewed by Superintendent Frank Mancini, Sgt. Det. Eblan's commanding officer. I find that the Department conducted a thorough review of the Appellant's criminal record and rightfully gave the Appellant an opportunity to address his record. *See, e.g. Finklea* v. *Boston Police Dept*., *supra*; and *Rolle* v. *Department of Correction,* 27 MCSR 254 (2014).

Boston Police Incident Report #09040130, which was written by one of the responding officers, states that Mr. Castater barged into the home of Mr. A, which was also the home of Mr. Castater's ex-girlfriend, Ms. A, on July 18, 2009 at 3:05 AM. The 2009 Incident Report details that Mr. Castater was armed with a bat and entered Mr. A's house with several his friends and states that Mr. Castater beat Ms. A's brother over the head with the bat. The officers on scene specifically witnessed a hole in the wall, a broken window, and blood drops around the house. Mr. Castater had allegedly fled the scene and was ultimately charged with two (2) felony counts in the Boston Municipal Court, one count of Assault and Battery with a Dangerous Weapon, and one count of Breaking and Entering in the Nighttime with the Intent to Commit a Felony. Mr. Castater told the Department that he believed Ms. A had been injured by her brother and he was there to protect her, although Ms. A subsequently did not recall how she sustained an injury. He denies that he had a bat with him at Mr. A's house or that he was accompanied there by his friends.

When Sgt. Det. Eblan re-investigated this 2009 incident in 2018, key witnesses had either changed their stories or asserted that they did not recall at least parts of the incident. For instance, Mr. A was the person who called 911 about the incident that early morning in 2009. He claimed Mr. Castater had a bat and had broken into his home. When interviewed over the phone in 2018 by Sgt. Det. Eblan, Mr. A was asked whether Mr. Castater had a bat at the 2009 incident. Mr. A told Sgt. Det. Eblan that Mr. Castater did not have a bat and that he does not recall telling the police that he did. Mr. A also told Sgt. Det. Eblan that Mr. Castater would often let himself into his house, that the doorbell did not work, and that he rarely even locked his door—insinuating that Mr. Castater did not "break and enter" his home during the 2009 incident. In contrast, however, Ms. A, Mr. Castater's ex-girlfriend told Sgt. Det. Eblan that Mr. Castater did not typically let himself into her home—he would be let in by someone who lived there. Mr. A, at the end of his interview with Sgt. Det. Eblan, said that Mr. Castater would make a good police officer—although Sgt. Det. Eblan never told him the purpose of his call was related to Mr. Castater's candidacy.

Additionally, Mr. A's son, the alleged victim of the beating with the bat, told Sgt. Det. Eblan in 2018 that Mr. Castater did not have a bat with him during the incident at issue, that he could not recall if Mr. Castater entered his home that day with other people or if he was alone, and said that it was all a "big misunderstanding." When asked by Sgt. Det. Eblan about whether or not he and Mr. Castater got into a physical altercation in the 2009 incident, Mr. A's son refused to answer and said that he already told the detective what happened. Without any prompting, Mr. A's son, like his father, told Sgt. Det. Eblan that Mr. Castater would make a good police officer. Sgt. Det. Eblan never told either Mr. A or his son that he was calling about Mr. Castater's candidacy. Similarly, Ms. A's recollection of events (including whether her brother, Mr. A's son, had hit her head during the 2009 incident) was questionable but not just for the lack of significant information or inconsistent statements (including information that was inconsistent with at least some of what Mr. Castater stated) but also in calling back Sgt. Det. Eblan to say that in this second conversation with him she was being honest, indicating that her initial comments to Eblan when he first called her were untruthful. In this context, the 2018 inconsistent comments of Mr. A, Ms. A, and Mr. A's son about the 2009 incident, were unreliable and improperly motivated—to shore up Mr. Castater's Department candidacy by undermining the criminal charges against him for his misconduct in 2009. Thus, the Department raised legitimate concerns regarding the 2009 incident. The events at the 2009 incident, described in the 2009 police report, which included a detailed description of the damage inside the house and the appearance of blood in some places, were quite violent and rightfully concerning to the Department when they re-investigated it. The statements in 2018 of Mr. A, who had called 911 in connection with the 2009 incident, and Mr. A's son and Ms. A cast doubt on their credibility. As a result, the Department has established valid concerns about Mr. Castater's misconduct at the 2009 incident by a preponderance of the evidence. The Appellant represented that the two felonies with which he was charged regarding the 2009 incident were dismissed prior to his arraignment. The court record in evidence here indicates that that is untrue and that the charges were not dismissed until four months after he was charged and the trial was scheduled to take place. That the case was dismissed for want of prosecution does not bar the Department from considering his misconduct.

Two years after being arrested for the 2009 incident, Mr. Castater was arrested again and charged with another felony, Assault and Battery with a Dangerous Weapon—to wit, the sidewalk. On September 26, 2011, Mr. Castater came in contact with a man who was highly intoxicated. When the intoxicated man came within steps of Mr. Castater, Mr. Castater pushed him so hard that

the man was lifted off both of his feet. When the man landed, he struck his head on the sidewalk so hard that he became unconscious and was visibly bleeding. A witness, Mr. S, ran over to the victim and helped him, holding the victim's head in his hands. Mr. S, who lives in Maine, told Sgt. Det. Eblan in his 2018 phone interview that he believed the victim was going to die. Mr. S's account to Sgt. Det. Eblan of what happened was detailed and vivid and consistent with the brief information provided by another witness.[9] Mr. Castater had fled the scene, even though he admits that he knew the victim was unconscious. Mr. Castater acknowledged in his testimony at the Commission hearing that he should have stayed with the victim that night. The victim, Mr. H, spoke with Sgt. Det. Eblan on the telephone in January 2018 and told Eblan that he suffered bleeding on his brain that night and suffered a traumatic brain injury as a result. His olfactory nerve was severed when his head hit the sidewalk and he no longer has a sense of smell. The victim told Sgt. Det. Eblan that the key witness to the crime was unable to travel from Maine to attend the criminal trial of this matter so the case was dismissed. A review of the criminal docket (1101CR005090) regarding the 2011 incident reveals that Mr. Castater's case was scheduled for court action no less than ten times, beginning with Mr. Castater's arraignment on September 26, 2011 and ending with a dismissal for want of prosecution in January 2013. On the date of the jury trial, the prosecution indicated that it was "not ready for trial" and the case was dismissed for that reason.

Following the re-investigation by Sgt. Det. Eblan, the Boston Police Department was deeply concerned with the 2011 incident's level of violence, the fact that Mr. Castater left the victim laying unconscious and bleeding on the ground, and the fact that Mr. Castater had fled the scene. The Department ultimately concluded that Mr. Castater showed a lack of judgment, that he used excessive force, and that he exhibited a pattern of anger management issues. The Police Commissioner found that the witnesses to the 2011 incident remained consistent with their prior statements. Further, the Police Commissioner was troubled by the undisputed fact that Mr. Castater did not stay at the scene to assist the victim nor did he remain to identify himself to police officers after exerting an inappropriate level of force against another individual. For these reasons, the Police Commissioner made the decision to withdraw the Department's sponsorship of Mr. Castater at the Boston Police Academy.

I find that the Department has established by a preponderance of the evidence that it had reasonable justification to conclude that Mr. Castater was not suitable for the position of police officer as a result of his misconduct in the 2011 incident, in addition to his misconduct in the 2009 incident, and to withdraw its academy sponsorship of Mr. Castater for those reasons. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the acts found by the commission, 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." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 332 (1983). *See Commissioners of Civil Service* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission is mindful of the timeline of events and the fact that Mr. Castater was given a conditional offer of employment in 2015 and 2017. The Department must be afforded the opportunity, if necessary, to reassess a candidate if the Department believes a grave mistake has been made prior to the candidate's ultimate hiring. The Department believed it had made a mistake and took reasonable actions to correct the mistake in a fair, thorough, and responsible manner, giving Mr. Castater an opportunity to be heard. That this depth of an investigation should have taken place back in 2015, when Mr. Castater first applied for the position, or in 2017 when he reapplied, does not preclude the Department from correcting its course of action.

The Appellant contends that other candidates who were members of the same Academy class have comparable criminal records to Mr. Castater. After a review of each of the twenty-three (23) criminal records the Appellant put into evidence at the hearing of this matter, I do not find any of the criminal records to be comparable based on the information in the record. Of the twenty-three (23), eighteen (18) of those Academy members' criminal histories consist of misdemeanor criminal charges that do not allege any acts of violence, to include Operating with a Suspended License, Operating with a Suspended Registration, Attaching Wrong MV Plates, Compulsory Insurance Violation, Disorderly Conduct, Trespassing, Leaving the Scene of Property Damage, etc. These criminal entries are not comparable to the Appellant's arrest for, and circumstances surrounding, three felonies, to include Assault and Battery with a Dangerous Weapon (twice) and Breaking and Entering with the Intent to Commit a Felony.

Five (5) Academy members' criminal histories do contain entries that allege or imply violence. The Commission is unaware of the underlying facts of these five candidates' cases since no evidence was presented other than the criminal history print-out. For example, given that four of the five charges date back more than a decade prior to the candidates' applications to the Department, it is unknown if the holders of those records were juveniles at the time of the charges against them and, if so, whether such information was factored into consideration of those records. Of the five candidates with criminal histories, Candidate 1 was charged with Assault and Battery and the case was Dismissed in 2006. This is a misdemeanor and it was dismissed 11 years prior to this candidate's application to the Department. Candidate 2 was charged with Assault and Battery on a Police Officer and Resisting Arrest and the cases were Continued without a Finding (CWOF) for three (3) months in 2001. These two charges are misdemeanors and the incident occurred 16 years prior to this candidate's application to the Department.

9. Mr. S was not aware that some of the information that he provided to police on the night of the incident and to Sgt. Det. Eblan in 2018 had been confirmed by the witness who provided information to the police the night of the incident but did not provide his contact information.

Candidate 3 was charged with Assault and Battery Dangerous Weapon and case was dismissed via nolle prosequi in 2014. Although Candidate 3 was charged with the same felony that the Appellant was charged with twice, a nolle prosequi was filed by the prosecutor in Candidate 3's case, which is a more advantageous result for a defendant in a criminal case than a simple dismissal for want of prosecution. It is as if the charges should never have been filed against Candidate 3, as opposed to a dismissal for the Appellant in 2011 (which was likely garnered in his 2011 criminal case because the witness, Mr. S, did not appear to testify against him since he lives in Maine). The prosecution was not prepared to go forward with the trial as scheduled, leading the court to dismiss the 2011 charges against Mr. Castater for want of prosecution. Mr. Castater has been charged with three felonies and Candidate 3 has been charged with one. Thus, it cannot be gainsaid that Candidate 3's criminal record is not the same as or similar to that of Mr. Castater, warranting a different result in this appeal.

Candidate 4 was charged with Assault and Battery on a Police Officer, Resisting Arrest, Trespass, and Disorderly Conduct and the charges were Continued without a Finding for 1 year in 2005. All of these charges are misdemeanors and the events that led to the charges took place 12 years prior to this Candidate 4's application to the Department, distinguishing Candidate 4's criminal record from that of the Appellant. Finally, Candidate 5 was charged with Assault and Battery and received a 1 year Continued without a Finding in 2003. This is a misdemeanor that he was charged with 14 years prior to this candidate's application to the Department in 2017, also distinguishing Candidate 5's criminal record from that of the Appellant.

Based on the evidence in the record, I do not find any of these five candidates' criminal histories to be comparable to the Appellant's criminal history, most especially as they relate to the 2011 case wherein Mr. Castater was charged with a felony just six (6) years prior to his candidacy for the Department and just two (2) years after having been charged with Assault and Battery with a Dangerous Weapon and Breaking and Entering with the Intent to Commit a Felony (both felonies as well). Mr. Castater permanently injured a man in 2011 by pushing him off both feet causing him to the hit his head on the ground, rendering him unconscious, ultimately causing a traumatic brain injury and the victim's permanent loss of his sense of smell. I find that the Department has established by a preponderance of the evidence that it had reasonable justification to determine that the Appellant was unsuitable for the position of Boston Police Officer and to withdraw its sponsorship of the Appellant in the policy academy.

CONCLUSION

For all of the above stated reasons, the bypass appeal and the equity appeal of Brandon Joseph Castater under Docket No. G1-18-027 and E-18-028 are ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chair; Ittleman, Stein & Tivnan, Commissioners [Camuso—Not Participating]) on June 17, 2021.

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* * * * * *

MATTHEW J. BUSCH

v.

TOWN OF WHITMAN

E-20-134

June 17, 2021
Christopher C. Bowman, Chairman

Non-Bypass Appeal-Rescission of Promotion to Whitman Fire Lieutenant-Appointment of Higher Ranked Candidate Before Effective Date of Promotion—Although finding the facts in this non-bypass appeal "troubling", Commission Chair Christopher Bowman declined to intervene to disturb the Town of Whitman's decision to rescind the Appellant's promotion to fire lieutenant in favor of a higher ranked candidate because he had never served in the position due to a delayed effective date. The rescission came about after the union threatened litigation on behalf of one of the successful candidates and town officials failed to support the Fire Chief's decision to appoint the Appellant.

DECISION ON RESPONDENT'S MOTION TO DISMISS

On August 31, 2020, the Appellant, Matthew J. Busch (Appellant), a firefighter in the Town of Whitman (Town)'s Fire Department (WFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission), alleging that he had been aggrieved by a decision of the Town to rescind his promotional appointment to Fire Lieutenant.

On September 29, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant, counsel for the Town and the Town's Fire Chief. As part of the

pre-hearing conference, the Town argued that the Appellant was not aggrieved as, according to the Town: a) The Appellant was not actually promoted but, rather, given a future effective date for a promotional appointment that was rescinded prior to the promotional appointment becoming effective; and b) the Town's decision to ultimately appoint the first candidate on the certification did not result in a bypass of the Appellant, who was ranked third on the certification.

The Town's decision to rescind the appointment, or offer, was the result of a settlement agreement between the Town and the two candidates who were tied for first on the certification, both of whom filed bypass appeals with the Commission which were effectively withdrawn after the settlement agreement between the parties was reached.

As part of the September 29th pre-hearing conference, I discussed the possibility of a resolution that would forego the need for this matter to be litigated before the Commission, which took into consideration the possibility of one or two additional vacancies that could arise in the position of lieutenant in the Town's Fire Department prior to the expiration of the current eligible list. A status conference was scheduled for October 27, 2020 to receive an update on those discussions and the procedural next steps of this appeal.

Prior to the status conference on October 27th, the Town submitted a Motion to Dismiss the Appellant's appeal. On October 27th, I held a remote status conference via Webex videoconference which was attended by the Appellant, his newly-obtained counsel, counsel for the Town, the Town's Fire Chief and the Town Administrator. As part of the status conference, counsel for the Town outlined why a resolution under the possible framework discussed at the pre-hearing conference was, in the Town's opinion, not feasible. Thus, the Town filed the above-referenced Motion to Dismiss. The Appellant subsequently filed an opposition to the Town's motion, to which the Town submitted a rebuttal.

On December 9, 2020, I held a remote motion hearing which was attended by the Appellant, his counsel, counsel for the Town, the Town's Fire Chief, the former Town Administrator and the Interim Town Administrator. Solely for the purposes of reaching a decision on the Town's motion here, I find the following facts to be undisputed or, if disputed, viewed in the light most favorable to the Appellant:

1. The Appellant is a firefighter for the Town's Fire Department. There are three (3) fire lieutenant positions in the Department.

2. In November 2018, the Appellant took and passed the promotional examination for fire lieutenant.

3. Based on the November 2018 promotional examination, an eligible list for Whitman fire lieutenant was established on March 1, 2019. Two other Whitman firefighters, Thomas Ford and Bryan Smith, were tied for first on the eligible list. The Appellant was ranked third, following Ford and Smith.

4. Firefighter Smith serves as an officer with the local firefighter's union and serves as a member of the bargaining committee that negotiates the union's collective bargaining agreement with the Town.

5. The Appellant has more seniority than Ford or Smith.

6. Looking to fill a retirement of a fire lieutenant scheduled to occur on August 29, 2020[1] , the Town created Certification No. 06350 on June 10, 2020. Consistent with the eligible list, the certification contained three (3) names: Ford and Smith (tied for first) and the Appellant (third).

7. The Town utilized an interview panel to assess the top three candidates, which included standard questions, a tactical fire problem, an employee counseling scenario and a public relations scenario. The interview format was similar to interviews conducted for prior promotions since at least 2008 or 2009, including fire lieutenant.

8. The interview panel ranked the three candidates' performance in each area as well as overall performance. The Appellant was ranked first overall of the three candidates.

9. In a notification dated June 16, 2020, which was signed by the Town's Fire Chief and the Appellant, the Fire Chief notified HRD that the Appellant was being promoted to the position of permanent fire lieutenant with an "appt. effective date" of "8/29/20".

10. In a 2 ½-page letter dated June 16, 2020, the Town's Fire Chief, who is the civil service appointing authority, notified Ford and Smith of the reasons for bypassing them for promotional appointment.

11. As part of the 2 ½-page letter, the Fire Chief wrote in part that:

> "At the conclusion of the interviews [which were approximately 30-45 minutes], the members of the interview panel independently evaluated the overall performance of each candidate and all ranked Firefighter Busch as the top candidate with an overall score of 85.6 points, followed by Firefighter Ford, with an overall score of 73.4 points, and then Firefighter Smith, with an overall score of 68.4 points."
>
> …
>
> "Based upon Firefighter Busch's greater actual firefighter experience, his education and training, as well as his interview performance, I have concluded that Firefighter Busch is the better qualified candidate for promotion to Fire Lieutenant."

12. In a series of emails between the Town's Fire Chief and HRD between June 30th and July 1st, 2020, the Chief worked with HRD to correct an administrative error which showed the Appellant's promotion as "temporary" instead of "permanent". As part of one of those email exchanges, the Fire Chief wrote: " … he was never

1. The incumbent's retirement date was subsequently changed to August 31, 2020.

temporary I appointed last week (sic) it is effective August 29, maybe they thought it was temporary until that date?"

13. On June 22nd and June 24th, 2020, Ford and Smith filed bypass appeals with the Commission. Pre-hearing conferences were scheduled to be held on July 21, 2020.

14. On July 13, 2020, counsel for the Town emailed the Commission, stating:

> "This office represents the Town of Whitman in the above-referenced matter that is scheduled for a pre-hearing conference on July 21, 2020 at 11:30 A.M. The Parties are in the process of discussion a resolution of [these appeals]. We are respectfully requesting that the pre-hearing conference be postponed to allow us the time to finalize the settlement terms. Counsel for the appellant has assented."

15. The Commission responded to the above-referenced email by inquiring:

> "Will the likely settlement be asking the Commission to take any action (i.e. - 310 relief) or would the likely settlement result in the appeal(s) being withdrawn?"

Counsel for Ford and Smith responded by stating: "The latter."

16. On July 16, 2020, the Commission dismissed the appeals of Ford and Smith with a future effective date of September 18, 2020, only to be re-opened if either party sought reconsideration on or before that date. No such reconsideration was sought and the dismissal became effective on September 18th.

17. Ford and Smith, through their counsel, argued to the Town Administrator and the Board of Selectmen that the Fire Chief had impermissibly used a de facto assessment center which they argued requires a delegation agreement and bargaining with the union beforehand. The Town was informed that Ford and Smith would pursue this argument to the Civil Service Commission and the union would pursue the same argument as part of an unfair labor practice complaint.

18. An executive session was convened to discuss this matter which was attended by former Town Administrator Frank Lynam, the Fire Chief and members of the Board of Selectmen. The Board of Selectmen is not the appointing authority for appointments and promotions below the rank of Fire Chief in the Town's fire department.

19. During that executive session, the Board of Selectmen and the Town Administrator, primarily for reasons related to litigation avoidance, agreed to a settlement agreement with Ford, Smith and the local union that would rescind the promotional appointment of the Appellant and promote Firefighter Ford instead, effective August 31, 2020. The Town's Fire Chief, who is the appointing authority for promotional appointments to fire lieutenant, argued that the 30-45 minute interviews did not constitute a de facto assessment center.

20. The Fire Chief never told the Board of Selectmen or the Town Administrator that he was in favor of the settlement agreement, but indicated that he would "accept it" in part because he did not believe his position would be supported by the Town's legal counsel in litigation.

21. The Fire Chief subsequently signed the settlement agreement, which was also signed by the Chair of the Board of Selectmen, the Town Administrator, Ford, Smith and the president of the local firefighters' union.

22. On August 3, 2020, the Fire Chief forwarded an email to HRD stating:

> "Please see the attached documents regarding Requisition #06350. The Town of Whitman reached a settlement agreement with the two members who appealed the bypass. Matthew Busch (sic) promotion to Fire Lieutenant is hereby rescinded and Thomas Ford is promoted to the position of Fire Lieutenant per the settlement agreement. I have updated NEO GOV."

23. On August 4, 2020, HRD responded, writing: "Received and Authorized."

24. Between June 16, 2020 and August 31, 2020, the Appellant and other firefighters, pursuant to provisions in the collective bargaining agreement, filled in for fire lieutenants on vacation or other leave based on seniority, for which they received additional compensation.

25. On August 31, 2020, the Appellant filed the instant non-bypass equity appeal with the Commission.

LEGAL STANDARD FOR SUMMARY DISPOSITION

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See*, *e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

APPLICABLE CIVIL SERVICE LAW

Section 1 of G.L. c. 31 defines basic merit principles as:

> "(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; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (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 em-

> ployees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions."

Section 2(b) of G.L. c. 31 provides that:

> "No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

Section 2(c) of G.L. c. 31 further states that "all references [in Section 2(b)] to the administrator shall be taken to mean the local appointing authority or its designated representative" and, thus, this Appellant must show here, *inter alia*, that Whitman's Fire Chief violated some provision of Chapter 31 or the state Personnel Administration Rules.

Section 14(3) of the Personnel Administration Rules (PARs) states:

> "No permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice by the administrator of promotion . If, however, his promotion is approved by the administrator while he is serving temporarily in a position of the same or higher grade, he may continue to serve in such position as authorized by the administrator, and his permanent promotion shall not be affected by such temporary employment in a different grade notwithstanding the fact that he is not actually employed in the position to which he has been promoted during said thirty days."

ANALYSIS

The issues raised here are strikingly similar to those addressed by the Commission in *Harrington* v. *City of Pittsfield*, 27 MCSR 524 (2014). The City of Pittsfield, after granting a conditional offer of employment to Harrington for original appointment as a firefighter, rescinded that offer after receiving advice from legal counsel that the City was unlikely to prevail before the Civil Service Commission if the two higher-ranked candidates filed bypass appeals with the Commission. On a motion filed by the City, the Commission, although expressing concern about the sequence of events, dismissed the Appellant's appeal.

Here, as in *Harrington*, it is undisputed that the Appellant was not bypassed for promotional appointment as no candidate ranked below him was promoted to the position of fire lieutenant.[2]

Rather, the Town rescinded the Appellant's promotion prior to him assuming the position of fire lieutenant in favor of a higher ranked candidate. The Appellant argues that, at the time of the rescission, he had already been promoted to and was serving in the position of fire lieutenant. The undisputed facts show otherwise. The documentation submitted to HRD, signed by both the Fire Chief and the Appellant on June 20, 2020, clearly states that the effective date of the promotional appointment was to be August 29, 2020. The undisputed facts also show that the Appellant never assumed the position of permanent fire lieutenant. Rather, between June 20th and August 29th, he and other firefighters continued the longstanding CBA-controlled practice of filling in for lieutenants on vacation and other short-term leave (i.e.—personal days) based on seniority.

Since the Appellant never served in the position of permanent fire lieutenant, a position which did not become vacant until the incumbent's planned retirement on August 29th, he could not have been considered to have been promoted under Section 14(3) of the Personnel Administration Rules (PARs) which states in relevant part that: "No permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice by the administrator of promotion …". (emphasis added)

Then to the issue of whether the Town is required to provide the Commission with justification for its decision to rescind its decision to promote the Appellant in favor a higher-ranked candidate and, if so, whether the Town's decision here was contrary to basic merit principles. Although this appeal was filed under G.L. c. 31, § 2(b), I have considered that question under both Section 2(b) as well as Section 2(a) which grants the Commission broad discretionary authority to conduct investigations, upon request by, among others, an aggrieved person or on its own initiative.

I am troubled by what occurred here. In short, the Town's Select Board and Town Manager effectively overrode the decision of the civil service appointing authority (the Fire Chief) regarding who was the most qualified person to serve as fire lieutenant based primarily on a decision (by the Board and the Town Administrator) to avoid litigation by the local union, one of whose officer's would stand to benefit by the rescission.

I listened carefully to the Fire Chief's testimony before the Commission. He strongly opposed making a promotional appointment based primarily on reasons related to litigation avoidance and he conveyed those concerns directly to the Select Board and the former Town Administrator. Ultimately, however, the Fire Chief agreed to sign the settlement agreement (and rescind the Appellant's promotional appointment) knowing that his position was not supported by legal counsel, which was effectively confirmed by the former Town Administrator who testified that the Fire Chief doesn't decide matters related to litigation. In sum, the Town's Select Board and Town Administrator effectively usurped the Fire Chief's authority under the civil service law to make a promotional appointment to fire lieutenant.

This case is a perfect example of being careful what you wish for. By trying to avoid the possibility of litigation, at best remote and unlikely of success, Whitman set itself up for actual litigation

2. No actionable bypass occurs when the final promotional examination score of an individual purporting to be aggrieved is tied with, or lower than, the individual actually promoted. *See, e.g., Cotter* v. *City of Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002), *aff'd in part, rev'd in part,* 323 F.3d 160 (1st Cir. 2003).

that exposed its dubious approach to micro-managing civil service appointments to the fire service. Next time, hopefully, the Select Board and Town Administrator will respect the judgment vested in its Fire Chief as civil service law intended.

The end result here, however, is that one of two candidates tied for first on the certification for fire lieutenant received the promotional appointment and there has been no allegation that the candidate promoted does not have the sufficient knowledge, skills and abilities to serve effectively as fire lieutenant. Put another way, the Appellant is arguing that the Commission should deem him an aggrieved person because a qualified candidate ranked above him on the certification was promoted over him.

Notwithstanding the troubling sequence of events referenced above, the undisputed facts here, including that the Appellant was never promoted to fire lieutenant, and that the Fire Chief ultimately appointed a qualified person ranked above the Appellant, the Appellant cannot show that he is an aggrieved person under Section 2(b) nor would it be appropriate for the Commission to exercise its discretionary authority under Section 2(a) to initiate an investigation.

CONCLUSION

For above reasons, the Town's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. E-20-134 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

Notice to:

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* * * * * *

AARON CRUTCHFIELD

v.

DEPARTMENT OF CORRECTION

D-18-019

June 17, 2021
Cynthia A. Ittleman, Commissioner

Civil Service Commission Jurisdiction-Disciplinary Action-Suspension of Correctional Officer-Failure to Request a Section 41 Hearing-Poor Union Advice—An appeal from a correctional officer contesting a 5-day suspension for disciplinary reasons was dismissed by the Commission for lack of jurisdiction as the Appellant, relying on bad union advice, had not pursued a Section 41 Hearing before the Appointing Authority and filed directly with the Commission.

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

On February 6, 2018, Aaron Crutchfield ("Appellant") filed an appeal with the Civil Service Commission ("Commission") alleging that the Department of Correction ("Department") suspended his employment for a period of five (5) days without just cause in violation of G.L. c. 31, § 41. On March 23, 2018, the Department filed an "Amended Motion to Dismiss Due to a Lack of Procedural Jurisdiction as Well as [Appellant's] Failure to Prosecute or Defend" ("Amended Motion"). The Appellant never filed any written opposition to the Department's Motion to Dismiss, but he did testify in opposition thereto at a hearing on the Amended Motion that I held on April 17, 2018.[1]

FINDINGS OF FACT

Based on all papers filed in this case, the parties' testimony and arguments, and reasonable inferences therefrom, taking administrative notice of pertinent statutes, caselaw, and rules, and viewing the evidence in the light most favorable to the non-moving party, the following material facts are undisputed unless otherwise indicated:

1. The Appellant began employment with the Department as a Correction Officer I (CO I) on October 5, 2008. (Pre-Hearing Memorandum)

2. On November 8 and 28, 2017, the Department's Internal Affairs Unit interviewed the Appellant in connection with allegations of off-duty misconduct. The Appellant was accompanied by a union representative. The Department's investigator concluded that some weeks earlier the Appellant had engaged in off-du-

1. The Standard Rules of Adjudicatory Practice and Procedure, located at 801 CMR §§ 1.01, *et seq*, guide these proceedings except wherein they conflict with the provisions of G.L. c. 31, in which case any pertinent statute prevails.

ty misconduct and had been less than truthful during the investigation regarding the alleged off-duty misconduct. (Pre-Hearing Memorandum; Amended Motion (Ex. 3))

3. Via letter dated February 2, 2018, the Department notified the Appellant that it was suspending him without pay for five days as the conduct alleged in Finding No. 2 of the Department investigation violates the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. The letter directed that the suspension was to be served from February 5 through 9, 2018, inclusive. The last two sentences of this letter, signed by James Ferreira, Director of the Department's Central Transportation Unit, stated as follows: "You may appeal this finding within forty-eight (48) hours of receipt to the Appointing Authority, the [Department's] Commissioner of Correction [copied on this letter]. I have attached a copy of MGL c. 31, §§ 41 - 45 for your information."[2] (Amended Motion (Ex. 3))

4. This letter was served in hand upon the Appellant on February 5, 2018 by a Captain employed by the Department. (Amended Motion (Ex. 3))

5. The Appellant delivered in hand a discipline appeal form to the Commission the next day. (Amended Motion (Ex. 1))

6. Also on February 6, 2018, the Massachusetts Correction Officers Federated Union ("MCOFU") submitted to the Department on behalf of the Appellant a written request to appeal the five-day suspension. (Amended Motion (Ex. 4))

7. A Department labor relations advisor wrote separate letters to the Appellant and MCOFU's vice president on February 8, 2018, notifying the Appellant, the union, and relevant Department personnel that a hearing to consider the Appellant's appeal was being scheduled for March 2, 2018, in the facility in which the Appellant worked. (Amended Motion (Ex. 4)) There is no indication in the record before this Commission that anyone objected to the time, date, or place set for this appeal hearing.

8. By letter dated February 23, 2018, MCOFU's vice president wrote to the Department's Director of Employee Relations to notify the Department that the union was withdrawing the grievance it had filed on behalf of the Appellant at Step II. MCOFU's letter stated: "This grievance is being withdrawn without prejudice." (Amended Motion (Ex. 5))

9. The Department responded by not proceeding with the Appellant's appeal hearing scheduled for March 2, 2018. (Amended Motion (Ex. 2); Testimony of Joseph Santoro) According to the Department's labor relations advisor assigned to this case, the Department intended for its March 2 appeal hearing to serve as both a Step II grievance hearing and an appointing authority civil service hearing under G.L. c. 31, § 41. (*Id.*)

10. The Chair of the Commission conducted a pre-hearing conference on March 6, 2018. At that conference, the Department submitted a Motion to Dismiss that asserted that, given the union's withdrawal of its request for a hearing in Appellant's case, the Department as appointing authority was not afforded a fair opportunity to conduct the Section 41 hearing that serves as a condition precedent to any appeal that might thereafter be lodged with the Commission. Accordingly, the Department argued, the Commission lacked jurisdiction to proceed any further with Appellant's appeal. (Motion to Dismiss; Administrative Notice)

11. At the Commission's March 6, 2018 pre-hearing conference, the Appellant stated that he had been encouraged by MCOFU's vice president to file an appeal with the Commission the preceding month and that he had never been advised that such an appeal could not be heard prior to a Section 41 hearing conducted by the Department. At the conclusion of this conference, this Commission's chair ordered:

> I. Mr. Crutchfield has ten (10) days to file a response to DOC's Motion to Dismiss.
>
> II. A motion hearing will be held at the offices of the Commission on April 17, 2018 at 9:30 AM.
>
> III. Witness testimony will be allowed, including on the issue of what conversation(s) Mr. Crutchfield had with MCOFU in regard[s] to the filing of an appeal with the Commission.
>
> IV. Should Mr. Crutchfield wish to call witnesses, he may ask such witnesses to appear voluntarily or, if necessary, ask the Commission for authorization to issue a subpoena.

(Procedural Order dated March 9, 2018; copy attached to Amended Motion as Ex. 2)

12. The Appellant never filed a written response to the Department's motion to dismiss. He testified on April 17, 2018 that he did not know how to do so and, despite inquiries, he received no assistance from MCOFU. He further reported that in the weeks preceding April 17, Edward Slattery, the union vice president who had first filed, and then withdrew, a Step II grievance on the Appellant's behalf, stopped serving as union vice president. (Testimony of Aaron Crutchfield)

13. On March 23, 2018, the Department's labor relations advisor served on the Appellant via email, and filed with the Commission, Respondent's Amended Motion to Dismiss, which contended, in addition to the lack of jurisdiction argument summarized in Finding No. 10, *supra*, that the Appellant's failure to comply with the Commission Chair's March 9 Procedural Order by not responding to the Department's original motion to dismiss signified that he had "failed to prosecute or defend his own case" and, for this independent reason as well, the Appellant's appeal should be dismissed. (Amended Motion, pg. 2)

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2. Upon notification of any disciplinary action covered by Section 41 of G.L. c. 31, the appointing authority is required by this statute to provide any affected employee with a copy of sections 41-45 of Chapter 31.

14. On Friday afternoon, April 13, 2018, the Appellant copied the Commission's office manager on an email he addressed to MCOFU's former vice president and which stated in key part: "I have a CSC hearing on April 17th at 1 pm that I would appreciate you attend to inform the commission that you advised me that I didn't have to go to the Step 2 hearing, and to confirm that I asked you, if I had to go to the step 2 hearing or if I could go straight to the CSC." On Monday afternoon, April 16, 2018, the Appellant forwarded to the Commission's chairperson via email (copying the Department's labor relations advisor) a letter from a state legislator asking that the Appellant, an individual he had known for many years and witnessed providing volunteer community service, be afforded a hearing by the Commission. The legislator wrote: "[Appellant] informs me he was given the wrong information by his union regarding a Step 2 hearing vs. going to Civil Service. I don't know all the details, however, I do understand he was suspended from his job, transferred from his unit, and has lost his shift and days off." On April 18, 2018, the Department's representative stated in an email to me that he had "no objections" to the legislator's letter "being added to the file." (Administrative Notice of Commission records)

15. At the April 17, 2018 motion hearing I conducted, the Appellant testified that MCOFU's former vice president had told him, on a date that he could not recall, that he did not need to go through with an appointing authority Section 41 hearing before pursuing an appeal with the Commission. The Appellant testified that he would have undertaken every required step had he known it was necessary, even though he believed that any Department hearing would have been futile. Because Mr. Slattery no longer served as a union officer, the Appellant asserted that he (Slattery) would have had to take personal time off from work in order to come testify at the Commission's April 17 hearing. The Appellant acknowledged erring in not arranging for Mr. Slattery to receive a subpoena commanding his attendance. The Appellant further testified that, although he had spoken with a union steward with the last name of Higginbotham the day before, there was not enough time before the motion hearing to enlist the union's further assistance as the matter would have had to be brought first to the attention of the union's executive board. The Appellant stated in the motion hearing that he took full responsibility for the correct steps not having been followed in this case and that he would understand if his Commission appeal had to be dismissed. (Testimony of Aaron Crutchfield)

16. Since the conclusion of the April 17, 2018 motion hearing, the Appellant has not taken any steps in an effort to reassert the viability of his appeal.

THE LEGAL STANDARD FOR CONSIDERATION OF A MOTION TO DISMISS

The Standard Adjudicatory Rules of Practice and Procedure (the "Rules"; 801 Code Mass. Regulations §§ 1.01, *et seq*.) guide administrative adjudication at the Commission, although Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail. There appears to be no conflict here. The Rules indicate that the Commission may, "at any time," dismiss an appeal "for lack of jurisdiction to decide the matter," among other grounds. 801 CMR 1.01(7)(g)(3).

An appeal may be disposed of on summary disposition when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See, e.g*., *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School* v. *Coles*, 71 Mass. App. Ct. 240, 249 (2008); *Lydon* v. *Massachusetts Parole Board*, 18 MCSR 216 (2005).

Section 41 of chapter 31 is clear and unambiguous in stating that if a tenured civil service employee is first suspended and then timely (within 48 hours) files a written request for a hearing before the appointing authority (here the designee of the Department's Commissioner) "on the question of whether there was just cause for the suspension," he shall be given a prompt hearing and a written decision. *Id.* "If it is the decision of the appointing authority, **after hearing**, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section [including, among other covered actions, a five-day suspension], such person may appeal to the commission as provided in section forty-three." *Id.* (emphasis added).

ANALYSIS

Citing G.L. c. 31, § 41, the crux of the Department's motions to dismiss (both as originally filed on March 6 and as amended on March 23, 2018) is that the Commission lacks jurisdiction over the Appellant's appeal because, by acceding to MCOFU's cancellation of the appeal hearing the Department had scheduled for March 2, 2018, the Appellant never afforded the Department a fair opportunity to hear the Appellant's reasons for contesting the five-day suspension that followed a thorough investigation and confirmation of allegations of substantial misconduct allegedly engaged in by the Appellant in 2017.

The Commission has construed the above-quoted statutory texts to mean that the civil service law mandates that an appellant, *prior* to filing an appeal with the Commission, *must* exhaust his or her statutory right to request a hearing before the appointing authority *and* allow the appointing authority a fair opportunity to conduct such a hearing and render a decision, within the statutorily prescribed time frames, in all disciplinary matters, including suspensions of five days or less. *Hurley* v. *Lynn*, 23 MCSR 251, 252 (2010). Here it is undisputed that Mr. Crutchfield hand-delivered an appeal form to the Commission within a mere 36 hours of receiving in hand, from a Department captain, notice of his appointing authority's decision to suspend him for five days. Moreover, the Appellant only requested (not directly, but through a union representative) a Department hearing that very day. Later in February 2018, that same union representative caused the Department to cancel the hearing it had scheduled to hear Appellant's side of the matter leading to the discipline in question. Accordingly, it cannot be disputed that Appellant's appeal with the Commission was premature and not in concert with civil service law requirements.

No matter how much it might sympathize with a civil service employee's plight, the Commission is duty-bound to give full effect to the Legislature's intent that an appointing authority have the opportunity, in the first instance, to hear evidence in support of, and in opposition to, discipline (including the testimony of the employee him or herself).

At the same time, the Commission will also give full effect to the Legislature's concomitant intent to protect a disciplined employee from any undue delay in receiving due process. Section 42 of chapter 31 provides a remedy when the appointing authority does not afford an appellant the protections laid out in section 41 of the statute in the course of discipline and s/he was prejudiced thereby. Thus, had Mr. Crutchfield been aggrieved *and* prejudiced somehow by any failure of his appointing authority to follow the dictates of G.L. c. 31, § 41, in conjunction with its meting out of discipline against him, he would have been entitled to file an appeal upon a satisfactory showing of those conditions with the Commission under c. 31, § 42. For example, had the appointing authority failed to schedule and conduct a timely disciplinary appeal hearing, or had it neglected to issue promptly thereafter a written decision on the Appellant's § 41 appeal, then the Appellant could have been justified in coming straight to the Commission. *But* (and this is important) Section 42 mandates that an appellant in such circumstance "shall set forth specifically in what manner the appointing authority has failed to follow such requirements [of § 41]." Here, the appeal form filed with the Commission by Mr. Crutchfield plainly did not specify any such failure by the Department to follow § 41's directives. Thus, under the circumstances here, the Appellant had "no reasonable expectation" of prevailing on at least one "essential element of the case".

OTHER ISSUES

I have found (and, indeed, Mr. Crutchfield has admitted) that the Appellant did not oppose in writing either of the Department's two dispositive motions. Nor did the Appellant make arrangements, in the approximately 40-day interval between receipt of the Commission's March 9, 2018 Procedural Order and its April 17, 2018 motion hearing, for union representation or witness testimony to bolster his assertion that he had been misled regarding civil service appeal requirements. He had been apprised on March 9 of the means by which to compel, if necessary, witness appearances. No doubt this inaction operated to the Appellant's disadvantage. To his considerable credit, however, Mr. Crutchfield candidly acknowledged at the April 17 hearing that he took "full responsibility for correct steps not having been followed here." And he added that he would "understand if his [Commission] appeal is going to be dismissed." The Appellant's understanding in this regard comports with the Commission caselaw holding that reliance on poor union advice regarding civil service issues is no excuse. *See Allen* v. *Taunton Public School*, 26 MCSR 376 (2013), *aff'd Allen* v. *Civil Service Commission and another*, Suffolk Sup.Ct. 1384CV03239 (July 17, 2014).

Any concerns Mr. Crutchfield may still have with regard to any misinformation, poor advice, or even possible misrepresentation by an MCOFU official of the civil service law's requirements, or any adverse consequences of a misunderstanding between the Appellant and his union's vice president, are all, unfortunately for the Appellant, beyond the ability of the Commission to rectify at this time. *See Boston* v. *Tolland*, 67 Mass. App. Ct. 1107 (2006). Moreover, it is well established that the Commission's jurisdiction depends on an appointing authority decision. *See Heggie* v. *New Bedford*, 32 MCSR 127 (2019) and long line of cases recognizing such.

In order to avert regrettable situations such as this arising again, the Department is strongly advised to notify employees that canceling a Commissioner's hearing may have consequences regarding future appeal rights under the civil service law.

CONCLUSION

For all of the above reasons, the Department's Motion to Dismiss this appeal is allowed and the Appellant's appeal under Docket No. D-18-019 is ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

Notice to:

Aaron Crutchfield
[Address redacted]

Joseph Santoro
Labor Relations Advisor
Department of Correction
P.O. Box 946
Norfolk, MA 02056

* * * * * *

BRADLEY HEARD

v.

DEPARTMENT OF CORRECTION[1]

G1-19-203

June 17, 2021
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Correctional Officer-Criminal History-Domestic Violence-Social Media—Although all but one of the criminal charges against this Appellant had been dismissed, his multiple arraignments and two restraining orders demonstrated patterns of behavior considered undesirable in a correctional officer and so his bypass was affirmed.

DECISION

On October 1, 2019, Bradley Heard ("Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction ("DOC" or "Respondent") to bypass him for original appointment to the position of Correction Officer (CO I). On October 15, 2019, a pre-hearing conference was held at the offices of the Commission, which was followed by a full hearing at the same location on December 13, 2019.[2] The hearing was digitally recorded.[3] The Appellant did not submit a post-hearing brief. The DOC submitted a post-hearing brief on January 10, 2020. As indicated below, based on the facts in this case and the applicable law, the appeal is denied.

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence by the Respondent; the Appellant did not offer any exhibits. Pursuant to my request, the Respondent provided supplemental documentation that was added to Exhibit 9 after the close of the hearing, permitting Exhibit 9 to be entered into the record in full. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Drew Duplessis, Background Investigator
- Eugene Jalette, Supervising Identification Agent

For the Appellant:

- Bradley Heard, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

Appellant's Application

1. The Appellant was born in Holyoke, MA and has been employed in the customer service and hospitality industries for most of his adult working career. He received his GED through Holyoke Community College in 2014. His current employment, obtained through a temporary agency, is with a company that produces plastic cases. (Exs. 3 and 8; Appellant Testimony).

2. The Appellant took the civil service examination for Correction Officer (CO I) on October 20, 2018. He was ranked 64th on Certification No. 06084. (Stip. Facts).

3. The Appellant applied for a position with the DOC as a CO I in March 2019 for consideration for appointment to the July 2019 Academy. (Appellant Testimony; Jalette Testimony).

4. As part of the hiring process, the DOC conducts background checks of all applicants, who sign a Background Investigation Request and Waiver authorizing the DOC to check with past employers, conduct a criminal record check, and conduct interviews with references. (Ex. 3; Jalette Testimony).

5. Mr. Duplessis, who has worked at the DOC and as a police officer for many years and who has received training in conducting background investigations, conducted the Appellant's background investigation. He has conducted over 40 such investigations. (Duplessis Testimony).

6. Mr. Duplessis's process for conducting a background investigation is to first call and meet candidates' references, and then contact the candidates' former and current employers. He confirms candidates' educational backgrounds by going to the institutions where candidates have received their education and then conducts home visits. He structures his investigations this way so that he will be able to inquire about any issues or concerns raised with the candidate at the home visit. (Duplessis Testimony).

7. The DOC reviews all applicants' Criminal Record Offender Information (CORI) as part of the hiring process. The CORI gathers information from the NCIC National Crime Information Center (NCIC); National Crime Information Center Interstate Identification Index (NCIC III); Board of Probation Criminal History for Massachusetts (BOP); and the Interstate BOP. (Ex. 8; Duplessis Testimony).

1. Attorney Norman Chalupka represented the Department of Correction in this appeal until he filed a post-hearing brief in this case but he no longer works at the Department.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

3. 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Review of Appellant's CORI

8. The Appellant's BOP demonstrated that the Appellant had several arraignments and two abuse prevention orders issued against him. (Ex. 5).

9. On December 5, 2016, an Abuse Prevention Order (restraining order) was issued against the Appellant by the Lynn District Court. The order was issued based on an affidavit of "Ms. B" stating that the Appellant had widely disseminated inappropriate pictures of her on social media; had shared her telephone number with strangers; had called her from different numbers "day and night"; and, while he dated Ms. B, had threatened to kill her and tried to choke her. (Ex. 6, 9). The *ex parte* restraining order was in place for two weeks and was dismissed on December 20, 2016. (*Id*.)

10. The BOP shows that the Appellant was arraigned at Lynn District Court as follows:

4/26/2016	Stalking/Following
4/26/2016	Threatening
6/7/2016	Intimidation
12/7/2016	Threatening
12/7/2016	Intimidation
12/7/2016	Threatening

These charges were dismissed. (Ex. 6; Appellant Testimony).

11. On July 22, 2015, the Appellant was arraigned for the crime of Larceny in Lynn District Court. This case was dismissed. (Ex. 6).

12. A second restraining order was issued against the Appellant on October 10, 2008 for actions involving the mother of the Appellant's son. This order was extended for one year. (Ex. 6; Appellant Testimony). The Appellant did not contest the extension of the order. (Appellant Testimony).

13. In 2002 and 2005, the Appellant was arraigned in Holyoke District Court on minor misdemeanor charges. The 2002 case was dismissed after being continued without a finding and the 2005 charge was dismissed. (Ex. 6; Appellant Testimony).

DOC Review of Application

14. On March 19, 2019, the DOC sent the Appellant a letter stating that the DOC had reviewed the Appellant's Criminal Record Offender Information (CORI) and that "based on the review, the DOC **may** be inclined to make an adverse decision." The letter explained how the Appellant could get information about correcting his CORI and provided contact information at the DOC if the Appellant had questions. (Ex. 5)(emphasis in original).

15. Mr. Duplessis conducted a home visit with the Appellant on April 26, 2019. He spoke with the Appellant about the job responsibilities, possible assignment locations, and the Appellant's history on the BOP. At that interview, the Appellant said that the restraining order and charges against him were issued in April, June, and December of 2016 stemmed from incidents with a former girlfriend that were ultimately dismissed. He alleged that the 2016 larceny charge was the result of his former girlfriend believing he had stolen her phone and alleged that she had later found the phone at home. The Appellant asserted that the restraining order of December 2016 was not renewed because, according to him, the allegations against him were false; when the Appellant showed the judge that his former girlfriend had been contacting him on social media, the judge did not extend the order. Further, the Appellant alleged to Mr. Dupressis that the 2016 criminal charges against him were based on allegations of a "a female acquaintance that was mentally unstable". (Ex. 8; Duplessis Testimony, Appellant Testimony).

16. Mr. Duplessis contacted the Appellant's reference, who described the Appellant as "very well liked," "dependable and good with customers," and a "hard worker, dependable, followed direction well, "and is a "very motivated and a good person." Another reference stated that the Appellant was a good communicator and that he would be eligible for re-hire. (Ex. 6; Duplessis Testimony).

17. At the end of the background investigation report, Mr. Duplessis wrote that the positive aspects of the Appellant's application included professional and employment references and that the Appellant speaks and understands Spanish as a second language. The negative aspects listed on the report were the Appellant's history of involvement with the criminal justice system, no experience with shift work, and no valid Massachusetts Firearms Identification Card or License to Carry. (Ex. 6; Duplessis Testimony).

18. Mr. Jalette, who has worked for the DOC since 2013 and is now the Supervising Identification Agent, reviews candidates' files and background investigation reports. He looks for qualities that show the applicants are suitable for work in the DOC environment. Undesirable traits include poor work history, a pattern of criminal history, and recent criminal history. Because the DOC is a paramilitary organization, he assesses candidates for their suitability to work in a stressful environment. When hiring, he looks at "the totality of the circumstances." (Jalette Testimony).

19. When reviewing the Appellant's file, Mr. Jalette was concerned about the Appellant's BOP, specifically, the pattern of behavior shown by two restraining orders. He noted that the behavior causing the restraining orders could continue into the Appellant's employment as a CO I. He was also concerned that one of the restraining orders had occurred fairly recently. In addition, that the crimes with which the Appellant was charged related to domestic problems were problematic for the Appellant's candidacy. (Jalette Testimony).

20. The next stage of review included review of the Appellant's materials by the DOC Commissioner, the Director of Human Resources, and Mr. Jalette, all of whom were continuously present at the meeting to review candidates. The Commissioner reviewed all material in each candidate's file, including the positive and negative aspects.[4] (Jalette Testimony).

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4. [See next page.]

21. The DOC decided to bypass the Appellant. In the non-consideration letter sent to the Appellant and dated August 7, 2019, the DOC wrote that the Appellant was not considered for the July 7, 2019 Academy because he had failed the background investigation:

> "Background Investigation: Failed Background due to your Criminal Offender Record Information (CORI) specifically 2 restraining orders that expired in 2016 and 2009, adult arraignments for Threatening (2 counts) Intimidation (2 counts), Intimidation (2 counts), and stalking; additionally in 2015 you were arraigned for larceny, . . ." [and the letter went on to recount that the Appellant had been arraigned twice before, in 2002 and 2005, on minor misdemeanor charges].

LEGAL STANDARD

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. *Boston Police Dep't* v. *Civil Service Comm'n*, 483 Mass. 461, 474-78 (2019); *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). "Reasonable justification . . . means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 243 (2006); *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971), and cases cited. *See also Mayor of Revere* v. *Civil Service Comm'n,* 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient" and upon "failure of proof by the [appointing authority], the commission has the power to reverse the [bypass] decision."). The governing statute, G.L. c. 31, § 2(b) gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev. den*., 426 Mass. 1102 (1997). The commission ". . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority"; however, when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *Id*. *See also Town of Brookline* v. *Alston*, 487 Mass. 278 (2021)(analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law). That said, "[i]t is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

In its recent decision in *Boston Police* v. *Civ. Serv. Comm'n and Gannon*, 483 Mass. 461 (2019), the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant.

ANALYSIS

The DOC has established by the preponderance of the evidence that it had reasonable justification to bypass the Appellant for appointment as an CO I based on a failed background investigation. The record supports the DOC's conclusion that the Appellant's multiple arraignments and two restraining orders issued against him demonstrate patterns of behavior the DOC determines to be undesirable in a DOC employee.

While under the age of twenty-one (21), the Appellant was twice charged with petty crimes. One charge resulted in dismissal after a CWOF and one charge, three years later, was dismissed outright. The first of the two restraining orders against the Appellant was issued in 2008 and was in effect for a full year. The Appellant's second restraining order was issued on December 5, 2016, approximately two years prior to his application at the DOC. This order was based on an affidavit from a former girlfriend who indicated that the Appellant physically abused her, called her "day and night," disseminated photographs of her on social media, and publicly shared her telephone number. The Appellant asserts that the restraining order issued against him in 2016 was the result of the complaints of an "unstable" girlfriend and that the restraining order was not continued beyond the initial temporary order. In addition, the Appellant asserts that the criminal charges against him based on his girlfriend's complaints were all dismissed.

The timing of the charges throughout 2016 cast doubt on the veracity of the Appellant's assertions regarding the criminal charges against him and the restraining order in 2016. Specifically, the Appellant said that his arraignment for Larceny in July 2015 stemmed from Ms. B's false accusation that he stole her phone. This means that the Appellant's conduct towards Ms. B continued from at least July 2015 through April 2016, when he was charged with Stalking and Intimidation, and into June 2016, when he was charged with Intimidation. The Appellant's conduct toward Ms. B. continued into December 2016, when the restraining order and charges of Threatening and Intimidation were issued against him. Thus, even though the Appellant alleges that he was not at fault for the charges and restraining orders issued against him and that the fault lies with Ms. B because she was "unstable," his own misconduct toward her lasted over a year and involved several seri-

4. Three DOC Deputy Commissioners were present for some, but not all of the meeting. (Jalette Testimony).

ous charges resulting in multiple court appearances. This personal history calls into question the Appellant's actions involving his relationships.

It is true that the criminal charges, except the one minor charge in 2002, were dismissed outright. But in certain instances, such misconduct nevertheless supports a law enforcement employer's decision to bypass a candidate. *See Louis* v. *Department of Correction*, 27 MCSR 31 (2014) (DOC's decision to bypass the Appellant for CO I was justified in light of the Appellant's history of criminal arraignments and restraining orders, despite the absence of any convictions); *Rosa* v. *Department of Correction*, 24 MCSR 143 (2011)(although the Appellant had no record of criminal convictions, DOC's decision to bypass him was justified based on his two arrests for assault and battery and for discipline while in the military); and *Soares* v. *Brockton Police Department*, 14 MCSR 109 (2001) (Brockton Police Department did not err in bypassing the Appellant for police officer based on a record of criminal violations and motor vehicle infractions merely because various court proceedings ended in dismissal or continuances).

In this case, the DOC conducted a thorough review of the Appellant's application and background, and followed the applicable law regarding criminal records, providing the candidate with written notice of his criminal records and an opportunity at his home interview to address his criminal record. As a result of its thorough review, DOC has established by a preponderance of the evidence that a judge, after a hearing, extended a restraining order against the Appellant for one year. That, coupled with a long list of criminal charges, justifies the bypass here.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-19-203 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on June 17, 2021.

Notice to:

Bradley Heard
[Address redacted]

Joseph Santoro
Department of Correction
PO Box 946, Industries Drive
Norfolk, MA 02056

* * * * * *

BENJAMIN MAHAN & VICKIE BAGU

v.

HUMAN RESOURCES DIVISION

B2-20-155 & B2-20-164

June 17, 2021
Christopher C. Bowman, Chairman

Examination Appeal-Field Parole Officer Promotional Examination-Fair Test Appeal-Lack of Timeliness—The Commission dismissed appeals from two failed candidates for Field Parole Officer promotions because the appeals were untimely filed. There was also no reason to toll the appeal period since the candidates knew when they took the test that some of the questions raised fairness issues. The Commission also noted that no less than nine incumbent employees of the Parole Board had intervened in the proceedings which suggested real problems with the test. Commission Chief Christopher C. Bowman also took aim at HRD for failing to notify by email over half of the participants in this matter of the option to file an appeal online.

ORDER OF DISMISSAL

On October 16, 2020, Appellant Benjamin Mahan (Mahan), a Field Parole Officer A/B (FPO A/B) at the Massachusetts Parole Board (MPB), filed an examination appeal with the Civil Service Commission (Commission).[1]

2. On November 17, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by Mahan and counsel for the state's Human Resources Division (HRD).

3. Three (3) other individuals joined the remote pre-hearing indicating that they had an interest in the issues that were the subject of the Appellant's appeal.

4. At the pre-hearing conference, Mahan clarified that his appeal related to the promotional examination for FPO C and Field Parole Officer D (FPO D), administered by HRD.

5. The parties stipulated to the following:

A. On August 6, 2020, Mahan took the examination for FPO C and FPO D.

B. The FPO C examination consisted of 80 written questions. Candidates wishing to take the FPO D examination completed an additional 20 questions.

C. Mahan chose to complete all 100 questions (i.e.—take both the FPO C and FPO D examinations).

D. On September 15, 2020, HRD released the scores for the FPO C and FPO D examinations (and another examination held the same day for Institutional Parole Officer C (IPO C)). Mahan was notified that he received a total score of 68.75 on the FPO C exam and a total score of 76 on the FPO D exam. The passing score for each examination was 70.

1. Approximately one month later, Vickie Bagu filed an appeal with the Commission regarding similar issues, as discussed in more detail below. She was joined as intervenor in this appeal given the similarity of issues.

E. Also on September 15, 2020, HRD established an eligible list of candidates for both positions. Mahan's name does not appear on the FPO C eligible list and his name appears 12th on the FPO D eligible list.

F. Also on September 15, 2020, HRD received email communication from Mahan asking for a copy of the test questions.

G. On a date on or after September 15, 2020, (date not provided by either party), HRD notified Mahan that examination questions were confidential.

H. On October 16, 2020, the Appellant filed the instant appeal with the Commission.

6. As referenced above, it also appears undisputed that, in addition to FPO C and FPO D, examinations were also held on August 6, 2020 for the Institutional Parole Officer series.

7. During the pre-hearing conference, Mahan stated that the reason he sent an email to HRD on September 15, 2020 asking for a copy of the exam questions was because he believed that some of the questions on the examination could have more than one answer; some of the questions on the examination contained grammatical errors; and other questions on the examination were no longer applicable and/or were superseded by COVID-19 protocols.

8. The three other persons who participated in the remote pre-hearing indicated that they had each taken the promotional examination(s) in question; had received failing scores; had difficulty understanding the process for filing an appeal with HRD; and/or had communication with HRD in which they had expressed, in their opinion, a desire to file an appeal regarding the examination(s) for the same reasons articulated by Mahan above.

9. For all of the above reasons, I ordered the following:

I. Mahan had 10 days to file a "More Definite Statement" clearly articulating why he believes he is an aggrieved person.

II. As discussed at the pre-hearing conference, the persons who participated in the pre-hearing conference other than Mahan had 10 days to file a motion to intervene, explaining the basis for the motion, including a detailed description of any efforts they took to file an examination appeal with HRD and for what purpose.

10. I informed the parties that, after receiving the above-referenced information, additional orders would be issued regarding the procedural next steps of this appeal.

11. I did not receive a more definite statement from Mahan.

12. Nine (9) other applicants who are Parole Board employees filed Motions to Intervene as follows:

a. Nathan Mendes (FPO D applicant), in his motion to intervene, stated in part: " … it is my belief that the process to exercise ones appeal right under MGL Sec 22 lacks clarity and does not truly provide a clear and concise method to initiate an appeal." According to Mr. Mendes, he submitted an examination appeal with HRD on September 24, 2020, which HRD deemed untimely.

b. Brian Lussier (FPO C applicant), in his motion to intervene, stated in part: "I had previous (sic) appealed my exam for the Field Parole Officer C on 9/24/20. I received an email from HRD that stated me (sic) appeal was not received in a timely fashion so therefore it was denied. My appeal is based on the fairness of questions that were asked."

c. Shawna Hawksley (FPO C and D applicant), stated in her motion to intervene: "The content of the exam did not represent the skills relevant to the Field Parole Officer D position Furthermore, many questions in the exam were inherently flawed. I recognized the following issues: 1) questions with missing information, 2) questions with two correct answers, 3) questions with no correct answers, and 4) questions with incoherent logic.

d. Michelle Wetherbee (Institutional Parole Officer C applicant), in her motion to intervene, stated in part: "The overall process of how to appeal was only explained to me by one of my colleagues although I had called and sent emails asking such questions. In order to appeal a test that is what determines our [livelihood] should be much easier." Ms. Wetherbee listed various alleged deficiencies in the exam, including: "The questions on the test that pertained to the Victim Services Unit and the Field Services Unit would not be part of this job function." (Ms. Wetherbee filed a separate E&E appeal with the Commission which has been denied.)

e. Vicky Bagu (Institutional Parole Officer C applicant), who filed her own fair test appeal with the Commission (B2-20-164), filed a motion to intervene stating in part, " … I also want to point out that contacting [] Civil Service HRD did not make the appeal process an easy transition. I sent in a request via emails to Civil Service regarding my appeal via my personal email as well as my state email several times. First time sending questions regarding the process in September 9/16/2020 to appeal to be aware and understand the process to receiving my answer sheet on 10/9/20 with just several letters in a row not understanding what answers were correct or right."

f. Kelley Sylvia (Institutional Parole Officer C applicant), in her motion to intervene, stated in part, "Personally, I feel some of the test questions were poorly written. I feel some of the questions had more than one correct choice. The questions should have been clear and concise with only one correct answer." (Ms. Sylvia subsequently withdrew her request to intervene.)

g. Lawrence Mittica (FPO C applicant), in his motion to intervene, stated in part: " … I took the Field Parole Officer C promotional exam. I received a failing grade and attempted several times to request an appeal, but was never given the opportunity." He also stated in part that: " … I sent approximately seven emails to Civil Service requesting an appeal or information on how to file an appeal and no one responded."

h. Daniel Wight (FPO C and FPO D applicant), in his motion to intervene, stated that, on 10/15/20, he received an email from HRD stating that his appeal was timely as it had been received within 17 days, only to receive a subsequent email on 10/28/20 indicating that his appeal was not timely as it had not been received within 7 days.

i. Kimm Yonika (FPO C and FPO D applicant) also filed a motion to intervene, stating in part that a number of the questions on the FPO C examination were "confusing and conflicted with how MA parole operates."

j. Eric Mawhinney (FPO D applicant) also filed a motion to intervene, stating in part that he had difficulty "follow[ing] protocols of appeal in a timely manner." He also stated in part that the test questions were "constructed around policy where there was incorrect information either in question or answer forms on various occasions."

13. In summary, nine (9) incumbent employees at the Massachusetts Parole Board took the FPO C, FPO D or Institutional Parole Officer promotional examination and notified the Commission that: a) they found the process for how to file an exam-related appeal with HRD to be unclear and/or confusing; and/or b) some of the questions on the examination should be reviewed as they were either unclear and/or did not reflect the current job duties and responsibilities of the position(s).

14. For these reasons, I requested that that HRD provide the following information:

> i. An overview of the process for applicants who took the examinations to file an appeal with HRD.
>
> ii. A copy of any instructions provided to the applicants detailing this process.
>
> iii. For the above referenced applicants, a summary of any communication these applicants had with HRD regarding a potential appeal; whether it was deemed to be a timely appeal by HRD; and, if not deemed timely, why such a determination was made.
>
> iv. A copy of any instructions regarding how applicants can contest an adverse HRD determination regarding an examination appeal to the Commission.
>
> v. A summary of any timely fair test or other appeals received by HRD regarding these promotional examinations, and what, if any adjustments were made as a result of these timely appeals.

15. On March 3, 2021, HRD provided the Commission, the Appellants and the remaining intervenors with a response to the Commission's orders.

16. According to HRD's response, applicants must file a multiple choice and/or fair test appeal with HRD within seven (7) days of the examination, either by sending an email to HRD or going to www.governmentjobs.com/careers/massachusetts and searching for the application titled "Promotional Exam Review".[2] According to HRD, applicants received notice of their right to appeal, with this link, on July 27, 2020, approximately ten (10) days prior to the examination. However, according to HRD, five (5) of the nine (9) applicants referenced above (Mahan, Mendes, Hawksley, Yonika and Wight) did not receive the notice due to a clerical error.

17. Also according to HRD, "all applicants were provided instructions on how to file a test appeal prior to the start of their examinations."

18. HRD also provided the following information regarding the nine (9) applicants now relevant to this appeal:

[See Table 1 at the top of the following page.]

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 22 states in part:

> "An applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination. (emphasis added)
>
> The administrator shall determine the form of a request for review. Each such request shall state the specific allegations on which it is based and the books or other publications relied upon to support the allegations. References to books or other publications shall include the title, author, edition, chapter and page number. Such reference shall also be accompanied by a complete quotation of that portion of the book or other publication which is being relied upon by the applicant. The administrator may require applicants to submit copies of such books or publications, or portions thereof, for his review."

G.L. c. 31, § 24 states:

> "An applicant may appeal to the commission from a decision of the administrator made pursuant to section twenty-three relative to (a) the marking of the applicant's answers to essay questions; (b) a finding that the applicant did not meet the entrance requirements for appointment to the position; or (c) a finding that the examination taken by such applicant was a fair test of the applicant's fitness to actually perform the primary or dominant duties of the position for which the examination was held. Such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator. The commission shall determine the form of the petition for appeal, provided that the petition shall include a brief statement of the allegations presented to the administrator for review. After acceptance of such an appeal, the commission shall conduct a hearing and, within thirty days, render a decision, and send a copy of such decision to the applicant and the administrator.
>
> **The commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time and form and unless a decision on such request for review has been rendered by the administrator**. In deciding an appeal pursuant to this section, the commission shall not allow credit for training or experience unless such training or experience was fully stated in the training and experience sheet filed by the applicant at the time designated by the administrator." (emphasis added)

In *O'Neill* v. *HRD* (https://www.mass.gov/doc/oneill-stephen-v-city-of-lowell-and-hrd-related-superior-court-decision-111209/download), the Superior Court ruled that:

> "HRD initially denied O'Neill's fair test review request because he did not file it within seven days of the exam administration, as required by G. L. c. 31, § 22. This court does not agree that the seven day filing limit begins running from the date of the exam in the present situation, **because the applicant could not know the number of faulty questions until he receives his answer key**. In ***that situation***, due process would seem to impose a discovery rule, in which the time limit begins at the time the applicant knew or should have known of the facts giving rise to his fair test challenge." (emphasis added)

2. The web page applicants are directed to if they follow the search functions states in part: "**For Fair Test Reviews:** Attach a document that specifies in detail why you believe this examination was not a fair test of the applicant's fitness to perform the primary or dominant duties of the position."

TABLE 1

Applicant	Item Appeal Notice Sent to Applicant?	Exam Date	Date Scores Released	Date Applicant Communicated with HRD	Summary of Communication	HRD Reply to Applicant
Mahan[A] (FPO C & D)	No	8/6/20	9/15/20	9/15/20	Asked for a copy of the questions.	Informed applicant that test questions are confidential.
Mendes (FPO C & D)	No	8/6/20	9/15/20	9/24/20	" … a few flawed questions on the exam as written were not conducive to answering in a manner that would produce a proper written response …"	Denied the request as untimely and noted that "the items cited were investigated and not found valid for changing the key..."
Hawksley (FPO C & D)	No	8/6/20	9/15/20	"No record of fair test appeal"	NA	NA
Wetherbee (IPO C)	Yes	8/6/20	9/15/20	"No record of fair test appeal"	NA	NA
Bagu (IPO C)	Yes	8/6/20	9/15/20	9/16/20	"I am looking to appeal and challenge the test that was given for the 2020 Institutional Parole Officer C examination. Any information would be greatly appreciated."	Denied the request as untimely and noted that "the request did not state in detail allegations upon which the request was based …"
Mittica (FPO C)	Yes	8/6/20	9/15/20	9/27/20[B]; 10/24/20; 10/29/20	9/27/20: "Emailed HRD looking for a review of the promotional examination scoring. 10/24/20: "I don't believe my parole promotional exam was graded properly and I'd like to appeal it." 10/29/20: "Emailed HRD asking for a status update"	Denied the request as untimely and noted that "the request did not state in detail allegations upon which the request was based …"
Wight (FPO C & D)	Yes	8/6/20	9/15/20	9/29/20	"Emailed HRD writing to contest his score results based on unfair questions on the Parole Officer D Examination taken on August 6, 2020. Wight asked for a review of several questions."	Denied the request as untimely. "Despite the timeliness issue, HRD investigated the issues raised by Wight. HRD determined that even if the appeal had been received by the deadline and was timely filed, the test questions referenced in Wight's email would not have resulted in any scoring changes."
Yonika (FPD C & D)	No	8/6/20	9/15/20	"No record of fair test appeal"	NA	NA
Mawhinney (FPO D)	No	8/6/20	9/1/20	9/18/20	"I am appealing the test"	Denied the request as untimely and noted that "the request did not state in detail allegations upon which the request was based …"

ANALYSIS

There is a threshold question regarding whether the Appellants (Mahan and Bagu) filed timely fair test appeals with HRD. G.L. c. 31, § 22 states that such appeals must be filed with HRD " … no later than seven days after the date of such examination." However, the Superior Court in *O'Neill*, based on the facts related to that appeal, applied a "discovery rule", and concluded that the timeline for filing the fair test appeal with HRD in that case could be as late as seven days after O'Neill received his examination score.

In regard to timeliness, the undisputed facts regarding the instant appeals distinguish this matter from *O'Neill*. In *O'Neill*, the basis of his fair test appeal was the number of questions deemed faulty by HRD, something he could not have known until he received his score and was notified of the issue regarding faulty questions. That is not the case here. Each of the Appellants and Intervenors,

A. HRD's response did not reference Mahan, presumably because the information was already available to the Commission.

B. HRD's information says "October 27, 2020; I presume this was a scrivener's error and should state September.

based on their own verbal and written statements, had concluded, *at the time that they took the examination*, that some of the questions, to them, raised questions about the fairness of the test. Applying the same "discovery rule" relied on in *O'Neill*, there is no justification to deviate from the plain language of the statute, which requires applicants to file a fair test appeal within seven days of the date of the examination. It is undisputed that none of the Appellants or Intervenors filed an appeal with HRD within seven days of the date of the examination.

That leads to the issue of whether the confusion regarding how the Appellants were notified of their right to appeal should effectively toll the statutory deadline for filing an appeal with HRD. In addition to proctors notifying applicants of their right to appeal at the outset of the examination, HRD's intent was to email a link to each applicant, allowing him/her to file an examination appeal online. By HRD's own admission, Mahan and some of the intervenors, apparently due to technical reasons, never received the email with the link. Had HRD not verbally instructed applicants of their right to appeal prior to beginning the examination, this technical glitch may have warranted tolling of the filing deadline.[3] While the failure to send all applicants the email to facilitate the online filing of an appeal would justify waiving the form in which such appeal must be filed (i.e.—a brief statement of the allegations regarding why the exam was not a fair test), it does not warrant waiving the time period in which such an appeal must be filed with HRD.

Since none of the Appellants or Intervenors filed timely appeals with HRD, the Commission lacks jurisdiction to hear these appeals as, "The commission shall refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed *in the required time* and form and unless a decision on such request for review has been rendered by the administrator." *Id*. (emphasis added)

While these appeals must be dismissed based on the Commission's lack of jurisdiction, that should not be the end of the story here. As referenced above, nine incumbent employees of the Massachusetts Parole Board have raised concerns about: a) the relevancy and accuracy of certain questions on these examinations; and b) the lack of unambiguous instructions regarding the proper manner to file an appeal with HRD. HRD should address both issues. There is something seriously wrong when more than half of the participants in this matter did not get notified via email of the option to file an appeal online. HRD should implement quality control measures to ensure that these email notifications have been sent to all applicants before and immediately after the examination.

Further, HRD, in its continuing efforts to safeguard the integrity of the testing process, should take notice (and action) when this number of incumbent employees raise concerns about the fairness of the test, even if the appeals were not received in a timely manner. At a minimum, greater transparency around certain issues (i.e.—the pass/fail rate; the mean and median scores; how many fair test appeals were received and the disposition of each, etc.) would bolster confidence in the examination process. I encourage HRD to take these proactive measures.

CONCLUSION

As the Commission lacks jurisdiction to hear examination appeals that were not timely filed with HRD, these appeals are ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

Notice to:

Benjamin Nahan
Vickie Bagu
[Addresses redacted]

Alexis Demirjian, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

3. On a going forward basis, a far better practice would be to ensure that instructions regarding appeal rights are memorialized in writing, something the Commission will consider when determining whether statutory filing deadlines in this regard should be tolled.

CONSTANCE PARKS

v.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

C-20-036

June 17, 2021
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Transitional Assistance-Clerk V to Program Coordinator I-Scope of Duties—The Commission denied an appeal from a long-serving and valued clerk with the Department of Transitional Assistance seeking a reclassification to Program Coordinator I since she was unable to establish that she was performing the functions of the desired classification a majority of the time. Specifically, she was unable to show she was coordinating and monitoring a Housing Stabilization unit or analyzing data from agency programs, among other things.

DECISION

On March 4, 2020, the Appellant, Constance Parks (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission) contesting the decision of the state's Human Resources Division (HRD) to deny her request for reclassification from a Clerk V position to Program Coordinator I (PC I) at the Department of Housing and Community Development (DHCD). A pre-hearing conference was held remotely via WebEx on March 24, 2020, and a full hearing was held remotely via WebEx on June 2, 2020.[1] The hearing was digitally recorded and both parties were provided with a recording of the hearing.[2] Both parties submitted post-hearing briefs. As indicated below, the appeal is denied.

FINDINGS OF FACT

The Respondent entered fourteen (14) exhibits into evidence (Resp. Ex. 1-14) and the Appellant entered twenty-one (21) exhibits into evidence (App. Ex. 1 - 21) at hearing. Based on these exhibits; the testimony of the following witnesses:

Called by Respondent:

- Ita Mullarkey, Acting Assistant Undersecretary, Division of Housing Stabilization
- Lisa Pollack, Human Resources Manager, DHCD

Called by Appellant:

- Constance Parks, Appellant;

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

1. The Appellant began her employment at the Department of Transitional Assistance (DTA) and has worked within this agency, DHCD, for thirty-five years. She is currently employed as a Clerk V in the Division of Housing Stabilization at the DHCD. The Division of Housing Stabilization serves and supports the homeless population for the state of Massachusetts and provides shelter, stabilization, child care, support and other services. (Appellant Testimony).

2. The Appellant is a valued employee within the DHCD. She is the front-line staff to the public and provides support services within the agency to other DHCD staff. The agency greatly appreciates the work she performs. (Resp. Ex. 2; Mullarkey Testimony).

3. In approximately August 2019, Ms. Parks learned that she would be performing some of the job duties that a coworker, M.H., who was a Program Coordinator I, had been performing until she left the office. These duties included Child Care referrals, Separation Notices, and Notice of Temporary Emergency Shelter Interruptions (TESIs).

4. On August 26, 2019, the Appellant filed an appeal for a reclassification with the DHCD because she had absorbed some of M.H.'s duties. (App. Ex. 1, 2; Appellant Testimony).

5. The Appellant wrote on her DHCD Classification Appeal Form ("Interview Guide"), dated September 18, 2019, that she had absorbed duties of the PC I position, specifically regarding Child Care referrals and Separation Letters. The Appellant listed the percentages of her time that she spent on these duties as follows:

- Process Child Care Referrals: 36%
- Process and Upload TESIs: 25%
- Create Separation Notices for Workers to be Distributed to Client 15%
- Correspond with Child Care Provider regarding referrals 10%.

(Resp. Ex. 1)

6. Ms. Pollack interviewed the Appellant and the Appellant's supervisors to discuss the Appellant's responsibilities. The Appellant's supervisor determined that the percentage of time the Appellant performs the four duties relevant to this appeal as follows:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

- Process Child Care Referrals: 15%
- Process and Upload TESIs: 2%
- Create Separation Notices for Workers to be Distributed to Client 10%
- Correspond with Child Care Provider regarding referrals—combine with process child care referrals.

(Resp. Ex. 1)

7. Ms. Pollack wrote a detailed memorandum outlining the Appellant's job functions and comparing those duties and responsibilities to those of a PC 1. She recommended the DHCD deny the Appellant's request for reclassification. (Resp. Ex. 1, 2; Pollack Testimony).

8. The Appellant's request for classification was denied on December 11, 2019. As the basis for its denial, the Department informed the Appellant that it found that she does not perform the duties of the PC I a majority of the time. (Resp. Ex. 2).

9. The Appellant appealed the DHCD's determination to HRD. The appeal was denied. (Resp. Ex. 3).

10. The job specification (Form 30) for a Clerk V provides that the general statement of duties and responsibilities are as follows:

> The Clerk V serves as the agency first point of contact for visitors and incoming telephone calls to the Department of Housing and Community Development (DHCD) regarding housing and the Emergency Assistance (EA) shelter system. The incumbent assists in scheduling meetings… and maintains multiple contact lists. He/She prepares outgoing mail and correspondence or parcels, prepares files, constituent records and documents; operates standard office machines and equipment and performs a variety of clerical support tasks and receptionist duties. (Resp. Ex. 7).

11. The Appellant's Clerk V Form 30 includes 16 duties and responsibilities, the following of which are relevant to this appeal:

- Receives, screens and directs all telephone calls for DHCD and Division of Housing Stabilization, identifying callers, determining subject of call, and directing them to appropriate staff…. Provides back-up receptionist support to the Undersecretary's Office as needed.
- Receives information utilizing the ASIST and BEACON systems, prepares separation letters, Notice of Temporary Emergency Shelter Interruption (TESI) requests. Accurately prepares and uploads records to be electronically archived. Files, maintains, locates, and retrieves information from active and closed case records.
- Works closely with Placement Unit manager throughout the review and approval process of all EA applications.
- Works in collaboration DHCD Divisions of Housing Stabilization and Rental Assistance, community partners, and EA families responding to inquiries regarding the status of submitted applications/packets.
- Creates MS Word and Excel documents as needed.
- Maintains current list of providers… and adds and deletes contacts as needed, which also includes maintaining current board of directors list for each provider.
- Tracks new contract manager schedules.
- Processes new child care voucher referrals. (Resp. Ex. 7).

12. The minimum entrance requirements for the Clerk V position are four years, or equivalent part-time, experience in office work, some of which must have been in a supervisory capacity, or equivalent combination of the required experience as detailed in the Form 30. (Resp. Ex. 7).

13. The Appellant has not had a complete EPRS evaluation in many years. The Appellant's draft EPRS, dated April 24, 2018, includes a comment that the Appellant has a new supervisor but lacks any ranking or other evaluation on her job performance. (Resp. Ex. 5, 6; Mullarkey Testimony).

14. The Classification Specifications (Class Specs) for the Clerk Series state that "the basic purpose of this work is to provide clerical support." (Resp. Ex. 10).

15. A PC I performs the following duties: (1) coordinates and monitors assigned program activities in order to ensure effective operations and compliance with established standards; (2) reviews and analyzes data concerning assigned agency programs in order to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc. and to devise methods of accomplishing program objectives; (3) provides technical assistance and advice to agency personnel and others concerning assigned programs in order to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards; (4) responds to inquiries from agency staff and others in order to provide information concerning assigned agency programs; (5) maintains liaison with various private, local, state and federal agencies and others in order to exchange information and/or to resolve problems; and (6) performs related duties such as attending meetings and conferences; maintaining records; and preparing reports. (Resp. Ex. 9).

16. The Class Specs for the Program Coordinator Series state that the primary purpose of work in this position is to "coordinate, monitor, develop and implement programs." The Program Coordinator Series is a supervisory level series that requires, at minimum, "two years' experience professional, administrative, or managerial experience in business administration, business management, or public administration the major duties of which involved program management, program administration, program coordination, program planning and/or program analysis, or equivalent substitutions with education." (Resp. Ex. 9).

17. The Appellant processes a large number of Child Care referrals each day. She cross-references them to determine if the family is receiving emergency benefits, which is the sole criterion for receiving child care benefits. Additionally, the Appellant checks the accuracy of the referrals and obtains additional information if needed and verifies that the information is accurate. If no child

care provider is available, the Appellant tries to find other providers. (App. Ex. 12; Appellant Testimony; Mullarkey Testimony).

18. In her position, the Appellant does not make determinations about the number of childcare slots that are available and does not oversee the Child Care referral program for efficiency or effectiveness. (Mullarkey Testimony).

19. The Appellant inputs placement data monthly based on information from seven different workers. Once she receives the information from the workers, it takes her "several hours" to input the data. (Appellant Testimony).

20. Temporary Emergency Shelter Interruption (TESI) forms are the agency's documentation that a homeless family who is in emergency shelter may leave the shelter and return without losing their place. The Appellant types up the form that has the family's information and uploads the document into an online database. (Appellant Testimony Mullarkey Testimony).

21. The Appellant does not approve TESI requests and does not monitor the TESI process in order to determine its operational effectiveness and efficiency. (App. Ex. 17; Mullarkey Testimony).

22. As part of her duties inherited from M.H., the Appellant creates Separation Notices, which are signed by the Associate Director and the Assistant Undersecretary. (Appellant Testimony; Mullarkey Testimony).

23. The Appellant does not determine whether a family should be removed from a shelter. (Mullarkey Testimony).

24. The office where the Appellant works is very busy and most of the Appellant's time is spent on her receptionist duties. (Mullarkey Testimony) The Appellant acknowledges that she answers the phone at the office, adding that she also performs her other duties while handling the phone calls. (Appellant Testimony).

25. The parties agree that the Appellant performs all the duties in her Class Specs as a Clerk and three duties pertaining to Child Care referrals, TESI forms, and Separation Notices. (Appellant Testimony; Mullarkey Testimony; Pollack Testimony).

LEGAL STANDARD

"Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal . . . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission. Said commission shall hear all appeals as if said appeals were originally entered before it." G.L. c. 30, § 49.

The Appellant has the burden of proving that she is improperly classified. To do so, she must show that she performs the duties of the CSES II title more than 50% of the time, on a regular basis. *Bhandari* v. *Exec. Office of Admin. and Finance*, 28 MCSR 9 (2015)(finding that "in order to justify a reclassification, an employee must establish that he is performing the duties encompassed within the higher-level position a majority of the time . . . ."); *Gaffey* v. *Dep't of Revenue*, 24 MCSR 380, 381 (2011).

PARTIES' ARGUMENTS

The DHCD argues that the Appellant is appropriately classified as a Clerk V, as her duties, according to the DHCD, fall in line with her current classification. The Appellant's duties are primarily clerical. Even though the Appellant spends a good deal of time on Child Care referrals and placements, the nature of that work does not comprise the program coordination required by a PC I. Likewise, the Appellant's duties for her other "new" responsibilities relating to TESI reports and Separation Notices require inputting information, verifying that it is correct, and ensuring that it appears in the proper databases. Ultimately, the DHCD argues, the evidence does not show that the Appellant is responsible for coordinating and/or monitoring programs.

The Appellant argues that she performs the level distinguishing duties of a PC I a majority of the time. The Child Care referrals, which take up most of her time, have increased her workload. In essence, she argues that she runs the Child Care referral program because she makes sure all the information on the form is correct, she finds available spots for childcare, and she double checks to see that the family is receiving the emergency benefits that qualify them for childcare services, which is the only criterion to receive that service. Regarding the TESIs, the Appellant argues that because this responsibility previously fell to an employee who was a Program Coordinator, it should not be considered "clerical." In addition, creating the Separation Notices, also formerly performed by a Program Coordinator, involves little more than inputting information. In all, the Appellant argues that she regularly uses her expertise and discretion and performs her work with minimal supervision from a manager and that her new job functions are more than clerical responsibilities.

ANALYSIS

The Appellant has not shown by a preponderance of the evidence that she spends a majority of her time performing the duties and responsibilities of a PC I as indicated below.

First, the position of a PC I at DHCD coordinates and monitors assigned program activities in order to ensure effective operations and compliance with established standards. The Appellant ensures that the child care referrals are correctly completed and recorded in accordance with office policy. Given that the sole criterion for a family to receive child care through DHCD's Housing Stabilization unit is to be eligible for emergency assistance, the Appellant performs the valuable function of ensuring eligibility and finding available care. However, this function does not constitute coordinating and monitoring the program. Ms. Mullarkey explained that the Appellant does not determine how many families are eligible for this benefit and does not oversee the program. The same is true for Separation Notices, a form letter which the Appellant completes, and the TESI forms, which involve the clerical work of properly inputting and electronically storing them.

Further, the Appellant did not establish by a preponderance of the evidence that it takes more than 50% of her time to complete the three forms involved other than her unsupported assertion.

Second, the Appellant does not perform the second responsibility of a PC I: "reviews and analyzes data concerning assigned agency programs in order to determine progress and effectiveness, to make recommendations for changes in procedures, guidelines, etc. and to devise methods of accomplishing program objectives." Resp. Ex. 9. The Appellant's level of involvement with child care referrals, Separation Notices and TESIs do not involve reviewing and analyzing data or devising methods of accomplishing program objectives. As a day-to-day matter, the Appellant ensures that families receive certain benefits for which they are eligible under the child care referrals and TESIs but she does not review or analyze data about these programs related to the forms she completes in order to determine program progress and effectiveness.

Regarding the third and fourth responsibility of a PC I: "provides technical assistance and advice to agency personnel and others concerning assigned programs in order to exchange information, resolve problems and to ensure compliance with established policies, procedures and standards" and "responds to inquiries from agency staff and others in order to provide information concerning assigned agency programs", the Appellant arguably gives technical assistance and advice to agency personnel and responds to inquiries about child care, Separation Notices, and TESI forms. Resp. Ex. 9. However, the clerical nature of inputting information into form letters does not indicate that her responsibilities are program-wide. Rather, these job responsibilities fall within the scope of the Clerk V duties: "to work in collaboration DHCD Divisions of Housing Stabilization and Rental Assistance, community partners, and EA families responding to inquiries regarding the status of submitted applications/packets" and "prepares separation letters, Notice of Temporary Emergency Shelter Interruption (TESI) requests [and] accurately prepares and uploads records to be electronically archived." Resp. Ex. 7.

Last, the fifth and sixth PC I responsibilities involve interacting with various private, local, state and federal agencies and others in order to exchange information and/or to resolve problems, as well as performing related duties such as attending meetings and conferences; maintaining records; and preparing reports. The record shows that the Appellant interacts with other entities, such as child care providers and other organizations supporting the homeless population when she finds child care for eligible families. The Appellant also maintains certain records. However, there is no evidence in the record showing that she prepares reports or exchanges information to resolve agency issues or problems or that she interacts with federal agencies.

Further, the detailed and thorough analysis prepared by the Respondent regarding the Appellant's functions, including the information provided by the Appellant's supervisor, and the consistent and credible testimony of the Respondents' witnesses, indicate that the Appellant does not perform the functions of a PC I a majority of the time.

In sum, the Appellant's work at the DHCD is highly valued and she is performing important and essential work for people seeking assistance at a crucial time in their lives from the DHCD's Division of Housing Stabilization. The Appellant has not shown, however, that the duties she is performing qualify as the job duties of a PC 1 and, even if they did, she has provided insufficient evidence showing that she performs the job duties of a PC 1 at least 51% of the time. Therefore, the reclassification of her position to a PC I is not warranted.

For all of the above reasons, the Appellant's appeal under Docket No. C-20-036 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on June 17, 2021.

Notice to:

Constance Parks
[Address redacted]

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