STEVEN ADAMS

v.

DEPARTMENT OF CORRECTION

D1-16-205

January 17, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Discharge of Correction Officer II-Domestic Violence-Disparate Treatment—In a decision by Hearing Commissioner Cynthia A. Ittleman, a unanimous Commission affirmed the discharge of an experienced Cedar Junction Correction Officer II after two serious domestic violence incidents within the same year as well as an OUI arrest. Thoroughly reviewing Appellant's claim of harsher disparate disciplinary treatment, Commissioner Ittleman noted that 70 DOC employees had been disciplined for domestic violence since 2003, many of them losing their employment. Moreover, some of these employees had been discharged after just one incident of domestic violence.

DECISION

Steven Adams (Mr. Adams or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on December 8, 2016, under G.L. c. 31, s. 43[1], challenging the decision of the Department of Correction (Respondent) to terminate Mr. Adams' employment. A prehearing conference was scheduled in this regard on December 20, 2016 at the offices of the Commission. The Respondent appeared at the prehearing conference but the Appellant failed to appear. By notice to the Appellant dated December 21, 2016, the Appellant was issued an Order to Show Cause by December 30, 2016 why his appeal should not be dismissed for lack of prosecution based on his failure to appear at the scheduled prehearing conference. The Appellant failed to respond and the appeal was dismissed on January 19, 2017. On February 16, 2017, the Commission received a letter from the Appellant stating that he had been unable to attend the prehearing conference because he had been detained in the Norfolk House of Correction. The Appellant's letter was treated as a Motion for Reconsideration of the Dismissal (Motion). The Respondent submitted an Opposition to the Motion. On March 30, 2017, the Motion was allowed. The prehearing conference was rescheduled and held on May 23, 2017 at the offices of the Commission. A hearing[2] was held on August 4 and 18, 2017 at the Commission. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties received a CD of the recording.[3] The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Respondent's Exhibits 1 through 16 (including rebuttal cases), and the Appellant's Exhibits 1 through 22 were entered into evidence at the hearing.[4] Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Nicholas Green, Correction Officer, Internal Affairs Unit, DOC
- Jason Wheeler, Police Officer, Easton Police Department (EDP), via subpoena
- Conor Flynn, State Trooper, Massachusetts State Police, via subpoena

Called by the Appellant:

- Edward Slattery, Correction Officer, MCOFU Vice President, via subpoena duces tecum
- Steven Adams, Appellant

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

BACKGROUND

1. In 1998, DOC hired the Appellant as a Correction Officer I (CO I). (Appellant Exhibits (A.Exs.) 1, 2) The Appellant was assigned to Mass. Correctional Institution (MCI) Concord, a medium secured facility. (Testimony of Appellant)

2. The Appellant was promoted to COII in 2011, and reassigned to MCI Cedar Junction in Walpole. (A.Exs. 1, 3). He successfully bid to work in the Department Discipline Unit (DDU), a most challenging assignment, and he has been assaulted there many

1. The Appellant asserts, for the first time, in his post-hearing brief (p. 34, n. 4) that he filed an appeal alleging both procedural (G.L. c. 31, s. 42) and substantive (G.L. c. 31, s. 43) flaws in his discipline. First, this effectively precluded the Respondent from responding to the argument. Second, the Appellant did not appeal the DOC's 2015 discipline decision regarding domestic violence and that matter is not before the Commission. Third, the appeal form filed by the Appellant in the instant case references only a substantive appeal and left the procedural appeal portion of the form blank. Fourth, the Appellant avers that the DOC 2016 discipline decision regarding domestic violence, which is the subject of the instant appeal, was issued late (a month after the hearing). Fifth, pursuant to Commission practice, I read an introduction at the hearing indicating that the appeal was premised on s. 43 and received no objection in that regard. Even if the Commission were to allow amendment of an appeal at this stage, the Appellant has not established that he was aggrieved thereby and the appeal would be denied. That said, all Respondents should issue timely decisions.

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.

4. The numbers the parties had assigned to their proposed exhibits were changed at the outset of the hearing to reflect deletions pursuant to objections and rulings thereon.

times. The CO II position is equivalent to the rank of Sergeant. (Testimony of Appellant; Appellant's Exhibits (A.Exs.) 3 - 9)

3. From 2011 until his termination on November 30, 2016, the Appellant was permanently assigned to MCI Cedar Junction, then a maximum secured correctional facility. (Testimony of Appellant; A.Ex. 3-7, 15, 20)

4. During the Appellant's approximately eighteen years of service as a corrections officer, the Appellant received favorable employee performance reviews, specialized training and recognition for his performance. (Testimony of Appellant; A.Exs. 4-7, 9 and10) Specifically, the Appellant had received a number of "exceeds" ratings in his EPRSs in recent years and on at least two (2) occasions, his EPRS referred to the Appellant as an "exemplary correctional professional". (*Id*.)

5. On November 10, 2010, the Appellant was appointed to the Special Operations Response Unit, Special Reaction Team. (Testimony of Appellant)

September 15, 2016 Incident

6. On September 15, 2016, at approximately 1:41 a.m., the Appellant's wife (Ms. A) entered the Alltown Mobile gas station on Foundary Street in Easton, MA and asked the store clerk, Ms. H, to use the phone. (Respondent's Exhibits (R.Exs.) 4 (pp. 20 and 23) and 6) Ms. A appeared upset so Ms. H asked if she was ok and Ms. A stated that she had been in an argument with her husband. Ms. A dialed 911 on Ms. H's phone. At approximately 1:42 a.m., the Appellant entered the store and stood next to Ms. A, who was on the phone. Ms. A hung up the phone. (R.Ex. 6)

7. The 911 dispatcher at the Easton Police Department (EPD) called the store back shortly thereafter and asked to speak with Ms. A. (R.Ex. 4, p, 20; R.Ex. 5) Ms. A told the dispatcher that she and her husband had gotten into an argument but there was "no problem". However, the Appellant was still standing next to Ms. A at that time. (R.Exs. 5 and 6)

8. The dispatcher told Ms. A that police would be responding to the gas station and asked to speak with Ms. H. The Dispatcher asked Ms. H if Ms. A appeared to be upset and Ms. H said that Ms. A did appear to be upset. (R.Ex. 5) Ms. H observed bruises on Ms. A's arm. (R.Ex. 4) While she was on the phone with the dispatcher, Ms. H said to Ms. A words to the effect that she has been in Ms. A's situation before herself and that no man should ever put their hands on you. (R.Exs. 4, 5 and 6)

9. At approximately 1:50 a.m., EPD Police Officer Jason Wheeler arrived at the gas station. EPD Officer Dennis Kitsos arrived at the gas station within the next five (5) minutes or so. (R.Ex. 6)

10. Officer Wheeler spoke with Ms. A, who said that her husband "beat her up on the side of Route 24". (R.Ex. 4; Testimony of Wheeler). Officer Wheeler observed that Ms. A's nose was bleeding, she had "bruises all over her arms, red marks around her neck, her ears and nose were bleeding, and she looked visibly shaken." (A.Ex. 4; Testimony of Wheeler)

11. Ms. A informed Officer Wheeler that she and her husband, the Appellant, went to a concert early in the evening in Boston and got separated afterwards for some time. When they were back together, the Appellant became angry with her and they started fighting on the way home. Ms. A was driving and the Appellant was the passenger. The Appellant tried to grab Ms. A's cell phone and throw it out of the car window but the window was closed and the Appellant injured his elbow. The Appellant had tried to choke her twice and beat her in the car. In addition, the Appellant tried to grab the steering wheel from Ms. A and force the car into the breakdown lane. Eventually, the car went into the breakdown lane. The Appellant had also pulled Ms. A by the hair and pulled her out of the car, where he attempted to choke her again. This occurred somewhere around the Avon exit on Route 24. Ms. A and the Appellant then got back into the car and proceeded to the Alltown Mobil gas station in Easton. (R.Ex. 4; Testimony of Wheeler)

12. Officer Kitsos took five (5) photographs of Ms. A at the gas station while they waited for someone from the State Police to arrive since the incident occurred on a state road (Rte. 24). The photographs of Ms. A's injuries that night were consistent with the injuries observed by Officer Wheeler. One (1) photograph shows a clump of Ms. A's hair that was "twice the size of a golf ball" that Officer Wheeler saw fall from Ms. A's hair after she put her fingers through her hair, which was consistent with Ms. A's statement that the Appellant had pulled her by her hair. (Testimony of Wheeler; R.Ex.4)

13. At the gas station, Ms. A drafted an affidavit describing what happened that evening. The affidavit states, in part, "he grabbed me in a chock [sic] hold and shook me pulled my hair and drag [sic] me out of car. He then … my car keys into the woods. Then we continued on driving with his set of keys …." (R.Ex. 9)[5]

14. Officer Wheeler also spoke to the Appellant outside at the gas station. Officer Wheeler told the Appellant what Ms. A had told him about the events that night. Officer Wheeler observed that the Appellant's elbow was bleeding. The Appellant told Officer Wheeler that he smashed the car window with his elbow but it was because, he asserted, Ms. A would not let him out of the car. The Appellant admitted to Officer Wheeler that he had pulled Ms. A's hair but he said that he did it because she was trying to bite him. The Appellant alleged that Ms. A was intoxicated or had been drinking that night but Officer Wheeler did not observe that Ms. A was intoxicated. The Appellant mentioned to Officer Wheeler that he (the Appellant) had been in a prior domestic violence incident. (R.Ex. 4; Testimony of Wheeler)

5. The quality of the copy of the affidavit is poor, making only some sections readable.

15. State Troopers Flynn and Lucas arrived at the gas station at or around 2:35 a.m. Trooper Flynn spoke with Easton Police Officer Kitsos, then the Appellant and then Ms. A. Trooper Flynn's report indicates, in pertinent part,

> … [The Appellant] said they began arguing and she pulled over into the breakdown lane. He grabbed the keys out of the ignition. As he was doing so, [Ms. A] bit his right bicep. I observed red marks on his right bicep (see photos). Steven then broke the passenger side window with his elbow to 'let himself out'. He said he got out of the vehicle and didn't remember what happened after that and he did not know how he got to the gas station … As I was speaking with Steven I detected a strong odor of an alcoholic beverage coming from his mouth.
>
> I then spoke with [Ms. A] who was visibly upset. She was crying and her hands were shaking. I observed a large bruise on her right bicep and red marks on her arm, shoulder, chest, and neck. I asked her what happened. She stated she and Steven were driving home … from Boston on Rt. 24 South. They began arguing and she pulled into the breakdown lane. Steven grabbed the keys out of the ignition and got out of the car. He walked around to the driver's side, opened the door and grabbed her by her hair and began shaking her. He put his hands around her neck and began 'choking' her. He pulled her out of the drivers (sic) door by her arm and dragged her to the side of the road. He grabbed her around her neck with his hands and began 'choking her'. He had a tight grip around her neck, began to squeeze and she was unable to breath (sic). She stated she was trying to fight back to free herself. Steven then let her go, and threw her car keys and cell phone into the woods. … They continued to argue and eventually got back in the car and drove away … They exited the highway and stopped at the Mobile gas station in Easton. Steven got out of the car, and walked away with the car keys and her purse. [Ms. A] then went inside the gas station and called 911 … [Ms. A] said Steven has hit her multiple times in the past, including an incident last summer where Steve was arrested on Domestic A&B in [town where they live]. [Ms. A] was read her 209A rights … She declined her rights at this time and said she would consider getting a 209A order in the morning at court. [Ms. A] stated Steve gets like this when he drinks, and that he was 'drinking a lot tonight'. [Ms. A] showed me a large clump of her hair she said was ripped out of her head by Steven during the altercation …
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> … The bruises on [Ms. A's] arm, and red marks on her neck were consistent with the account of the incident told by [Ms. A]. Based on the marks and bruises, it was determined Steven Adams was the primary aggressor in this incident. Steven was informed he was under arrest for Domestic Assault and Battery on a Family Member Ch. 265 13M-B and Strangulation or suffocation Ch. 265 15D-A. … He was transported back to the SP Milton Barracks where he was read his rights, booked, photographed and fingerprinted. … Bail Commissioner … was contacted and stated Steven should be held until court. (R.Ex. 4, pp. 47-49; *see also* A.Exs. 2 and 18 and Testimony of Flynn)[6]

In addition to photographing the red marks on the Appellant's right bicep, the State Police photographed the cuts on the Appellant's elbow. In addition, police took control of the Appellant's license to carry a firearm and arranged to remove the Appellant's pistol from his house and to have the house checked to ensure that there were no other firearms there. (*Id.*) "The remainder of [the Appellant's] firearms are stored at his supervisor's house … [The Appellant] said he has stored them there since he was last arrested for Domestic A&B last summer." (*Id.*) The State Police informed the Appellant's supervisor, Capt. Jeff Sousa, and his commanding officer, of the Appellant's arrest. (*Id.*) The Appellant testified at the Commission hearing that he had his gun license at that time. (Testimony of Appellant)

16. By around 3:40 a.m., the State Police and Easton Police appear to have left the Mobil gas station, with the State Police having arrested the Appellant and transported him to the State Police Barracks in Milton, where he was booked, photographed and detained. However, Ms. A remained inside the gas station store. Initially, she was standing next to the cashier or the cashier's counter. At some point, Ms. H apparently brought out a chair for Ms. A, putting the chair next to the cashier or the cashier's counter. From this time forward, Ms. A remained close to the cashier or the cashier's counter, except to go to the restroom briefly, until she (Ms. A) left the store. While in the store, Ms. A appeared to talk to the cashier occasionally and borrowed the cashier's phone to make a call a couple of times. During at least one (1) of those calls, Ms. A called a towing company to request a tow for her car because the Appellant had thrown her keys away and, apparently, the Appellant did not have or give his keys to Ms. A. A tow truck arrived at the store at or around 5:15 a.m. to tow the car that Ms. A and the Appellant had ridden in that night and Ms. A left the store. (R.Exs. 4 and 6)

17. Later that morning, the Appellant was arraigned in Stoughton District Court, bail was set and he was ordered not to abuse Ms. A and to stay away from her. However, at the Prosecution's motion, the Court then ordered the Appellant to be held without bail until December 14, 2016 apparently because of conditions related to the Appellant's arrest for an OUI in July 2016 in Attleborough District Court. The assault and battery and strangulation or suffocation charges in Stoughton were transferred to the Attleborough Court, wherein bail was re-established and conditions were added to protect Ms. A as follows if bail was posted: GPS monitoring with exclusion zones of victim's residence and employment; stay away from victim; no abuse of victim; do not possess firearms; refrain from alcohol with random testing; and "*Defendant is <u>not</u> to be released without GPS." (A.Ex. 18)(emphasis in original) In or about December 5, 2016, the Appellant posted a cash bond. On December 15, 2016, the Appellant's bail was revoked for an unspecified "violation of terms of release". (*Id.*) The Appellant's trial for the assault and battery and strangulation or suffocation charges was scheduled for January 26, 2017. However, on the hearing date, Ms. A, "after colloquy with the court", raised the marital privilege not to testify against her husband, and the case was dismissed "for failure to prosecute [without] prejudice." (*Id.*)

18. By letter dated September 15, 2016, the Respondent informed the Appellant, "[it] has come to the Department's attention that you are currently in custody and unavailable to report for work.

6. It is unknown if Ms. A was informed that the Appellant would be held without bail at least until he was arraigned in court later that morning.

Accordingly, you are considered off the payroll until further notice." (R.Ex. 4)

19. On September 16, 2016, DOC began an investigation of the Appellant's arrest. The investigation was conducted by Correction Officer Green of the DOC Office of Investigative Services. On September 26, 2016, CO Green submitted a detailed 88-page report of his investigation to the Chief of the DOC Office of Investigative Services. CO Green's report indicated, in part, that he obtained and analyzed:

> the State Police report related to the Appellant's September 15, 2016 arrest;
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> Easton PO Wheeler's report related to the September 15, 2016 incident;
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> photographs taken of the Appellant and Ms. A on September 15, 2016 in connection with the Appellant's arrest;
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> Ms. A's written statement given to the police on September 15, 2016;
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> an interview of Ms. H at the gas station store;
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> court records regarding the September 15, 2016 charges against the Appellant;
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> 911 audio recordings involving Ms. A at the gas station store on September 15, 2016;
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> audio recordings of certain calls made by the Appellant while he was in custody between September 15 and September 22, 2016;
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> video recordings of the gas station store and exterior gas pumps area between approximately1:37 a.m. and 5:20 a.m. of September 15, 2016;
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> DOC Incident Reports relating to the Appellant's September 15, 2016 arrest;
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> records of the Appellant's employment at DOC, including his disciplinary history;
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> the Appellant's license to carry a firearm;
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> the September 15, 2016 letter from DOC to the Appellant indicating that he was off the payroll because he was in custody and unavailable to work;
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> the Internal Investigations Waiver form that the Appellant signed asserting his constitutional rights against self-incrimination when he was scheduled to be interviewed by CO Green; and
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> the Appellant's Board of Probation (BOP) record.

(R.Ex. 4; *see also* Testimony of Green)

CO Green called the law enforcement officers involved in the Appellant's arrest on September 15, 2016 to schedule their interviews. However, the officers did not respond prior to September 26, 2016, the date of CO Green's investigation report. (R.Ex. 4)

20. The Appellant's BOP indicates that:

> a restraining order was issued against the Appellant on August 26, 2015 at the request of Ms. A and the order ended on September 8, 2015;
>
> he was arraigned on August 26, 2015 for assault and battery and the case was dismissed in May 2016;
>
> the Appellant was also arraigned on August 26, 2015 for destruction of property, for which he received a continuance without a finding (CWOF), and the case was dismissed in May 2016.
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> he was arraigned for an OUI on July 14, 2016, which case was open at the time the Appellant was arrested on September 15, 2016 for assault and battery of a household member and strangulation or suffocation[7]; and
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> the Appellant was arraigned for assault and battery and for strangulation or suffocation on September 15, 2016 in regard to the matters underlying the instant appeal.

(R.Ex. 4)

21. Prior to September 15, 2016, the Appellant's DOC disciplinary record consisted of:

> 2003 letter of reprimand ("no call, no show");
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> 2011 letter of reprimand ("refused to remain on duty; refused forced overtime"];
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> January 2015 letter of reprimand ("failed to provide medical evidence"); and
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> August 26, 2015 five (5)-day suspension and "Last Chance Warning" ("arrested for assault and battery on a family member (domestic); destroyed property less than $250; took actions that put family in fear; restraining order and assault charges dismissed").

(R.Ex. 4; *see also* R.Ex. 10)

22. Audio recordings of the Appellant's phone calls while he was held in NCCC after his September 15, 2016 arrest include:

> September 20, 2016, approximately 11:49 a.m. - the Appellant called his father and asserted that Ms. A had been attacking him. His father told the Appellant, in part, that he needed to "get help" because of the way he reacts and that he (Appellant's father) had contacted the DOC Employee Assistance Services unit to get help. The Appellant said, in part, that he wanted to obtain a restraining order against Ms. A to counter a court order against him;
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> September 20, 2016, approximately 4:18 p.m. - the Appellant called Capt. S at Old Colony Correction Center (OCCC), admitting that he threw Ms. A's phone away. He also asked Capt. S if "Mark" got "those things" out of the closet and Capt. S said that he did;
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> September 20, 2016, approximately 4:32 p.m. - the Appellant called his mother and told her, in part, that Ms. A was driving 100 mph and threatened to kill them both. He admitted that he grabbed the steering wheel and Ms. A bit him and that he had grabbed her by the throat. He also stated that Ms. A needed to do the same thing as before and not testify and end a restraining order[8];

7. There is no evidence in the record about the court disposition of the OUI charge against the Appellant.

8. Presumably the Appellant was referencing the order to stay away from Ms. A and not abuse Ms. A issued by the court during his arraignment as there is no in-

> September 21, 2016, approximately 8:41 a.m. - the Appellant called Capt. S. and said, in part, that the court order ordering him to stay away from Ms. A needed to be removed and Capt. S stated that his wife would talk to Ms. A;
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> September 21, 2016, approximately 1:26 a.m. - the Appellant called his cousin and said that Ms. A was driving 100 mph on the highway, she stopped, he got out and started walking and that Ms. A tried to run him down;
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> September 22, 2016, approximately 12:32 p.m. - the Appellant called Capt. [S], who said, in part, that this was the "third" incident between the Appellant and Ms. A and that the Appellant may want to resign before he is fired[9] . The Appellant said, in part, that he was going to file charges against Ms. A as collateral. Capt. [S] said that he and his wife would talk to Ms. A to "see where she is at";
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> September 22, 2016, approximately 12:45 p.m. - the Appellant called a female DOC employee stating, in part, that Ms. A was driving dangerously, they got into a struggle and he admitted he "grabbed [Ms. A] by the throat", asserting that Ms. A had hit him with a mug, bit him and tried to run him down; and
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> September 22, 2016, approximately 8:49 p.m. - the Appellant called the female DOC employee and admitted that on September 15, 2016, he had choked Ms. A and pulled her hair, asserting he did so to protect himself.

(R.Ex. 4)

23. When CO Green conducted an interview of Ms. H on September 22, 2016, they were at the gas station store. Ms. H asked that the interview not be recorded and stated,

> Ms. A said that the Appellant had beaten her up on the highway that night and it was not the first time he had done that;
>
> Ms. A said that she was scared to leave the Appellant because they have two (2) young children and she did not know how the children would be affected by that;
>
> Ms. H did not think that Ms. A was under the influence of alcohol when Ms. A was in the gas station store with her and that Ms. A did not slur her words;
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> she (Ms. H) recalled that Ms. A had an injury to her harm but she asserted that she did not recall if Ms. A had other injuries; and
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> she (Ms. H) recalled that the Appellant's elbow was bleeding.

(R.Ex. 4)

After interviewing Ms. H, CO Green searched the property outside the store to see if he could find the Appellant's keys. He did not find the keys. (R.Ex. 4)

24. On September 26, 2016, CO Green completed his investigation report, finding that the Appellant violated DOC General Policy 1, Rule 1, Rule 19 and 103 DOC 238, the latter being the DOC's Policy for the Prohibition of Sexual Assault, Domestic Violence, Harassment and Stalking. (R.Ex. 4)

25. DOC Deputy Commissioner Michael Grant concurred with CO Green's findings. (R.Ex. 4)

26. On September 26, 2016, Dep. Commissioner Grant wrote to the Appellant indicating that the investigation of his conduct on September 15, 2016 had been completed and that the matter was being referred for a Commissioner's hearing. (R.Ex. 4)

27. DOC Commissioner Thomas Turco informed the Appellant on September 26, 2016 that a hearing would be held on September 30, 2016 at the Norfolk County Correctional Center (NCCC), where the Appellant was being held, to determine whether:

> a. On or about September 15, 2016, you physically abused your wife[.]
>
> b. Your abuse of your wife included, but was not limited to: 1) pulling your wife by the hair and 2) putting your hands around your wife's neck and attempting to choke her.
>
> c. You squeezed your wife so tightly around her neck that it caused marks or bruising.
>
> d. Your wife sustained injuries from your abuse including, but not limited to, a bruise on her bicep and red marks on her arm, shoulder, chest, and neck.
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> e. You ripped a clump of hair out of your wife's head.
>
> f. You threw your wife's cell phone, preventing her from using it.
>
> g. You took your wife's car keys, preventing her from operating her vehicle.
>
> h. You smashed the passenger side window of the above vehicle while you and your wife were inside.
>
> i. Your wife called 911 from a gas station in Easton and Easton Police officers responded. After the police spoke with you and your wife and observed injuries, you were arrested and charged with Domestic Assault and Battery/Family Household Member and Strangulation or Suffocation.

(A.Ex. 2)

At the hearing, it would be determined whether such conduct violates:

> General Policy 1, which provides, in part, 'Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents or by their authority. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations. Your acceptance of appointment to the Massachusetts Department of Correction shall be acknowledged as your acceptance to abide by these rules and regulations ….'

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formation in the record indicating that Ms. A sought and received a separate civil restraining order.

> Rule 1, which provides, '[y]ou must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent.
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> Rule 19(d), which states, 'It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank.'

(A.Ex. 1)

The notice also stated, in part,

> Your actions are also in violation of 103 DOC 238, the Department's Policy for the Prohibition of Sexual Assault, Domestic Violence, Harassment and Stalking, which states, 'The Commonwealth has a zero-tolerance policy for sexual assault, domestic violence, harassment and stalking occurring within or outside the workplace.' 103 DOC 238.01 The policy explains, 'MGL Chapter 209, Section 1 … defines domestic violence as a form of abuse among family or household members, which includes those individuals who are or have been involved in a substantive dating relationship. Abuse is defined as 'the occurrence of one or more of the following acts between family or household members:'(a) Attempting to cause or causing physical harm; or (b) Placing another in fear of imminent serious physical harm; ….' 103 DOC 238.03(1). Moreover, the policy states, 'Department employees shall: (a) Ensure that they do not participate in any form of sexual assault, domestic violence or harassment, either within or outside the workplace. (b) Cooperate in the investigation of alleged sexual assault, domestic violence [sic] harassment by providing information they possess concerning such matters.' 103 DOC 238.04(3).

(*Id.*)

Finally, the notice indicated that G.L. c. 31, ss. 41-45 were attached thereto. (*Id.*)

28. The DOC hearing was held on September 30, 2016. Present at the hearing were Administrative Prosecutor Amy Hughes; Investigator CO Green; CO Ted Slattery, then-Vice President of MCOFU; and the Appellant. The hearing officer wrote that CO Green testified but, "Sgt. Adams did not testify at the hearing under advice of counsel and the Union. [The hearing officer] did not draw a negative or adverse inference from his decision not to testify." (R.Ex. 2)

29. On October 3, 2016, the hearing officer sent Commissioner Turco a memorandum about the hearing, indicating that she found CO Green's testimony about his investigation to be extensive and credible. Based on the evidence and her analysis thereof, the hearing officer found that the Appellant committed the actions described in Commissioner Turco's notice of hearing to the Appellant and she found that such actions violated the cited rules and policies. (R.Ex. 2)

30. On November 30, 2016, Commissioner Turco wrote to the Appellant articulating the hearing officer's findings regarding the Appellant's actions on September 15, 2016, and his related conduct, and the hearing officer's determination that such actions and conduct violated the cited rules and policies. Based thereon, Commissioner Turco terminated the Appellant's employment. (R.Ex. 3)

31. On December 8, 2016, the Appellant filed the instant appeal. (A.Ex. 1; Administrative Notice)

32. At the Commission hearing in this case, the Appellant invoked his constitutional rights against self-incrimination, refusing to testify regarding his September 15, 2016 arrest and related matters. However, he testified regarding other matters and that he was then attending Alcohol Anonymous meetings, counseling and a batterers program. (Testimony of Appellant)

Prior Discipline[10]

33. Prior to the incident described above, on August 26, 2015 the Appellant was arrested and an Abuse Prevention Order (AB) was issued against the Appellant. (R.Exs. 14 and 15) By letter dated September 1, 2015, DOC superintendent Saba informed the Appellant that if he was convicted of a domestic violence offense, "by operation of law", he would be barred from carrying and operating firearms as a Correction Officer as long as the ABO remained in effect. This letter added, in part,

> Given the extreme gravity with which the Department views such crimes of violence in domestic circumstances, after proper notice and hearing you will be subject to discipline up to and including termination …
>
> … This letter is not to be considered disciplinary in nature; however, the Department does reserve all rights to proceed against you administratively as may be appropriate in the future. …

(R.Ex. 15)

The letter attached a copy of the DOC Policy for the Prohibition of Sexual Assault, Domestic Violence and Harassment, 103 DOC 238, and informed the Appellant of employee support programs. (*Id.*)

34. By letter dated September 9, 2015, Supt. Saba informed the Appellant that the ABO issued was vacated and that he was no longer barred from working an assignment that requires a firearm. (R.Ex. 16)

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9. CO Slattery testified that COs are, on occasion, informed by the union of the option to resign, rather than be disciplined.

10. Although the Appellant invoked his constitutional right not to testify in connection with his 2016 arrest and related matters, he testified concerning his 2015 arrest, which I consider for the purpose of understanding that the Appellant's 2016 arrest was the second domestic violence incident for which the Appellant was disciplined.

35. By letter dated March 17, 2016, Commissioner Higgins O'Brien informed that Appellant that, based on an investigation, a hearing would be held on April 19, 2016 to determine if he had violated the cited DOC rules and policies. The investigation found:

> 1. On August 26, 2015, police responded to your home and arrested you. You were charged with assault and battery on a family or household member, assault and battery, and malicious destruction of property of $250.00. A restraining order also issued against you.
>
> 2. You did, in fact, maliciously[11] destroy property valued over $250.00
>
> 3. You did, in fact, take physical actions that were threatening and that placed your mother and wife in fear.
>
> 4. The restraining order was dismissed on September 8, 2015 at the request of the victim, and on November 5, 2015, the charges of assault and battery against a household member and assault and battery were dismissed upon payment of a fine, due to the victims' refusal to testify.
>
> 5. You pled to sufficient facts in connection with the malicious destruction of property charge, and that matter was continued without a finding for six (6) months.
>
> 6. You failed to properly report in writing the incident, and related court appearances to your Superintendent or DOC Department Head, as required.
>
> 7. You had police contact on July 23, 2015, that you failed to report to the Department in any manner, as required.
>
> 8. You were less than truthful when interviewed by a Department investigator regarding the above-matters.

(R.Ex. 13)

The March 17, 2016 letter also stated that the Appellant's conduct violated General Policy 1, Rule 1, Rule 2(b) (regarding the prompt written notice to DOC of an employee's involvement with law enforcement pertaining to an investigation, arrest or court appearance), Rule 19(c) (regarding responding to questions in an investigation), and the DOC Policy for the Prohibition of Sexual Assault, Domestic Violence, and Harassment at 103 DOC 238 (stating, in part, that the state has "a zero-tolerance policy for sexual assault, domestic violence, harassment and stalking occurring within or outside the workplace …" and that employees are required to "promptly" report in writing if they are the named defendant or subject of an [ABO]). (*Id.*)

36. On May 2, 2016, a hearing officer reported to Deputy Commissioner Grant that she sustained the findings of the investigation and found that the Appellant's conduct violated the cited rules and policies. The hearing officer's report was a detailed review of the allegations against the Appellant and she made detailed credibility assessments finding the Appellant's testimony to be flawed, lacking in corroboration and inconsistent. (R.Ex. 14)

37. By letter dated June 1, 2016, Commissioner Turco informed the Appellant that he sustained the findings of the hearing officer's report and suspended him for five (5) days. Further, Commissioner Turco wrote,

> [a]dditionally, I am imposing a **Last Chance Warning** that any violation of *any* Department rule, policy, or regulation may lead to termination of your employment with the [DOC].

(R.Ex. 10)(emphases in original)[12]

This letter also informed the Appellant of the right to appeal to the Commission. (*Id.*) The Appellant did not appeal Commissioner Turco's decision.[13] (Administrative Notice)

Other DOC Employees Disciplined for Domestic Violence

38. According to the records produced by the Respondent, since 2003 approximately seventy (70) Correction Officers have been disciplined in connection with domestic violence. Of the seventy (70), approximately[14] 80% of the Correction Officers were disciplined for one instance of domestic violence; most of the others were disciplined for mostly a repeated instance of domestic violence. Approximately twenty (20) of the seventy (70) Correction Officers disciplined for domestic violence were disciplined with a one (1) day of suspension, approximately nine (9) were disciplined for three (3) days, approximately 14 received five (5)-day suspensions, and a handful received ten (10), fifteen (15), twenty-five (25) or thirty (30)-day suspensions. Pursuant to some settlement agreements, parts of some of the suspension days were held in abeyance for one (1), two (2), or three (3) years. Four (4) of the suspensions included "last chance agreements". (A.Exs. 20, 21 and 23)

39. According to the records in evidence, the Respondent terminated the employment of nine (9) of the disciplined Correction Officers; eight (8) of the nine (9) whose employment was terminated were disciplined for only one (1) domestic violence incident. Two (2) of the COs whose employment was terminated were convicted of domestic violence-related crimes. Another two (2)

11. At the April 19, 2016 DOC hearing, the DOC Prosecutor amended the "malicious" allegations to "wanton", without objection from the Appellant or his representative. (R.Ex. 14)

12. The precise meaning of "last chance warning" is unclear. CO Slattery testified that the Respondent sometimes refers to "last chance agreements" or to "final warnings" in its discipline documents. He defined a "last chance" agreement as a phrase indicating that a disciplinary settlement refers to a specific time period and issue. He defined a "final warning" as a phrase indicating that the discipline is more "global" and has no time limit. (Testimony of Slattery) Given that the Appellant's 2015 domestic violence incident occurred only one (1) year before his 2016 domestic violence incident and that Commissioner Turco's decision referenced future violations of "any" DOC policies or rules, the reference to a "last chance warning" does not alter the results here.

13. Commissioner Turco's June 1, 2016 decision letter to the Appellant listed the rules that the Appellant was found to have violated via the DOC hearing but the list did not include the Respondent's domestic violence rule referenced in the notice of hearing sent to the Appellant. Nonetheless, Commissioner Turco found that the Appellant had been charged with assault and battery on a family or household member, a restraining order was issued and more. Therefore, the allegation of the Appellant's 2015 domestic abuse was sustained by Commissioner Turco.

14. Although these determinations are intended to reflect the final outcome in each disciplinary matter, approximations are used to account for some distinctions between the cases. For example, 1) one CO was disciplined on one occasion for multiple domestic violence related incidents on divers dates that had not been reported; 2) discipline was modified following arbitration or appeal; and 3) some of the wording of the discipline in A.Ex. 20 is unclear.

of the COs whose employment was terminated were terminated during their employment probation period. (*Id.*) In non-probationary period and non-conviction terminations, the following COs were terminated after one (1) domestic violence incident:

> 1) a CO was specifically disciplined for domestic violence that occurred in 2009 and 2010; he was terminated in 2013 when he "failed to properly notify dept of court appearance" without specifically stating that the 2013 court appearance involved domestic violence (A.Ex. 20 (#33));
>
> 2) a CO was terminated for only one (1) incident of domestic violence in 2008 and his termination was upheld in arbitration (A.Ex. 20 (#53));
>
> 3) a CO was terminated for only one (1) incident of domestic violence in 2012, which termination was upheld by this Commission (A.Ex. 20 (#24));
>
> 4) a CO was terminated for only one (1) domestic violence incident in 2009 but this Commission reinstated the CO with a four (4) month suspension (A.Ex. 20 (#41)); and
>
> 5) a CO was terminated for one (1) incident of domestic violence in 2009, years after he had received letters of reprimand for unrelated misconduct and a brief suspension for using profanity at other COs (A.Ex. 20 (#22).

40. Much of the information in the record does not describe the specific acts of domestic violence committed by the approximately seventy (70) COs, any injuries their victims sustained and any property damage they caused. Neither did the information produced always indicate if restraining orders were issued against the COs, the duration of any such orders, and the reasons such orders were ended. Similarly, the information produced does not indicate the disposition of criminal charges against the COs, if any, except in the two (2) instances in which a CO was terminated following his criminal conviction. In seventeen (17) of the domestic violence incidents involving approximately seventy (70) COs, discipline was issued pursuant to settlement agreements; eight (8) of the settlement agreements are in the record. In five (5) of the eight (8) settlement agreements, certain details of the domestic violence are provided by notice letters sent to the CO:[15]

1. In 2016, a notice letter charged CO-A as follows:

> … you engaged in an argument with your son's mother, during which you pushed her purse over the counter, smashed your watch and 'flipped over' a piece of a sectional couch.
>
> As the argument continued, your son became involved and you punched him in the face.
>
> You challenged your son to a fight and engaged in a physical altercation where you grabbed him by the waist and 'suplexed' him to the floor.
>
> … you were arrested by the [redacted] police and charged with Simple Assault and Disorderly Conduct. These charges were subsequently dismissed.
>
> You failed to properly report the court dates associated with your arrest to the Department.
>
> (A.Exs. 23 (#52); *see also* A.Exs. 20 and 21 (which includes Disciplinary Histories produced by Respondent)[16]

CO-A was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension, of which part would be held in abeyance for one (1) year. (*Id.*) This is the only domestic violence discipline of CO-A in the record. (Administrative Notice)

2. Also in 2016, a notice letter charged CO-B as follows:

> … [redacted] police responded to your residence in connection with a domestic incident with your girlfriend. You were later arrested and charged with assault and Battery (sic) on a family or household member, and intimidation of a witness.
>
> You did, in fact, push your girlfriend.
>
> You did, in fact, hit your girlfriend.
>
> … you appeared in [redacted] Court and agreed to pre-trial probation [for one year], on both criminal charges. You also agreed to administrative supervision and to attend a batterers' program.

(A.Exs. 23 (#69); *see also* A.Exs. 20 and 21)

CO-B was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A "last chance" settlement agreement between the parties resulted in a fifteen (15)-day suspension such that "any future violation of the Department's policies, procedures or post orders … after a hearing … shall constitute just cause for … termination. … " (*Id.*) This is the only domestic violence discipline of CO-B in the record. (Administrative Notice)

3. In 2015, a notice letter charged CO-C as follows:

> … you were arrested by the [redacted] Police Department for assault and battery, domestic. You did, in fact, commit a domestic assault and battery.
>
> As a result of the above-mentioned incident, a restraining order issued against you. This order remains in effect until [eight (8) months after the incident].
>
> (A.Ex. 23 (#68); *see also* A.Exs. 20 and 21)

CO-C was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension. (*Id.*) This is the only domestic violence discipline of CO-C in the record. (Administrative Notice)

4. In 2016, a notice letter charged CO-D as follows:

> … you were involved in a domestic dispute with your wife and became enraged. During this dispute, you yelled at your wife and spit in her face. You also attempted to hit her with a board. Your teenage son intervened by jumping on your back, causing you both to fall on the bed and the floor.

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15. CO Slattery, Appellant's witness and then-Vice President of MCOFU, testified under a subpoena duces tecum, that whether or not there is a notice letter with some detailed information is available depends upon the point in the disciplinary process the parties reached a settlement agreement.

16. I take Administrative Notice that the term "suplexing" is defined as, "[a] move in which a wrestler lifts an opponent over his or her shoulder before falling backwards, driving the opponent to the mat." https://en.oxforddictionaries.com/definition/suplex (January 3, 2019)

> During the aforesaid incident, you punched and/or kicked several doors, causing damage.
>
> You were under the influence of marijuana and/or prescription medications at the time of this incident.
>
> … you were arrested by [redacted] Police and charged with four misdemeanors. You were arraigned on these charges on [date redacted]. On [date redacted], your wife invoked her marital privilege not to testify against you and all charges were dismissed.
>
> The aforesaid conduct is unbecoming a correction officer.
>
> (A.Exs. 23 (#40); *see also* A.Exs. 20 and 21)

CO-D was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A "last chance" settlement agreement between the parties resulted in a five (5)-day suspension. In addition, the parties agreed that CO-D "will continue to attend substance abuse treatment until otherwise directed by a counselor. [CO-D] will provide proof of counseling to the Department upon request. Failure to comply with this counseling provision may result in additional administrative action. … [A]ny further violations of the Department's [Domestic Violence Policy] shall constitute just cause for [CO-D's] termination. … This provision shall remain in effect for three (3) years …." (*Id.*) This is the only domestic violence discipline of CO-D in the record. (Administrative Notice)

5. In 2016, a notice letter charged CO-E as follows:

> … On or about [date redacted], during an interaction with your daughter's mother, your inappropriate conduct resulted in a police response and led to your arrest.
>
> During the above interaction, you struck your daughter's mother in the face.
>
> On or about [date redacted], you were arrested and subsequently charged with simply (sic) assault (domestic) and disorderly conduct. Pursuant to a plea agreement, you pled guilty to the disorderly conduct charge and the assault charge was dismissed. …
>
> (A.Exs. 23 (#61); *see also* A.Exs. 20 and 21)

CO-E was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension, part of which would be held in abeyance as long as CO-E "does not engage in any further misconduct in one (1) year." This is the only domestic violence discipline of CO-E in the record. (Administrative Notice)

41. CO Slattery, a thirty (30)-year CO who then had been Vice President of MCOFU for four (4) years, testified pursuant to a subpoena duces tecum from the Appellant.[17] Mr. Slattery produced a number of settlement agreements in cases involving domestic violence dating back to 2013[18]. Having been involved in a number of them, Mr. Slattery explained the union's role in reaching the settlement agreements, how at least some of the agreements were reached and the meaning of the agreements (e.g. a five (5)-day suspension, with three (3) days of suspension held in abeyance for one (1) year). Mr. Slattery also clarified the difference between a "last chance agreement" and a "final warning", indicating that the former applies to a specific time period and involves the matter for which the CO was disciplined whereas the latter is more "global" and has no time limit. (Testimony of Slattery)

Other Matters

42. On June 2, 2017, the Appellant filed a complaint at the Mass. Commission Against Discrimination (MCAD) *alleging*, in part,

> … On August 25, 2015, I was arrested for a domestic violence incident. Following this arrest, I applied for FMLA leave for alcohol treatment.
>
> On August 31, 2005, I commenced an FMLA leave until October 7, 2015.
>
> In November 2015, I returned to the workplace following my FMLA leave.
>
> In May of 2016, I served a 5 day suspension for conduct unbecoming.
>
> On April 10, 2016, I requested transfer which was date stamped by Respondent on April 21, 2016.
>
> In June 2016, … I was approved for intermittent FMLA after resubmitting paperwork in order to complete treatment programs for my alcoholism and domestic violence.
>
> On September 15, 2016, I was arrested for a domestic violence incident.
>
> On November 30, 2016, I was terminated for a violation of the domestic violence policy.
>
> I believe that due to my alcoholism and use of FMLA my employment was targeted for termination. Therefore I charge Respondent with discrimination on the basis of disability. (A.Ex. 19)(*see also* A.Exs. 13 - 17)

43. The Respondent's policy regarding disability are contained in 103 DOC 206, which provides generally, in part, that it is "committed to maintaining a work environment that is free from illegal discriminatory behavior with regard to both hiring and the terms and conditions for employment, including, but not limited to, promotions, terminations, transfers, job assignments and discipline, including behavior which creates a hostile, offensive, humiliating or intimidating work environment and sexual harassment …." It defines disability, in part, as "(a) A physical or mental impairment, which substantially limits one or more major life activities; (b) a record of such impairment; or (c) being regarded as having such impairment. Unless specifically stated to the contrary, disability in this policy shall be synonymous with the term 'handicap' as used in MGL c. 151B, s. 1 (16), (17) and its implementing regulations as set forth in 804 CMR s. 3.01 (5)." (A.Ex. 24) Under 103 DOC 206, an employee may request a reasonable accommodation for a disability. (*Id.*)

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17. Although Mr. Slattery appeared in response to the Appellant's subpoena, the Appellant argues in his post-hearing brief that Mr. Slattery should have been disqualified from testifying about his confidential communication with the Appellant even though he acknowledges that union-member privilege is, at best, unsettled in Massachusetts. (Post-Hearing Brief, p. 38, n. 5)

18. Mr. Slattery testified that he searched the previous ten (10) years of records for settlement agreements in cases involving domestic violence but only found the ones dating back to 2013.

44. With respect to transfers, 103 DOC 230.05 provides, "[t]he Department 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." (A.Ex. 11) If a CO has received a discipline above a letter of reprimand, the CO cannot be transferred for one (1) year. (Testimony of Slattery and Appellant) There are no transfers for mental health purposes or stress. A CO may be transferred to thirty (30) days if there is a staff conflict but after that, the CO would have to bid for a transfer pursuant to the collective bargaining agreement and seniority. (Testimony of Slattery)

45. The Appellant alleges that he sought a transfer because he was suffering from stress at work in the performance of staff before he was terminated, in addition to the usual stress in the DDU. He alleges that he reported the staff problems to his direct supervisor, who reviewed video surveillance and spoke to the staff but the remedy was apparently short-lived. The Appellant did not report the staff with whom he was having problems to the Deputy Superintendent or Superintendent. (Testimony of Appellant)

APPLICABLE LAW

Pursuant to G.L. c. 31, § 43, a "person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . . ." The statute provides, in pertinent part:

> 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 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 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.

G.L. c. 31, § 43.

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." *Cambridge* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Comm'rs of Civil Serv.* v. *Mun. Ct. of Bos.*, 359 Mass. 211, 214 (1971); *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. of Brockton* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (*citing 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).

While the Commission makes *de novo* findings of fact, "the Commission's task, however, is not to be accomplished on a wholly blank slate." *Town of Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006). "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.* at 823-24 (*citing Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983)).

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority. *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006)." *Clark* v. *Boston Housing Authority*, 24 MCSR 193 (2011), *Clark* v. *Boston Housing Authority*, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff'd.* (Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions "may be the subject of a negative inference by a fact finder where the opposing party … has established a case adverse to the person invoking the privilege. *Quintal* v. *Commissioner of the Dep't. of Employment & Training*, 418 Mass. 855, 861 (1994), quoting *Custody of Two Minors*, 396 Mass. 610, 616 (1986)." *Town of Falmouth*, at 826-27 (citations omitted).

Under certain circumstances, the Commission may modify the discipline issued to a tenured civil service employee. "The … power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority." *Falmouth* v. *Civ. Serv. Comm'n*, 61 Mass. App. Ct. 796, 800 (2004) quoting *Police Comm'r* v. *Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). 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 commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." *Falmouth* v. *Civil Service Commn*, 447 Mass. 814, 823 (2006). The Commission is also guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" as well as the "underlying purpose of the civil service system … to guard against political considerations, favoritism and bias in governmental employment decisions. " *Id.* (and cases cited). Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uni-

formity. *See Boston Police Dep't.* v. *Collins*, 48 Mass. App. Ct. 408, 412 (2000).

Credibility

Although the Appellant declined to testify about matters related to his September 15, 2016 arrest, based on his other statements, I find that the Appellant's credibility was limited. When interviewed by Trooper Flynn, the Appellant asserted that he did not recall what happened after he got out of the car on Rte. 24. However, while he was in jail after the arrest, he admitted in some calls that he had grabbed the steering wheel and grabbed Ms. A by the throat, in other calls the Appellant accused Ms. A of driving 100 mph, hitting him in the head with a mug and trying to run him over. Had the Appellant reported such grave assertions about Ms. A to the police on the night of his arrest, these statements would have had some support but the Appellant did not make these assertions until he was in jail. Other calls the Appellant made while incarcerated further diminish his credibility. For example, the Appellant asked others to speak to Ms. A to see if she would refuse to testify against him in the impending criminal trial like she had in regard to his 2015 arrest for domestic violence; the implication was clearly to undermine the prosecution of the criminal charges against him. In one (1) call, the Appellant told his father than he wanted to obtain a restraining order against Ms. A in an apparent effort to counter a court order against him. In his testimony at the Commission, the Appellant complained that he was starting to have problems with staff at work before he was terminated but he testified that he did not report the staff to the Dep. Superintendent or Superintendent the staff with whom he was having problems when the efforts of his immediate supervisor had limited effect. In addition, there is no supporting documentation in the record in this regard. When answering questions about his 2015 domestic violence incident, the Appellant minimized many aspects of his conduct.

I find EPD Officer Wheeler to be credible. At the time of the September 15, 2016 domestic violence, he had been a member of the EPD for nine (9) years, he was a field training officer and a member of a regional SWAT team. His testimony was straightforward and consistent with his report. When he did not know the answer to a question, he said so. For example, he was asked how the 911 call to the EPD was made and he stated that he did not know. His timely report and his testimony indicated that he gave full consideration to the statements and injuries of both the Appellant and Ms. A before determining that the Appellant was the primary aggressor. Before asking the Appellant what happened, he told him what Ms. A had said. The police photographs of injuries confirmed Officer Wheeler's testimony and report.

I find Trooper Flynn, who arrested the Appellant on September 15, 2016, to be credible. Although he had been member of the State Police for only one year since completion of the State Police academy at the time of the Appellant's arrest on September 15, 2016, he had additional experience as a police officer, having worked at the Marshfield police department for three (3) years. His testimony was clear and consistent with his timely report and the photographs taken of injuries. In addition, although Trooper Flynn testified that he spoke to at least one (1) of the EPD officers at the gas station, the officer told him that the case involved a "domestic" incident but the officer did not tell Trooper Flynn what the Appellant and Ms. A had told the EPD officers, leaving Trooper Flynn to make his own assessment. When Trooper Flynn did not know or recall the answer to a question, he stated so. For example, when he was asked if he asked the Appellant why he needed to get out of car that night, as the Appellant alleged, Trooper Flynn said that he could not recall if he asked the Appellant why. Moreover, Trooper Flynn's testimony reflected common sense, stating that if the Appellant was simply defending himself that night, he could have walked away when the car stopped.

I find CO Green, who investigated the Appellant's September 15, 2016 domestic violence incident, to be credible. CO Green has received forty (40) hours of investigation training and, at the time of events here, he had been assigned to the DOC Internal Affairs division for approximately three (3) years. Prior to that, he was a facility investigator at another DOC facility for a couple of years. CO Green's investigation report was a lengthy and well-documented report and his testimony was largely consistent therewith. For the report, CO Green obtained the EPD and State Police reports, information and photographs, as well as recordings of the 911 calls involving Ms. A, and analyzed the information in depth. He obtained and reviewed many audio recordings of the Appellant's calls from jail and video recordings from the gas station convenience store (from varying camera angles) where the Appellant and Ms. A went after the domestic violence on Rte. 24. He interviewed the gas station cashier and he called the officers who wrote the police reports to interview them but they did not respond before CO Green concluded his investigation on September 26, 2016. However, CO Green testified that he concluded that both the Appellant and Ms. A had been drinking on September 15, 2016 although the police reports did not so find.

I find CO Slattery to be credible. He provided consistent interpretations of DOC rules, policies and practices regarding disciplinary matters pertaining to domestic violence and settlements related thereto, explaining the union's role in such disciplinary matters and settlements. He recalled, albeit with admitted limitations, the domestic violence disciplinary matters and settlements in which he was involved over the four (4) years he has served as MCOFU Vice President. Further, he clarified how and why different terms were used in the various settlement agreements and the meaning and purpose of such terms.

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant for his conduct in connection with his September 15, 2016 arrest, which conduct violated the cited DOC rules and policies. In addition, I draw an adverse inference from the Appellant's decision not to testify at the Commission hearing about the events of September 15, 2016 and related subsequent matters, his decision not to testify at the DOC hearing, and his decision not to answer questions during the DOC's investigation.

The evidence in the record concerning the Appellant's domestic violence on September 15, 2016 and related matters is detailed and damning. While Ms. A was driving on a state highway late at night on September 15, the Appellant was sitting in the passenger seat and tried to grab the steering wheel and attempted to force the car off the road and pull the keys out of the ignition. The Appellant also tried to throw Ms. A's cell phone out the passenger window but the window was closed so the Appellant injured his elbow. In the car, the Appellant beat Ms. A and tried to choke her. Ms. A attempted to stop the Appellant's attack. The car ended up in the breakdown lane. The Appellant got out of the car and pulled Ms. A out of the driver's seat, pulled her hair, and tried to choke her again. During the abuse, the Appellant threw Ms. A's cell phone and keys into the woods, cutting off her ability to get help or escape. Thereafter, they returned to the car and, using the Appellant's keys, drove to an exit off the highway and stopped at the Alltown Mobil gas station in Easton, where they arrived at approximately 1:40 a.m.

At the gas station, Ms. A entered the convenience store and asked Ms. H, the cashier, to borrow her cell phone. Ms. H offered her the phone and Ms. A called the Easton Police Department (EPD) to report the abuse while standing next to the cashier. However, during Ms. A's call to the police, the Appellant entered the store and stood next to Ms. A. As a result, Ms. A hung up the phone and handed it back to the cashier. Shortly thereafter, the EPD dispatcher called Ms. H's phone and asked to speak to the person who had called them and hung up before the call was over. Ms. H handed her phone to Ms. A. The dispatcher informed Ms. A that she was sending the police to the store because it was EPD policy to do so under the circumstances. The dispatcher then spoke to Ms. H, asking Ms. H if Ms. A appeared to be upset and Ms. H said that Ms. A did appear to be upset. Two (2) EPD officers arrived at the store shortly thereafter. EPD Officer Wheeler spoke with Ms. A and noted that she had "bruises all over her arms, red marks around her neck, her ears and nose were bleeding, and she looked visibly shaken." EPD Officer Kitsos photographed Ms. A's injuries. One of the photos shows a clump of Ms. A's hair that was "twice the size of a golf ball" that Officer Wheeler saw fall from Ms. A's hair as she put her fingers through it. At Officer Wheeler's request, Ms. A drafted an affidavit describing the Appellant's abuse. Thereafter, Officer Wheeler told the Appellant what Ms. A reported and he noticed that the Appellant's elbow was bleeding. The Appellant told Officer Wheeler that he smashed the car window with his elbow but he did so in an attempt to get out of the car. He admitted pulling Ms. A's hair but said he did it because she was trying to bit him. The Appellant alleged that Ms. A had been drinking but Officer Wheeler did not observe that Ms. A was intoxicated. The Appellant disclosed to Officer Wheeler that that he had been involved in another domestic violence incident.

The State Police were informed of this matter since the abuse occurred on a state road. At or about 2:35 a.m., Troopers Flynn and Lucas arrived at the gas station and spoke with the EPD officers. Thereafter, Trooper Flynn spoke first with the Appellant and then Ms. A. The Appellant alleged that he and Ms. A were arguing on the way home, that Ms. A pulled over into the breakdown lane on Rte. 24, and that when he grabbed the keys from the ignition, Ms. A bit his bicep. Trooper Flynn observed red marks on the Appellant's right bicep. The Appellant further alleged that he broke the passenger window with his elbow when he was trying to get out of the car and that he did not recall how he got to the gas station from there. Trooper Flynn detected a "strong odor of an alcoholic beverage" coming from the Appellant's mouth. In speaking with Ms. A, Trooper Flynn noted that the bruises on her arm and red marks on her neck were consistent with what she reported. Trooper Flynn concluded that the Appellant was the "primary aggressor", placed him under arrest for domestic assault and battery under and strangulation or suffocation, and transported him to the Milton State Police Barracks, where he was processed, photographed and fingerprinted. A bail commissioner was called and informed the state Police that the Appellant should not be released, rather, that he should be detained until he appeared in court later that morning. For obvious reasons, the State Police took the Appellant's license to carry a firearm and made arrangements to obtain the Appellant's pistol at home and to search the house for any other guns. Trooper Flynn's report specifically noted, "The remainder of [the Appellant's] firearms are stored at his supervisor's house … [The Appellant] said he has stored them there since he was last arrested for Domestic A&B last summer." R.Ex. 4. Ms. A remained at the store for the rest of the night, always standing or sitting close to the cashier, clearly in fear, only leaving at approximately 5:15 a.m. when a tow truck arrived to transport the car.[19]

The Appellant's reprehensible conduct continued after he abused Ms. A in 2016 and after his related arrest. In court later that morning, the Appellant was ordered not to abuse Ms. A but, in addition, he was held without bail until December 14, 2016 because of his prior arrest for an OUI in another court. The charges against the Appellant were transferred to the court in which the OUI charge was pending, where the court set bail and explicitly stated that the Appellant was not to be released without a GPS monitoring device. While the Appellant was in custody, he made a number of calls to his parents and others asserting that Ms. A had been the aggressor on Sept. 15, that she tried to run him down, and that she hit him in the head with a mug, for example, even though he had not made such assertions to police at the time of his arrest. During phone conversations with his father, the Appellant's father told him that he needed help. During other phone conversations, the Appellant admitted that he pulled Ms. A's hair, tried to grab the steering wheel and grabbed Ms. A's throat. In other such calls, a colleague said that this (the 2016 incident) was not the second, but the third time the Appellant had abused Ms. A, urging the couple to separate and stating that the Appellant should consider resigning. The Appellant said that Ms. A needed to decline to testify against him at the criminal trial scheduled for January 2017, as she had done in 2015 when the Appellant faced similar crim-

19. Since the Appellant threw Ms. A's keys away on Rte. 24, they used the Appellant's keys to drive the car to the gas station. It is unclear what happened to the Appellant's keys thereafter but Ms. A apparently had no keys and needed the tow truck in order to transport the car home.

inal charges and a colleague said that he and his wife would talk to Ms. A to inquire in that regard. Thereafter, in early December, the Appellant posted bail but his bail was revoked thereafter for an unspecified "violation of terms of release". In light of the Appellant's phone calls, it is no surprise that Ms. A invoked her marital privilege not to testify against the Appellant at trial and the case was dismissed and the Respondent had just cause to discipline the Appellant. Collectively and clearly, these actions by the Appellant in relation to his 2016 arrest constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and the Respondent was justified to discipline him therefor.

The Appellant alleges that his termination constitutes disparate treatment since other DOC employees disciplined for domestic violence have not been terminated. A review of the evidence adduced here indicates that the majority of the approximately seventy (70) DOC employees who have been disciplined for domestic violence have been suspended for various time periods and a small number of them have been terminated for one (1) incident of domestic violence. There is little evidence in the record about the details of many of the domestic violence incidents, the outcome of related criminal cases and restraining orders, and the injuries to victims. However, it is clear that in disciplining COs charged with domestic violence, the Respondent considers each case and it has terminated the employment of a small number of COs after one (1) domestic violence incident. In the instant case, the Appellant was charged with domestic violence in two (2) occasions only a year apart. The Respondent has established by a preponderance of the detailed evidence in the instant case that the Appellant committed domestic abuse in 2016 and violated cited DOC rules and/or policies, which the Respondent found merits termination. The Appellant's egregious conduct leading to his 2016 arrest and his conduct thereafter in connection with that arrest, noted above, warranted appropriate discipline. That the criminal charges against the Appellant in 2016 were dismissed does not undermine the Respondent's decision to discipline the Appellant since the Appellant, through his phone calls from jail, was able to communicate indirectly with Ms. A to invoke the marital privilege, as she did one (1) year earlier, depriving the prosecution of its one percipient witness. Given the Appellant's conduct in connection with his 2016 arrest, his second incident of domestic violence in a year, the Respondent's decision to discipline the Appellant by terminating his employment does not constitute disparate treatment. Since the findings of fact and interpretation of the pertinent law herein are similar to those of the Respondent, I find no reason to modify the discipline.[20]

The Appellant also avers that the Respondent terminated him for taking FMLA time to obtain treatment for his alcoholism and domestic violence and denied his request for a transfer, which constitute discrimination on the basis of a disability. In so far as the Appellant alleges his transfer request was wrongfully denied, I note that 103 DOC 230.05 requires the Respondent to consider an employee's discipline history before the employee is transferred, promoted or reassigned and that the employee's request "may be denied based on the date of the incident which resulted in discipline being imposed." A.Ex. 11. The Appellant also asserts that the Respondent was required to offer him a reasonable accommodation for a disability under the circumstances. The Appellant reports filing an MCAD claim in this regard and the Commission will not further comment thereon.

CONCLUSION

For the reasons asserted herein, Mr. Adams' appeal under Docket No. D1-16-205 is hereby ***denied***.

Civil Service Commission

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 17, 2019.

Notice to:

Howard Mark Fine, Esq.
218 Lewis Wharf
Boston, MA 02110

Amy Hughes, Esq.
Department of Correction
Division of Human Resources
Industries Drive, P.O. Box 946
Norfolk, MA 02056

* * * * * *

20. The Respondent argues that courts have overturned arbitrators' decisions restoring law enforcement officers to work after termination for committing domestic violence as against public police, citing *Commonwealth DOC* v. *MCOFU and Paul Brouillete*, Superior Court C.A. No. 10-4286F (2012), Connolly, J. However, the instant case does not involve an arbitration. Further, the Respondent relies on *City of Boston* v. *Boston Police Patrolmen's Association*, 443 Mass. 813, 823 (2005) to assert that a correction officer can be terminated for felonious misconduct and conviction not required. In the instant case, it is unclear if the Appellant was charged with a felony domestic assault and battery in connection with his arrest on September 15, 2016.

SEAN T. GIBBONS

v.

CITY OF WOBURN

G1-17-067

January 17, 2019
Paul M. Stein, Commissioner

***Bypass Appeal-Original Appointment as an Intermittent Reserve Police Officer in Woburn-Political Influences-Bias-Successful Candidates-Professional Background*—**Reasons cited by the Mayor of Woburn for bypassing this very qualified young candidate for appointment to Intermittent Reserve Police Officer simply did not add up to Commissioner Paul M. Stein, who found traces of political influence in the decision-making process and the stated reasons for selecting other candidates unconvincing. Many of the selected candidates had strong roots in the Woburn police but so did this unsuccessful Appellant, who would have been the third generation in his family to work in the Department. The appeal was allowed.

DECISION

The Appellant, Sean T. Gibbons, appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c. 31, §2(b)[1], to contest his bypass by the City of Woburn (Woburn) for appointment as an Intermittent Reserve Police Officer with the Woburn Police Department (WPD). A pre-hearing conference was held on April 25, 2017 at the Commission's offices in Boston. A full hearing, which was digitally recorded, was held at that location on June 13, 2017.[2] Eleven exhibits (Exh.1 through Exh.11) were received in evidence at the hearing. On August 28, 2017, the Appellant submitted a Post-Hearing Brief and also provided two additional documents (a "flash drive" and a DVD) which are marked, over Woburn's objections, as P.H.Exh.12 & P.H.Exh.13, respectively. Woburn submitted a Proposed Decision on August 31, 2018.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- Woburn Mayor Scott D. Galvin
- WPD Police Chief Robert J. Ferullo, Jr.

Called by the Appellant:

- Sean T. Gibbons, Appellant
- Mark Gibbons

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, Sean T. Gibbons, is a life-long Woburn resident. He received a Bachelor of Science Degree from UMass Lowell in August 2016, majoring in Criminal Justice and Psychology, with a Minor in Arabic Studies. (*Exh. 8; Testimony of Appellant*)

2. While in college, Mr. Gibbons served with three law enforcement authorities - two years as a paid, uniformed Police Cadet with the Lexington Police Dep't, as well as internships with the Burlington Police Dep't. and the Money Laundering Division of the Federal Drug Enforcement Agency. While a Lexington Police Cadet, on his employer's recommendation, he was granted an Unrestricted License to Carry a firearm. (*Exhs. 5, 8 & 9; Testimony of Appellant*)

3. Mr. Gibbons is a certified Forensic Sketch Artist and a certified Rape Aggression Defense (RAD) counselor, expertise that he has provided to various police and school departments, including Woburn. (*Exh. 8; Testimony of Appellant & Chief Ferullo*)

4. Mr. Gibbons' father (Mark) is a WPD Patrol Officer.[3] His uncle (Joseph) is a WPD Lieutenant. His late grandfather also was a retired WPD police officer. (*P.H.Exhs. 12 & 13; Testimony of Appellant, Mayor Galvin, Chief Ferullo & Mark Gibbons*)

5. Mr. Gibbons took and passed the civil service examination for municipal police officer, administered by the Massachusetts Human Resources Division (HRD), on April 25, 2015. His name was placed on the eligible list generated from this examination effective from October 2, 2015 through October 31, 2017. (*Exh. 1; Stipulated Facts*)

6. The Mayor of Woburn is the appointing authority for civil service appointments to the WPD. (*Stipulated Fact; Testimony of Mayor Galvin*)

7. Woburn has a sworn officer staff of approximately 80 full-time officers and maintains a roster of 19 Reserve Police Officers (the "Reserve List"). Reserve Officers are fully uniformed, carry a firearm and are called to provide extra coverage for special events, to perform walking beats in densely populated areas on weekends and to cover details. WPD may employ up to four of the most senior Reserve Officers on a full-time basis, generally assigned

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 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 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.

3. I take notice that Officer Mark Gibbons was awarded a 2012 Hanna Medal of Honor and honored as one of 2012's Top Cops by President Obama for his actions in interdicting a gang fleeing the scene of an armed robbery in which a fellow officer was gravely wounded (and who also received a Hanna award). (*Exhs. PH12 & PH13; Testimony of Mark Gibbons; https://www.woburnma.gov/ government/ police/ woburn-pd-hanna-award-recipients/*)

to desk duty. Permanent WPD officers are appointed from the Reserve List. (*Testimony of Chief Ferullo*)

8. On November 18, 2016, HRD issued Certification #04221 authorizing Mayor Scott Galvin to appoint 11 Intermittent Reserve Police Officers to the WPD Reserve List. (*Exh. 1*)

9. Thirty candidates signed Certification #04221 as willing to accept appointment as an Intermittent Reserve Police Officer. Twelve candidates ranked above Mr. Gibbons signed willing to accept, followed by a tie group including Mr. Gibbons and one other candidate, and fifteen candidates who signed willing to accept ranked below Mr. Gibbons' tie group. (*Exhs. 1 & 2*)

10. The WPD conducted background investigations on each candidate's application packet, which included employment history and reference checks. (*Exh.8; Testimony of Chief Ferullo*)

11. Mr. Gibbons' background investigation confirmed his clean criminal record and driver history. His personal references included, among others, two officers with agencies for whom he had interned. A Burlington Police Detective, called him "highly motivated" and "highly recommended him" to the WPD. A DEA Special Agent called him a "hard worker" and "a good fit." (*Exh. 8*)[4]

12. Mayor Galvin reviewed all completed application packages and conducted 20 to 30 minute interviews with all twenty-three of them. Mr. Gibbons was one of those he interviewed. As was his custom, Mayor Galvin interviewed each candidate alone, using set, pre-determined questions. He took notes of the responses as well as his overall impressions. He did not use numerical scoring or relative ranking of performance. (*Exh. 5; Testimony of Mayor Galvin*)

13. According to Mayor Galvin, after completing his interviews, the factors he considers in making his decision about each candidate's suitability as the type of "well-rounded" individual he is looking for, include: (1) results of background checks; (2) education (college degree preferred but not required); (3) "post graduate" law enforcement experience; (4) community involvement, and (5) maturity and "life experiences". (*Testimony of Mayor Galvin*)

14. Overall, Mayor Galvin's interview with Mr. Gibbons left "no negative impressions". His interview notes expressed concern for a "Lack of Maturity, Felt he deserved job because of his family's prior service,[5] no pursuit of job in Criminal Justice after graduation." In describing his work with the DEA and as a Lexington PD Cadet ("writing reports, assisting Sergeant"), Mayor Galvin wrote that Mr. Gibbons appeared "a little immature about extent and importance of his work." (*Exh.5; Testimony of Mayor Galvin*)[6]

15. Mr. Gibbons was not selected. Mayor Galvin appointed 11 candidates, four ranked above Mr. Gibbons, one who was tied with Mr. Gibbons (Candidate A) and six ranked one to four tie groups below Mr. Gibbons (Candidates B through G). (*Exhs.1, 2 & 4)*

16. By letter dated February 10, 2017, Mayor Galvin informed Mr. Gibbons that he had been bypassed, stating the following reasons about his suitability and why he found the six other lower ranked candidates more suitable for appointment:

> 1. Mr. Gibbons has a lack of post graduate experience in the Criminal Justice field, currently working as a math tutor 20 hours per week.
>
> 2. Subsequent candidates selected were stronger and more mature due to significant experience in the Criminal Justice field on a full time basis, or stronger on the combination of academic performance and experience working post-graduation in the Criminal Justice Field.

This appeal ensued. (*Exhs. 3 & 4*)

17. Chief Ferullo's nephew was a candidate (Candidate G). The Chief took no part in the hiring process (and he normally did not do so), save to welcome candidates at an introductory meeting. He did speak to the Mayor at the end of the hiring process and expressed his support for giving Mr. Gibbons a place on the Reserve List, but the Mayor had already made up his mind to the contrary. (*Testimony of Mayor Galvin, Chief Ferullo & Mark Gibbons*)

18. Based on the statements contained in Mr. Gibbons' bypass letter and other evidence, the following facts were established about appointed Candidate A (tied with Mr. Gibbons) and appointed Candidates B through G (who ranked below Mr. Gibbons and bypassed him):

Candidate A

- Background - One criminal citation and several driving infractions over ten years old, which Mayor Galvin discounted as too stale
- Education - Associates Degree in Criminal Justice (graduation date unknown)
- Law Enforcement Experience - Suffolk County Sheriff (4 years)
- Community Involvement - "Very involved in Woburn"; wife's grandfather is member of Woburn Registrar of Voters
- Maturity - "Excellent" personal and employment references; owns his own home

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4. Mr. Gibbons did not include his Lexington PD supervisor as a "personal" reference because he was a paid cadet and had listed that information in the "Work History" section of the application. (*Exh. 8; Testimony of Appellant*)

5. On cross-examination, Mayor Galvin clarified that his written note did not mean that Mr. Gibbons said he "felt he deserved the job" due to his family connections, but represented the Mayor's interpretation of the statement that he recalled Mr. Gibbons made to the effect: "My family has a long history of serving with the WPD and I want to do the same." (*Testimony of Mayor Galvin*)

6. As noted below, Mr. Gibbons credibly explained how Mayor Galvin's perception of the work he did as a paid cadet, and his satisfaction with that work, misconstrued his experience in some important and material respects. See Finding No. 19.

Candidate B

- Background - Poor credit record, which Mayor Galvin discounted as due to an isolated period after losing his job
- Education - No degree noted
- Law Enforcement Experience - 911 Dispatcher for Waltham Police Dept; history of law enforcement in family
- Community Involvement - "Strong community service record"; brother recently appointed to WPD
- Maturity - "Very positive" references: "working hard" to improve credit rating

Candidate C

- Background - OUI conviction in college (discounted by Mayor Galvin as youthful indiscretion) and speeding, surchargeable accident (Mayor did not recall)
- Education - Bachelor's Degree in Criminal Justice, Minor in Coaching (2012)
- Law Enforcement Experience - Essex County Sheriff (2 years)
- Community Involvement - Summer camp counselor; Mother is Administrative Assistant to Woburn Superintendent of Schools
- Maturity - "Very positive" references; developed leadership skills playing team sports

Candidate D

- Background - No evidence of criminal or driver history
- Education - Bachelor's Degree in Criminal Justice (2014)
- Law Enforcement Experience - Reserve Academy Trained; College Security Officer (1 year); Summer Jobs as Reserve Officer in Nantucket and Billerica
- Community Involvement - None noted; Mother and two other relatives employed with Woburn Public Schools
- Maturity - "Very positive" references

Candidate E

- Background - No criminal record or driver's history noted
- Education - Bachelor's Degree in Criminal Justice
- Post-Graduate Experience - Sergeant (supervision 5-7 personnel) at Health Care Facility
- Community Involvement - Nothing noted
- Maturity - "Very positive" references

Candidate F

- Background - No criminal record or driver's history
- Education - Bachelor's Degree in Criminal Justice
- Law Enforcement Experience - Security Guard; "worked security in college"
- Community Involvement - Active in Woburn Youth Soccer; Sister is Head Cook for Woburn Fire Dep't
- Maturity - Bilingual; good public speaker; "Very positive" references

Candidate G

- Background - No criminal record or driver's history
- Education - Bachelor's Degree in Criminal Justice
- Law Enforcement Experience - Victim Compensation Bureau, Massachusetts Attorney General
- Community Involvement - None noted; Nephew of Chief Ferullo
- Maturity - "Very positive" references

(*Exhs. 4 through 7; Testimony of Mayor Galvin & Chief Ferullo*)

19. At the Commission hearing, Mr. Gibbons provided succinct, articulate, convincing and credible evidence of his passion for police work and his training and experience in the field:

- He pointed out that serving as Lexington Police Cadet was the "best two years of my life." He listed the specific details about the duties of the job and contact information for his supervisor in the Work History section of his application ("Asst. with communications/traffic/records/patrol/and detective bureau.") and elaborated with examples during his testimony, presenting a picture of a dedicated employee who was relied upon for special assignments, allowed to operate a patrol car and perform many of the regular duties of a police officer and a police detective (under supervision).
- He explained that he used an issue at the Lexington PD when asked for an example of how he handled an ethical issue because it showed how he managed to resolve it, not because he had a problem with the job, as Mayor Galvin seemed to infer. Rather, his response showed how he politely defused a potential conflict with an administrative secretary who wanted him to take more time helping her file traffic tickets, for which she was responsible, which he did less of than other cadets because he was being regularly pulled off by his supervising officers for more substantive assignments.
- He explained that his training and subsequent assignments as a forensic sketch artist involved more than learning how to draw. The curriculum included training on interview techniques and study of human anatomy. He explained how knowledge of both of those subjects was essential to being a good forensic artist, as well as enhanced the skills for conducting interviews and in making "positive" identification of persons that a police officer must apply in the regular course of his or her duties.

(*Exh. 8; Testimony of Appellant*)

20.Mr. Gibbons' father, Officer Mark Gibbons, provided unrebutted testimony regarding Mayor Galvin's actions several years ago, when he "vetoed" a Home Rule proposal approved by the City Council (more specifically, refused to sign off on the petition which was a requirement for it to be submitted to the legislature for approval), that would have enhanced the pension of a retired WPD police officer who had been gravely injured in the line of duty (loss of an eye and finger) while confronting an armed gang engaged in robbing a jewelry store. Officer Gibbons was one of the officers who responded to the crime scene and prevented the

gang's escape. Officer Gibbons was brought to tears as he recounted the incident. (*Testimony of Mark Gibbons*)[7]

21.Officer Gibbons recounted how his late father was one of many people who had spoken out at the City Council meeting in support of providing his disabled fellow officer an enhancement to his pension of 100% of his pay after age 65 - words to the effect that "he gave 100% and he deserves 100%." Despite this plea, and the support of the City Council, Mayor Galvin insisted that the pension should not exceed 80%, for reasons that he explained in his remarks to the City Council. (*Exhs. PH12 & PH13; Testimony of Mark Gibbons*)

22.Evidence was also introduced which established that Mr. Gibbons' uncle, a WPD Lieutenant, was twice bypassed for promotion to Captain, once by a prior Mayor (which resulted in a successful Commission appeal) and once by Mayor Galvin in May, 2012, when Lt. Gibbons stood at the top of the eligible list established in March 2012, as a result of his prior Commission appeal). (*Exh. 10; Testimony of Mayor Galvin, Chief Ferullo & Mark Gibbons*)

23.Evidence was also introduced which established that, on June 14, 2014, three months after the prior eligible list had expired on or about March 31, 2014, Mayor Galvin promoted another Lieutenant to Captain whose name appeared first on the new eligible list, generated after an assessment center examination. Lt. Gibbons' name appeared fourth on that new eligible list. (*Exhs. 10 & 11; Testimony of Mayor Galvin, Chief Ferullo & Mark Gibbons*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. The mechanism for ensuring adherence to basic merit principles in hiring and promotion is the provision for regular competitive qualifying examinations, open to all qualified applicants, from which eligible lists of successful applicants are established, ranking them according to their scores on the qualifying examination, along with certain statutory credits and preferences, which then may be used by appointing authorities to make civil service appointments based on a "certification" of candidates according to their standing on the applicable eligible list. G.L. c. 31, §§6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.L. c. 31, §27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person "other than the qualified person whose name appears highest", 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. Pursuant to the Personnel Administration Rules (PAR) promulgated by the Massachusetts Human Resources Division (HRD), the statement of reasons must be specific and complete:

> "Upon determining that any candidate on a certification is to by bypassed . . . an appointing authority shall, immediately upon making such determination, send . . . a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked. . . . Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass. . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission." PAR.08(4)

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)

"Reasonable justification in this context means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006) and cases cited; *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971), *citing Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928).

In selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-

7. Although Officer Gibbons did not mention it during his testimony, as noted earlier, both officers were decorated for their valor. (*Finding No. 3, fnt. 3*)

305, *rev.den*., 428 Mass. 1102 (1997). It is not necessary, however, for the Commission to find that the appointing authority acted "arbitrarily and capriciously." Rather, the governing statute, G.L. c. 31, §2(b) , gives the commission broad "scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 428 Mass. 1102 (1997). In deciding "whether there was reasonable justification" shown for an appointing authority's exercise of discretion, the Commission's primary concern is to ensure that the action comports with "[b] asic merit principles." G.L. c. 31, §1. *See Massachusetts Ass'n. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 188 (2010); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den*., 428 Mass. 1102 (1997); *MacHenry* v. *Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass.1106 (1996); *Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). Although it is not within the authority of the commission "to substitute its judgment about a ***valid*** exercise of ***discretion based on merit or policy considerations*** by an appointing authority", when there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." *Id*. (***emphasis added***)

ANALYSIS

The preponderance of the evidence established that Woburn's decision to bypass Mr. Gibbons was made without an impartial and reasonably thorough review and is not reasonably justified. Although the evidence falls short of establishing the Appellant's contention that Mr. Gibbons' bypass was part of a larger pattern of bias against his family, there is a preponderance of evidence that, contrary to the requirements of basic merit principles under civil service law, Mayor Galvin's decision was based on unsupported, overly subjective and flawed conclusions about Mr. Gibbons qualifications that unfairly set a higher standard for him than other candidates whose qualifications are not materially distinguishable from his.

First, the record of Lt. Gibbons' three unsuccessful attempts to win a Captain's position does not warrant an inference that those efforts were due to some unlawful bias by Mayor Galvin against Lt. Gibbons. The original bypass did not come at the hand of Mayor Galvin but was the decision of his predecessor. There is no specific evidence about the reasons provided for the second bypass and, if unjustified, the recourse for addressing any bias would have been another appeal to the Commission. Evidence now offered, here, about that 2012 promotion does not, and could not now, be expected to fairly revisit and assess whether that bypass was justified or not. As to the third promotion, the candidate ranked first was promoted. Lt. Gibbons stood fourth on the list and was not within the "2n+1" range even to be considered for that promotion. Although the Appellant argues that something untoward was afoot because the third promotion was made from a fresh list created from an Assessment Center in April 2014, immediately after the prior list was "allowed" to expire. The experience of civil service candidates who "die on the vine" when they are not promoted before the expiration of an eligible list (normally, as here, after two years) is a well-known consequence of the system, which ensures that promotions are based on examination results that are reasonably current as well as enables opening promotional opportunities for newly eligible candidates. Again, here, the promoted candidate was on both the 2012 and 2014 lists and the evidence now is far too stale and cannot support any inference that Lt. Gibbons' fate in this regard was not simply another classic case of "dying on the vine." Were it otherwise, again, the recourse was to have appealed to the Commission.

Second, I have carefully reviewed the evidence related to the Home Rule issue regarding an enhanced disability pension for the heroic WPD officer whose career was cut down prematurely in the line of duty. The proponents of the "100%" pension benefit approach included Mr. Gibbons' grandfather as well as a majority of Aldermen, other WPD personnel, and citizens of Woburn. The Mayor did not disagree that the officer deserved an enhanced pension and explained why the alternative package he supported (at a pension 80% of pay and other benefits) was fair to the officer and consistent with the enhanced pensions granted to others, particularly one most recently approved by the General Court for a police officer in nearby Somerville. Much of the difference between the two proposals is highly technical, and I find nothing in the evidence presented to the Commission that warrants any conclusion about it other than that there was a good faith dispute over what it would take to make the officer "whole." It strains credulity to believe that Mayor Galvin harbored any animosity, much less let it fester, and took it out on Mr. Gibbons many years later.

I do not agree with Woburn, however, when it comes to the stated reasons for bypassing Mr. Gibbons. I agree with the Appellant that the preponderance of the evidence does not support the conclusion that his bypass was reasonably justified. Two examples illustrate my conclusion.

First, Woburn used a flawed method of distinguishing the suitability of Mr. Gibbons' employment record, and applied a higher standard to him, compared to other lower-ranked hired candidates whose "post-graduate" work experience made them "more mature," which was the core distinguishing characteristic that purportedly justified his bypass. In particular, Woburn provides no logical rationale for discounting Mr. Gibbons' employment with the Lexington PD (and other law enforcement experience) on the grounds that only "post-graduate" employment was useful to assess his suitability, and either overlooked or misconstrued his experience. Surely, his two-year stint as a Lexington Police Cadet, during which time he performed substantially all of the duties that would be required as a part-time WPD Reserve Officer (as well as additional duties assisting detectives), has equivalent value, and probably is more relevant, than the work of Candidate B (who worked as a 911 dispatcher and did not finish college); Candidate C (who had worked for two years as a county corrections officer after college); Candidate D (one year as a campus security guard and credited in the bypass letter for having a "summer" job as a

Nantucket Reserve Police Officer); Candidate F (who worked "in college" and thereafter as a security guard); or Candidate G ("currently working" with Attorney General's Victim Witness Bureau). Moreover, in concluding that "Mr. Gibbons has a lack of post graduate experience" in criminal justice, Woburn took no account of the fact that Mr. Gibbons graduated from college barely three months before applying to the WPD, although it appears that it took other candidates a year (Candidate D) or two (Candidate C) to settle in to their "post graduate" law enforcement experience.

Second, the "positive" reasons for hiring other candidates, most also with family members employed by Woburn, were touted in the bypass letter as "very involved in the Woburn community" (Candidate A) and "active in community service with Woburn Youth Soccer" (Candidate F). As to Mr. Gibbons, Woburn's bypass letter states only that he works for an unnamed employer "as a math tutor 20 hours per week", neither noting that the employer is the Woburn Public Schools, where he also trains students on rape resistance techniques. Similarly, one of the "positive" reasons for hiring one (Candidate B) was the "history of law enforcement in his family". When Mr. Gibbons alluded with pride to a desire to be the third generation in his family to serve the WPD with distinction, however, his comment was misconstrued as implying that he "felt he deserved the job" because of his family connections.

Finally, I do not overlook the fact that a police officer, who carries a badge and a gun, holds a sensitive job, and the Commission recognizes that, ordinarily, it should give considerable deference to an appointing authority to decide whether to "bear the risk" of hiring a particular candidate to such a position. *See Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 188-190 (2010) That principle, however, is not absolute, and it has limited relevance in the particular facts of this case. The decision to bypass Mr. Gibbons did not reference any negative history or traits that posed a "risk" to his employment as a police officer, per se. Indeed, he had held such positions in the past. Moreover, the bypass decision here was not made, as in other cases, based on the recommendation of the police department. Indeed, one needs to look no further to dispel the perception that Mr. Gibbons posed any "risk" than the fact that Chief Ferullo was fully prepared to welcome Mr. Gibbons to the WPD, and advocated for his selection as a Reserve Officer, even though that might have meant his own nephew would not have been hired.

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Sean T. Gibbons, is ***allowed.*** Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of Woburn in its delegated capacity take the following action:

- Place the name of Sean T. Gibbons at the top of any current or future Certification for the position of WPD Intermittent Reserve Police Officer until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Gibbons is appointed as a WPD Intermittent Reserve Police Officer, he shall receive a retroactive civil service seniority date and ranking on the Reserve Roster for purposes of future permanent appointment to the WPD which is the same date as the first candidate ranked below Mr. Gibbons who was appointed from Certification No. 04221. This retroactive civil service seniority date is not intended to provide Mr. Gibbons with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 17, 2019.

Notice to:

Michael Reilly, Esq.
P.O. Box 64
Woburn MA 01801

Ellen Callahan Doucette, Esq.
City Solicitor
Woburn City Hall
10 Common Street
Woburn MA 01801

John Marra, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

* * * * * *

FRANCIS J. GRAHAM, JR.

v.

DEPARTMENT OF CONSERVATION AND RECREATION

C-17-131

January 17, 2019
Cynthia A. Ittleman, Commissioner

Commission Practice and Procedure-Motion for Reconsideration-Department of Conservation and Recreation—Commissioner Cynthia A. Ittleman declined to reconsider her decision denying an upward reclassification to a DCR Forest and Park Supervisor when ruling on a pro se motion and found that the Appellant failed to provide her with any new information regarding a significant factor she might have overlooked in making the initial decision. She did grant the reconsideration motion to the extent of making several clerical and mechanical corrections to the original decision.

RULING ON APPELLANT'S MOTION FOR RECONSIDERATION

On November 8, 2018, the Commission issued its decision in the above captioned matter [31 MCSR 337] denying the appeal requesting reclassification of the Appellant from Forest and Park Supervisor II (FPS II) to FPS III. At the hearing in this case, the Appellant was represented by counsel. On or about November 15, 2018, I received the Appellant's Motion for Reconsideration (Motion) directly from the Appellant, not his counsel, without an indication that the Appellant had served the Respondent with a copy of his Motion. I inquired of Appellant's counsel (copying the Appellant and Respondent's counsel) whether she still represented the Appellant and she sent a withdrawal of appearance form (copying the Appellant and Respondent's counsel). On November 19, I advised the Respondent that its opposition, if any, was due November 30, 2018. I received notice from Respondent's counsel stating that he understood the deadline but I did not receive an opposition to the Motion from him. Thereafter, the Appellant appealed the Commission's November 8, 2018 decision in Superior Court pursuant to G.L. c. 31, s. 44 (*Graham* v. *Civil Service Commission*, Suffolk Superior Court, C.A. No. 18-3672B).

Pursuant to 801 CMR 1.01(7)(1):

> After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. *The motion must identify a clerical error or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked* in deciding the case. . . ." (*emphasis added*)

The now *pro se* Appellant's Motion asserts that the decision contains the following clerical or mechanical errors:

1. The South Shore Yacht Club is located in the Abigail Adams State Park not Webb State Park as stated in the decision. Upon further review, the Yacht Club is in or near Abigail Adams Park near Bridge Street in Weymouth, not in or near the Webb State Park on River Street in North Weymouth.

2. Correcting his name in the "Notice" section at the end of the decision.

Appropriate changes have been in the attached Clarified Decision to correct these clerical or mechanical errors, which changes do not alter the outcome of the decision.

Other issues that the Appellant asserts are clerical or mechanical errors or constitute significant factors that the Commission may have overlooked are not. For example, the Appellant's Motion disputes the weight given to certain evidence by the Commission; he refers to information not in evidence; he asserts that he was responsible for grooming tree limbs, mowing the grass and snow plowing certain areas for two or three years in an area of Webb State Park that was used for South Shore ARC, Inc., which is not dispositive; he offers new information, for example, pertaining to his assignments, which information is irrelevant because it occurred two or three years prior to the date that he requested reclassification; he asserts that the park he works in generates revenue when it was the amount of revenue generated that was considered, not whether the park generates *any* revenue, one of a number of factors considered by the Respondent in assessing whether parks qualify as "major recreation areas" or as "heritage parks" with multiple facilities and identifying appropriate employee classifications therein; he asserts that he has more autonomy than determined by the decision; and he continues to argue that he performs each of a number of FPS III functions 100% (as opposed to a percentage of 100%) of the time.

CONCLUSION

Accordingly, for the above stated reasons, the Appellant's Motion for Reconsideration is ***allowed in part*** (as to the clerical and mechanical errors identified) and otherwise ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 17, 2019.

Notice to:

Meaghan Ventrella, Esq.
AFSCME 93
8 Beacon Street
Boston, MA 02108

Kenneth Langley, Esq.
Labor Relations Unit/Shared ServicesExecutive Office of Environmental Affairs
251 Causeway St., Suite 600
Boston, MA 02114

Francis Graham
[Address redacted]

Debra Friedman, Esq.
[No Listing]

John Marra, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Robert Quinan, Esq.
[No Listing]

* * * * * *

JERROLD LUCAS

v.

NEW BEDFORD SCHOOL DEPARTMENT

D-17-081

January 17, 2019
Paul M. Stein, Commissioner

Disciplinary Action-10 Day Suspension-Absenteeism-New Bedford Motor Equipment Operator—Commissioner Paul M. Stein affirmed the 10-day suspension of a New Bedford school-lunch delivery driver with a simply atrocious attendance record going back at least five years. This is the Appellant's second appeal of discipline for absenteeism rejected by the Commission within the last 18 months. Oddly, New Bedford school officials consider him a good employee they wish to retain if the attendance problem can be solved.

DECISION

The Appellant, Jerrold Lucas, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §43[1] contesting his ten-day suspension by the New Bedford School Department (NBSD) from his position as Motor Equipment Operator. A pre-hearing conference was held on June 9, 2017 and a full hearing, which was digitally recorded,[2] was held on September 15, 2017, both at the UMass School of Law in Dartmouth. The hearing was declared private. Twenty-one exhibits were received into evidence (Exhs. AA1 through AA15, AA18, EE19 through EE21) and two documents marked for identification (Exhs. AA16ID & AA17ID). Proposed decisions were received on January 2, 2018.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- Nancy Carvalho, Supervisor, NBSD Food Service Department
- Heather Emsley, Executive Director of NBSD Human Capital Services

Called by the Appellant:

- None

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, Jerrold Lucas, is a tenured labor service employee with the NBSD who became employed by the NBSD as a Laborer in 2005 and has held his current title of Motor Equipment Operator (MEO) since September 29, 2008. Prior to his employment with the NBSD, Mr. Lucas worked as a Laborer with the City of New Bedford's Department of Public Works from 1993 until July 2003, when he was laid off as part of a reduction in force. His civil service seniority date is February 1, 1993. (*Exhs. AA1, AA2, AA11*[3])

2. Mr. Lucas is one of three full-time MEOs assigned to the NBSD Food Service Division, which prepares and serves approximately 18,000 meals daily, including breakfast and lunch to students at the 32 schools in the NBSD system. (*Exh. AA11, Testimony of Carvalho*)

3. The meals are prepared at one of the 12 "feeder" schools that have a full cafeteria and the MEOs are responsible to pick up the prepared food from these schools and deliver them to 20 "satellite" schools without a full cafeteria on-site. MEOs also deliver supplies, such as paper goods, to the schools from the NBSD central Administration Building. (*Exh AA11*)

4. Each Food Service MEO is assigned one of three routes (North, South & Central) and a Laborer to assist him. Mr. Lucas is responsible for nine schools, delivering meals from four (4) feeder schools to five (5) satellite schools. The MEOs work a 6:15 AM to 2:15 PM schedule, delivering breakfast the day before and lunch on the day it is served. Food Service MEOs are "school year" employees, meaning that they work 181 days a year when school is in session. (*Exh. AA1; Testimony of Carvalho*)

5. Pursuant to the Collective Bargaining Agreement (CBA) between the NBSD and AFSCME Council 93, Local 641, of which

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. 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 CD 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. This proceeding is the second time that Mr. Lucas has appealed a suspension by the NBSD for absenteeism. By Decision in *Lucas* v. *New Bedford School Department*, 30 MCSR 222 (2017) (*Lucas I*)(Exh. AA11), the Commission upheld the three-day suspension imposed for prior absenteeism.

Mr. Lucas is a member, he accrues 1.25 sick days per month, or a total of 12.5 days per school year. (*Exh. AA18*)

6. The CBA provides for incentives for employees who do not use up their sick leave, ranging from a $450 bonus for perfect attendance to a $200 bonus for using four days of sick leave or less. (*Exh. AA11 & AA195; Testimony of Emsley*)

7. Employees who exhaust all of their their sick leave accrual may be placed on vacation leave (if available) or leave without pay at the discretion of the NBSD. An employee's department head may require a physician's certification in cases of "frequent use of sick leave" or when the employee is suspected of sick leave abuse or medical incapacity. Prior to invoking such a requirement, the employee must be provided a non-disciplinary "Letter of Expectations" These notices advise the employee that he/she must improve his/her attendance but do not set any specific required targets for improvement. (*Exhs. AA 11! & AA18; Testimony of Emsley*)

8. In the four school years prior to the 2016-2017 school year, Mr. Lucas exhausted his sick leave accruals. His absences included:

School Year	Days Absent	Attendance Rate
2012-2013	53	70.1%
2013-2014	118	34.8%
2014-2015	79	56.3%
2015-2016	71	60.8%

(*Exh. AA11*)

9. In most cases, the NBSD did not have advance notice of Mr. Lucas's sick leave requests. Typically, Mr. Lucas would call in sick on the day of his absence and he would be out of work for a few days at a time. This required the NBSD to reallocate the work between the other two MEOs or ask one of the Laborer assistants to work Mr. Lucas's route alone. (*Exh. AA11; Testimony of Carvalho*)

10. The NBSD has used progressive discipline to encourage Mr. Lucas to improve his poor attendance including verbal coaching, letters of expectation, written warnings and unpaid suspensions. In particular, Mr. Lucas received the following progressive discipline for his excessive absenteeism through the end of 2015-2016 school year:

- April 5, 2013 - Written Warning
- February 20, 2015 - Written Warning & Letter of Expectation
- November 13, 2015 - Letter of Expectation
- March 8, 2016 - Written Warning
- June 17, 2016 - Three Day Suspension (affirmed by Commission)

(*Exh. AA11*)

11. In the 2016-2017 school year, Mr. Lucas again exhausted his sick leave accruals. His recorded absences included 44 days as of the end of March 2017, with three months of the school year remaining. (*Exhs.AA12, AA161D &AA17ID; Testimony of Emsley*)

12. On March 31, 2017, the Appellant received notice of a contemplated (10) day suspension without pay for his continued excessive absenteeism and failure to adhere to the school district's attendance policy. The March 31, 2017 letter noted that the Appellant was absent during the 2016-2017 school year for a total of forty-four (44) days to that point. The letter also stated, "Throughout the years, the District has attempted to address your excessive absenteeism through verbal coaching, letters of expectation, written warnings and a three (3) day suspension that was issued on June 17, 2016. Despite these efforts, your attendance continues to be at a level that is well below the District's expectations." (*Exh. AA13)*

13.An Appointing Authority hearing on the matter was conducted on April 7, 2017 and, on April 13, 2017, the Appellant received a letter from Superintendent of Schools Dr. Pia Durkin upholding the ten (10) day suspension. This appeal duly ensued. (*Exhs. AA13 & AA14; Claim of Appeal)*

14. Mr. Lucas did not testify at the Commission hearing of this appeal. He proffered documentary evidence that he had provided medical notes to the NBSD regarding most of his absences, which involved medical illness, treatment and testing, covering his absences on October 26 through 28, 2016; November 4 through November 8, 2016; January 9 through January 13, 2017; January 18 through January 20, 2017; January 24, 2017 through February 17, 2017; March 15 through March 17, 2017; and March 20 through March 22, 2017. (*Exh. EE19*)

15. Mr. Lucas also proffered evidence that other NBSD employees with attendance issues received lesser discipline than he has. None of these other employees, however, presented attendance issues to the level of Mr. Lucas's absenteeism that spanned multiple school years, and all of the other employees have either corrected their attendance problems or are no longer employed with the NBSD. (*Exhs. 20 & 21; Testimony of Emsley*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be suspended for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, §41. A person aggrieved by a decision of an appointing authority made pursuant to G.L. c. 31, §41 may appeal to the Commission under G.L. c. 31, §43, which provides, in part:

> "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."

Under Section 43, the Commission makes 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) and cases cited. 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." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *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).

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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (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, *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. 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 "separating employees whose inadequate performance cannot be corrected." G.L. c.31, §1.

G.L. c. 31, Section 43 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")

> "[T]he *power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service*' [Citations]"

Id., (*emphasis added*). *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 NBSD has established by a preponderance of evidence that it had just cause to impose discipline upon Mr. Lucas for a continuing pattern of excessive absences that substantially impaired the efficiency of the public service.

As noted in the Commission's Decision in *Lucas* v. *New Bedford School Dep't*, 30 MCSR 222 (2017) (*Lucas I*): "At the risk of stating the obvious, attendance is an essential function of any job." *Rios-Jimenez* v. *Principi*, 520 F.3d 31 (1st Cir. 2008) and cases cited. The NBSD is not required to continue to tolerate an employee, for the indefinite future, who has demonstrated an unacceptable level of unreliability in his/her ability to report to work. This is especially true when the employee is a part of a team that has a time-sensitive and critical mission of providing public school students with meals each school day.

Mr. Lucas again argues, as he did in his prior appeal, that he was only told that he was "expected" to "improve" his attendance, but claims that the NBSD had no specific attendance standards, never quantified its "expectations", and never gave him any specific personal targets that would relieve him from the risk of further sanctions. Mr. Lucas also seems to believe that his "improvement" for the 2016-2017 school year over his record in prior years, and the medical justification for most of his absences, makes his 10-day suspension inappropriate as remedial, progressive discipline. As I explained in *Lucas I*, the acceptable range of absences for sickness was expressly negotiated and set forth in the CBA, along with specific provisions to reward those who hewed to those standards and the Commission should not intervene to fine-tune the well-designed process that the NBSD had chosen to put in place. I do not find anything about the other employees identified by Mr. Lucas to suggest he received any disparate treatment.

Finally, I note that the NBSD did not suspend him for failing to justify his absences, but because of the unacceptably high level of absenteeism in the aggregate. The NBSD indicated that it is willing to work with any employee who needs accommodations, requires an extended, defined, leave of absence, or who needs resources to help conform their attendance to acceptable standards. Mr. Lucas is regarded by the NBSD as a good employee whom the NBSD wants to continue in employment if the attendance problem can be solved. To the extent that this, and his prior suspension, has moved Mr. Lucas in the right direction, is precisely the outcome that remedial discipline under basic merit principles of civil service law was intended to achieve.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Jerrold Lucas, under Docket No. D-17-081 is ***denied*** and the ten-day suspension is affirmed.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 17, 2019.

Notice to:

Phillip Brown, Esq.
Associate General Counsel
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

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

* * * * * *

MARC SAVAGE

v.

SPRINGFIELD FIRE DEPARTMENT

D-17-247
DALA Docket No. CS-18-0151

January 17, 2019
Cynthia A. Ittleman, Commissioner

Commission Practice and Procedure-Mootness-Execution of Settlement Agreement—The Commission dismissed an appeal from a Springfield Fire Captain of a one-day suspension after the matter had been settled by reducing the suspension to a warning.

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Commission received and reviewed the written objections of the Appellant and the Respondent's responses to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

As stated in the Tentative Decision and the parties' reply briefs:

1. The Springfield Fire Department suspended Captain Savage for one (1) day.

2. Captain Savage appealed the one (1)-day suspension to the Commission.

3. Prior to the final conclusion of the full hearing, the parties, both represented by counsel, executed a settlement agreement, reducing the one (1)-day suspension to a written warning.

4. Captain Savage has received and accepted payment for those wages associated with the now-rescinded one (1)-day suspension.

5. Retaining jurisdiction over this appeal is not warranted.

For all of the above reasons, the Appellant's appeal under Docket No. D-17-247 is ***dismissed***.

By vote of the Civil Service Commission (Camuso, Ittleman, Stein and Tivnan, Commissioners [Bowman, Chairman - Abstain][1]) on January 17, 2019.

September 21, 2018
Judithann Burke, Administrative Magistrate

SUMMARY OF RECOMMENDED DECISION

The parties executed a written, signed settlement agreement for purposes of resolving this matter on August 20, 2018. The City agreed to issue, and the Appellant agreed to accept, a written warning in lieu of the original a one-day suspension. The Appellant's subsequent requests to nullify the agreement and re-open the matter must be denied as neither the Administrative Magistrate nor the Civil Service Commission retains jurisdiction over this matter. It is recommended that the Civil Service Commission dismiss this appeal. *See Ernie B. Silva* v. *Department of Correction,* D-07-352 (Civil Service Commission August 28, 2008).

RECOMMENDED DECISION

Pursuant to G.L. c. 31, §§ 41 & 43, the Appellant, Marc A. Savage, had appealed from the August 15, 2017 decision of the Appointing Authority, City of Springfield, suspending him for a period of one (1) day without pay from his position as Fire Captain in the City of Springfield. The appeal was timely filed.

A pre-hearing conference was held at the offices of the Civil Service Commission on January 18, 2018. At or about that time Christopher Bowman, Chairman of the Civil Service Commission recused himself from the case and transferred the matter to the Division of Administrative Law Appeals.

On March 19, 2018, I held a pre-hearing conference in Room 320 at 436 Dwight Street, Springfield, MA. At that time, the Appellant was represented by Attorney Marshall Moriarty and the City of Springfield was represented by Attorney Maite Aponte Parsi. A pre-hearing filing schedule was established and a hearing date was set.

Testimony commenced on June 18, 2018 and continued on June 27, 2018 and July 23, 2018. During this phase of the process, the Appellant represented himself and conducted direct and cross examination of all of the witness. Attorney Moriarty was present to act as his legal advisor. The City of Springfield was represented by Attorney Maurice Cahillane.

A fourth day of testimony was scheduled for August 20, 2018. At that time, I held a settlement conference with the parties. The negotiations culminated in a handwritten agreement that was signed by the Appellant, Attorney Moriarty, Attorney Cahillane and Springfield Fire Commissioner Bernard Calvi. All parties retained a copy of the agreement. The original agreement was placed in the Civil Service file. (Attachment A.)

In an e-mail transmission to me dated August 22, 2018 the Appellant requested that, "in conjunction with your (my) approval of the agreement, for you (me) to review, also for your (my) approval, the employee written warning that the parties agreed to." The Petitioner also inquired as to the limitations of the agreement. (Attachment B.)

I responded to the Petitioner on August 22, 2018. I informed him that my approval of the voluntary agreement was unnecessary and that any approval of the written warning was not within my purview. I further indicated that the hearing had been de novo and the testimonial evidence was limited to that which was heard during the hearing, however the investigative report of Deputy Glenn Guyer remained was a documentary exhibit. I attached a copy of a Civil Service withdrawal form and noted that a withdrawal would be necessary in order to heed the intent of the parties that the agreement be kept confidential and not be open to possible scrutiny pursuant to the Public Records Laws. (Attachment C.)

In an email Transmission dated September 6, 2018, Attorney Moriarty indicated that the Appellant had authorized and directed him to request that the settlement agreed on "September 20, 2018" (*sic*) be declared null and void and without effect as no proposal had been presented to the Petitioner, and, therefore, there was no consideration on the part of the City of Springfield. Mr. Moriarty noted further that the Appellant had a "complete and warranted expectation that the warning be reviewed for accuracy and consistency with the spirit of the agreement before formally withdrawing his claims."

In an email transmission dated September 12, 2018, Attorney Cahillane informed me that the final resolution of the matter had not occurred because of "some confusion on his part as to exactly how the Appellant wants us to remove the suspension and replace it with a warning." (Attachment E.)

In an email transmission dated September 16, 2018, Attorney Moriarty indicated that his client had been "adamant and unwavering in his resolution to move forward due to the delay in resolving the content of the suggested written warning"…etc. He added that he and the Appellant were of the opinion that "the only method to truly resolve this matter of the one day suspension is to have the matter adjudicated by an independent third party." (Attachment F.)

Lastly, in an email transmission to me dated September 18, 2018, Attorney Cahillane indicated that both parties agreed to a resolution and that the City stands ready to comply with the agreement. (Attachment G.)

CONCLUSION AND RECOMMENDED RULING

There is no provision in the written agreement executed by the parties on August 20, 2018 that makes it contingent upon the review and approval by the Appellant and/or his legal advisors. There is

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1. The Tentative Decision states that Commissioner Bowman recused himself from this matter. To ensure clarity, while Commissioner Bowman opted to ask DALA to hear this matter, he did not recuse himself. That notwithstanding, Commissioner Bowman opted to abstain from voting on whether to accept the Magistrate's Tentative Decision.

no date specified in said agreement upon which the written warning must be executed. Rather, the agreement provides that the suspension be removed, the written warning be issued, and, that the written warning be removed from the Petitioner's personnel file no later than August 20, 2019. Further, the agreement provides that the written warning may not be grieved. However, mine is not to determine contract law provisions. Those issues must be litigated in the Superior Court.

I have construed the email entreaties by the Appellant's legal advisors to be motions to re-open the case, thus making the agreement null and void. I question the issuing of emails by the Appellant's legal advisors through the office para-legal when he represented himself throughout the actual hearing process. I further question the use of the email method to make such substantive and potentially dispositive requests when, on several prior occasions, the Appellant's legal team was specifically instructed to put matters of such import in writing and file through proper channels. Be all of that as it may, the requests to re-open the hearing and declare the agreement null and void should be denied.

In *Ernie B. Silva* v. *Department of Correction*, D-07-352 [21 MCSR 473] (Civil Service Commission August 28, 2008), Civil Service Commissioner Paul M. Stein noted that G.L. 31 § 41 limits the Commission's jurisdiction in discipline cases to appeals by tenured employees who have been "discharged, removed, suspended…laid off [or] transferred from their positions without their written consent." Commissioner Stein noted further that the Civil Service Commission may dismiss any appeal brought before it on lack of jurisdiction or other proper grounds on its own motion or the motion of any party per 801 CMR 1.01970(g)(3).

In the present case, the discipline of the Appellant has been reduced below the Commission's original jurisdiction amount through the voluntary agreement of all of the parties on August 20, 2018. Retaining jurisdiction over this appeal is unwarranted. *Silva, supra.*

I recommended that the email requests to re-open the record in this case be denied and that the matter be dismissed because the case is otherwise moot.

Notice to:

Marc Savage
[Address redacted

Marshall T. Moriarty, Esq.
Moriarty Law Offices
34 Mulberry Street
Springfield, MA 01105

Maurice Cahillane, Esq.
Egan, Flanagan, and Cohen, P.C.
67 Market Street
P.O. Box 9035
Springfield, MA 01102

Edward McGrath, Esq.
Chief Administrative Magistrate
Division of Administrative Law Appeals
14 Summer Street, 4th floor,
Malden, MA 02148

* * * * * *

PATRICIA E. SUTLIFF

v.

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT

C-17-077

January 17, 2019
Paul M. Stein, Commissioner

Reclassification Appeal-Department of Labor Standards-Industrial Safety and Health Inspector-Scope of Responsibilities-Lack of Formal Supervisory Functions—A long-serving and distinguished Industrial Safety and Health Inspector II with the Department of Labor Standards was denied a reclassification to level IV where she did not perform the formal supervisory functions of that title or devote more than 50% of her time to its level distinguishing duties.

DECISION

The Appellant, Patricia E. Sutliff, 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 Department of Labor Standards (DLS) within the Executive Office of Labor and Workforce Development (EOLWD) from her current title of Industrial Safety and Health Inspector II (ISHI-II) to the title of Industrial Health and Safety Inspector IV (ISHI-IV). The Commission held a pre-hearing conference on May 2, 2017 and a full hearing, which was digitally recorded,[2] on July 12, 2017, both at the Commission's Boston office. Eleven exhibits were taken into evidence. Each party submitted a Proposed Decision.

FINDINGS OF FACT

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

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.

Called by EOLWD:

- Michael Flanagan, DLS Chief of Safety and Health Programs
- Cheryl Stanton, EOLWD Payroll and Staffing Manager

Called by the Appellant:

- Patricia Sutliff, 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, Patricia Sutliff, has been employed with the DLS since 1996, initially, as an Environmental Engineer II and promoted to Environmental Engineer III in 1998. Her prior employment includes five years with the Massachusetts Department of Fisheries and Wildlife, handling permitting and regulations, and approximately ten years for the Town of Brookline, first in the Building Department and then as a Health Inspector, where she began to handle lead and asbestos abatement issues. (*Exh. 2; Testimony of Appellant*)

2. The DLS is the agency tasked with protecting workers' safety and health, wages and working conditions, headed by a Department Director. (*Exh. 6; Testimony of Flanagan: https://www.mass.gov/orgs/ department-of-labor-standards*)

3. Effective January 24, 2016, pursuant to a Memorandum of Agreement (MOA) between the Commonwealth and the bargaining agent for EOLWD employees (MOSES Unit 9), the Environmental Engineer Series was replaced by a new job series entitled Industrial Safety Health Inspector (ISHI) Series. Pursuant to the MOA, the new ISHI series created four new job titles - ISHI-I (Grade 21); ISHI-II (Grade 23); ISHI-III (Grade 25); and ISHI-IV (Grade 27). The MOA further stated:

> "As a result of this new grade structure, the parties agree that Inspectors at the Department of Labor Standards shall be reallocated from their current grade levels in accordance with levels described above. In addition, Environmental Engineers (EE) II, III, IV and V at the Department of Labor Standards shall be placed in the new ISHI series as follows: EE II/ISHI I; EE III/ ISHI II; EE IV/ISHI III/EE V/ISHI IV."

(*Exh.1; Testimony of Flanagan*)

4. In accordance with the terms of the MOA, Ms. Sutliff's job title was reclassified from Environmental Engineer III to her current job title of ISHI-II. (*Stipulated Facts; Testimony of Appellant & Stanton*)

5. The job of employees with the ISHI series is to "protect the health and safety of working people and the public by investigating and evaluating workplaces for health and safety hazards, hazardous exposures, violations of safety procedures, compliance with established health and safety standards . . ." There are four levels in the series:

- ISHI-I - the entry-level technical classification. Incumbents focus on gaining knowledge and seek guidance from more experienced colleagues
- ISHI-II - the fully competent professional classification. Incumbents have mastered the technical job content, perform work of greater complexity, exercise greater independence in making decisions, handle most cases independently and provide leadership through guidance and adviCe to others. Examples of specific functions performed at the ISHI-II level include: (1) functional direction, assignment of work, and acting as mentor to employees of lower grade; (2) represent agency at meetings with outside governmental and private sector organizations; (3) Provide on-the-job training; (3) draft rules, regulations, procedures, forms, manuals, directives and descriptive and/or educational bulletins; (4) assist in preparation of grant applications and progress reports; (5) assist with laboratory operations as assigned; and (6) interpret data, apply policies, rules and regulations, and render decisions on complex cases.
- ISHI-III - the first-level supervisory classification. Incumbents perform complex work in a specialty area requiring judgment in determining approaches, interpreting and applying agency policies, standards and procedures. IncumbentS are expected to be able to perform the duties of ISHI-Is and ISHI-IIs but, at this level, the primary focus is to provide formal and informal supervision and act as the liaison with agency management. Examples of specific duties of an ISHI-III include: (1) supervise program operations; (2) exercise overall management of training programs; (3) grant hearings to aggrieved individuals; and (4) coordinate major activities of the department on a statewide level.
- ISHI - IV - the second-level supervisory classification. Incumbents perform advanced work in a specialty field, handle more complex projects, and exercise significant independence in making program decisions and assisting in policy development. Examples of specific duties of an ISHI-IV include: (1) supervision over, assign work to and review the performance of other employees of lower grade; (2) represent the agency in high-level policy discussions; (3) assist management in strategic planning; (4) oversee design and development of training programs and other forms of outreach; (5) oversee the drafting of regulations and policies; and (6) develop, implement changes to, and review program design for best practices and evidence based data to support program goals.

6. Ms. Sutliff is one of eight staff members (all now IHSI-IIs) assigned to the DLS Investigations and Enforcement Unit. Her unit supervisor holds the title of IHSI-IV (currently Michael Weakly and, at the time of the reclassification request, Brian Wong) and reports to the Chief of Safety and Health Programs, Michael Flanagan. Mr. Flanagan reports directly to the DLS Director. (*Exhs.2, 6 & 7: Testimony of Appellant & Flanagan*)[3]

7. Ms. Sutliff's core duties focus on providing technical services for the Asbestos and Lead Program, including lead and asbestos licensing of abatement contractors, analytical labs, consultants and training providers; performing and documenting routine and specialty field inspections; and, to a lesser degree, assisting her superiors and others in the development of regulations and techni-

3. At the time of Ms. Sutliff's 2016 EPRS, the position of Investigations and Enforcement Unit manager was vacant, so Mr. Flanagan performed that EPRS, although he had "not had time to fully assess performance" of the unit staff. (Exh. 7; Testimony of Flanagan)

cal guidance materials. She mentors new hires and exercises discretionary technical leadership and oversight at field inspections and training audits but she acknowledges that she has "no direct reports" for whom she evaluates performance. (*Exhs. 2, 7 through 11; Testimony of Appellant & Flanagan*)

8. On October 18, 2016, Ms. Sutliff filed a reclassification appeal with EOLWD, which denied her request on February 7, 2017. (*Stipulated Facts; Exhs 2 &. 4; Testimony of Stanton*)

9. Ms. Sutliff duly appealed the EOLWD decision to the Massachusetts Human Resources Division (HRD). On March 30, 2017, HRD informed Ms. Sutliff that HRD concluded that EOLWD had properly determined that she was correctly classified as an ISHI-II and denied her appeal. (*Stipulated Facts; Exh. 5*)

10. Ms. Sutliff's appeal to the Commission ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE 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 Ms. Sutliff performs the "distinguishing duties" of the RN-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

Ms. Sutliff has a long and distinguished career with the DLS and is clearly a master of her field of expertise in lead and asbestos abatement regulatory work. She is uniformly regarded by her colleagues as a dedicated public servant who works hard at her job. However, reclassification of a position by the Commission requires proof that specified distinguishing duties at a higher title 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.

The evidence establishes that substantially all of Ms. Sutliff's job duties fit squarely within her current level of an ISHI-II. While she does occasionally perform at a higher level, the preponderance of the evidence falls well short of establishing that she performs above the ISHI-II level more than 50% of the time, which is the Commission's core requirement to allow a reclassification.

First, the preponderance of the evidence established that EOLWD and HRD correctly determined that substantially all of the duties regularly performed by Ms. Sutliff are not distinguishing duties of an ISHI-IV. Indeed, they largely fall well within the duties expected of an ISHI-II. These duties include the core functions associated with licensing, training audits, and field inspections. Although she also does assist in drafting regulations and technical materials, she does that work subject to review and approval of her superiors. Similarly, she participates in meetings with other agencies and institutions as the "eyes and ears" of DLS but not as a policy or decision maker. Her role in these ancillary functions fits squarely within the functions of the "fully competent" professional ISHI-II. Moreover, even if some part of this work could be considered more complex than the work she typically does, the record simply does not show that such work comprises any quantifiable regular part of her job, let alone, show that it occupies more of her time than her other core ISHI-II level duties.[4]

Second, as defined in the Classification Specification, the "primary focus" above the ISHI level is supervision. While, an ISHI-III "may" exercise either functional or formal supervision, at the ISHI-IV level, an employee in that title MUST have formal supervisory responsibility over lower level employees. Ms. Sutliff admits that, while she exercises some "functional" supervision and mentors lower level staff (which is expressly provided as a duty of an ISHI-II), she has no formal supervisory role as defined by the ISHI classification specification for an ISHI-IV.

Third, reclassification of Ms. Sutliff would be fraught with practical complications, including, the elevation of an employee whose position has been reallocated pursuant to a collective bargaining agreement, which, in the area of job reallocations, the Commission has no authority to tread. See G.L. c.30, §46 & §49,¶3. Moreover, the reclassification of Ms. Sutliff to the same level as her supervisor presents an organizational anomaly that, as a general rule, ought to be avoided.

In sum, Ms. Sutliff did not meet her burden to establish that she performs the duties of an ISHI-IV more than half of her time.

4. A fair argument might be made that some of Ms. Sutliff's "functional supervision" of others and performance at a more "complex" level fit the specification for an ISHI-III, but the extent to which she might be performing at the ISHI-III level a majority of the time was not before the Commission and is not addressed in this Decision.

Therefore, the Commission is not authorized to order that her position be reclassified to an ISHI-IV.

Accordingly, for the reasons stated above, the appeal of the Appellant, Patricia E. Sutliff, under Docket No. C-17-077, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on January 17, 2019.

Notice to:

Joseph G. Donnellan, Esq.
Rogal & Donnellan, P.C.
100 River Ridge Drive, Suite 203
Norwood, MA 02062

Patrick G. Butler, Esq.
Labor Counsel, Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

JONATHAN W. WALLACE

v.

TOWN OF SAUGUS

G1-18-139

January 17, 2019
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a Firefighter-Driving Record-Criminal Record-Mischaracterization-Staleness—In a decision by Commissioner Paul M. Stein, the Commission threw out the bypass of a candidate for original appointment to the Saugus Fire Department, finding that his driving, employment, and criminal records had been mischaracterized and that the Town could not lawfully justify its bypass decision on a 13-year-old OUI. The candidate had a very strong working history, excellent references, and a solid marriage and family life.

DECISION

The Appellant, Jonathan W. Wallace, appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c. 31, §2(b)[1], to contest his bypass by the Town of Saugus (Saugus) for appointment as a Firefighter with the Saugus Fire Department (SFD) and to remove him from the eligible list pursuant to Personnel Administration Rules PAR.09. A pre-hearing conference was held on August 28, 2018 and a full hearing, which was digitally recorded[2], was held on November 7, 2018, both at the Commission's Boston office. Seventeen exhibits (Exh.1 through Exh.17) were received in evidence. The parties waived the filing of Post-Hearing Proposed Decisions.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Fire Chief Michael C. Newbury

Called by the Appellant:

- Jonathan W. Wallace, Appellant
- JA, Boston Area Restaurant Manager

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 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 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 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.

1. The Appellant, Jonathan W. Wallace, is a resident of Saugus MA, where he resides with his wife and two young daughters. He graduated from UMass Lowell in 2006 with a Bachelor Degree in Business Administration. He has been steadily employed during and since college, including work for an HVAC company. He now works nights as a bartender/manager for a Boston restaurant and cares for his two children while his wife works days. (*Exhs. 8 & 16; Testimony of Appellant & JA*)

2. Mr. Wallace took and passed the civil service examination for municipal firefighter and his name appeared on Certification No. 05324 issued to Saugus in March 2018 for appointment of 4 (later revised to 5) candidates to the position of Permanent Full Time Firefighter with the SFD. Mr. Wallace was ranked 5th on the Certification and was the third ranked candidate to sign willing to accept appointment. (*Exh. 2; Testimony of Chief Newbury*)

3. The Saugus Town Manager is the Appointing Authority for hiring SFD Firefighters. His decision is made on the recommendations of the Fire Chief, based on the candidates' 40-page application packet, including references, the results of a thorough background investigation, an initial (unscored) interview by a panel consisting of the Fire Chief, Deputy Fire Chief and a Saugus HR representative, and a second interview that includes the Town Manager and was scored. (Exh. 16; *Testimony of Chief Newbury*)

4. Mr. Wallace duly completed the application process. His background investigation disclosed that he had an excellent credit score (the highest of all candidates); had been steadily employed for fifteen years with an excellent attendance record and never been disciplined; and had an excellent marriage and family life; and presented himself as "pleasant, professional and responsive to any requests." His interview with the Town Manager received a score of 4/5 in all categories, describing him as "Very well groomed", "Speaks, thinks clearly and with confidence", "Strong interest in position, asks reasonable questions", "Good common sense reasoning ability" and "Good interpersonal abilities, will relate well to others." (*Exh. 16; Testimony of Chief Newbury*).

5. Mr. Wallace's references (which included neighbors, his current employer, a Massachusetts State Trooper and a Boston Firefighter consistently attested that he was "an excellent family man, respectful, courteous and willing to help others", was "athletic and active", "exercises very good judgment and is an outstanding communicator" and has a "strong sense of pride in his community." (*Exhs. 8 & 16; Testimony of Appellant & JA*)

6. In response to specific questions asked of the references about Mr. Wallace's use of drugs and alcohol, the references uniformly responded, on personal knowledge, that Mr. Wallace has never used illegal drugs and his alcohol consumption is solely confined to occasional and responsible social drinking. (*Exh. 8; Testimony of JA*)

7. In response to specific questions about how Mr. Wallace handled stress, the references provided explicit examples of how Mr. Wallace performed under pressure, both on the job and in private life. At the Commission hearing, his current supervisor amplified on his example with further details, adding considerable credibility to these responses. (*Exh. 8; Testimony of JA*)

8. Chief Newbury recommended that Mr. Wallace not be hired based on an "extensive" record of driving infractions and criminal history, and the Town Manager accepted that recommendation, bypassing Mr. Wallace for four other lower ranked candidates that Chief Newbury believed were better qualified. (*Exhs. 1 & 17*)

9. At the Commission hearing, Chief Newbury explained that his concerns about Mr. Wallace's driver history and criminal record were premised on what he called a long pattern of his problematic behavior, especially those incidents that involved alcohol and questionable "interaction" with law enforcement. Specifically, Chief Newbury counted 13 driving infractions (including 5 speeding violations, 3 at-fault accidents, and an OUI/Driving to Endanger, as well as several criminal offenses (a 2007 charge of Assault with a Dangerous Weapon, a 2006 charge of Disturbing the Peace and two charges as a Minor in Possession of Alcohol). (*Exhs. 1, 3, 4 through 7; Testimony of Chief Newbury*)

10. Chief Newbury also pointed to the work history of the other hired candidates, all of whom he noted had "interviewed well", had a background packet "without any deficiencies", and had been employed in jobs that involved extensive use of heavy tools and required mechanical abilities that "translates well into the fire service." He contrasted these candidates with Mr. Wallace whose only employment he recalled was as a bartender. (*Exhs. 17; Testimony of Chief Newbury*)

11. At the Commission hearing, Mr. Wallace presented as a strong and credible witness on his behalf. He did not deny or excuse his record of poor behavior and took full responsibility for his actions, but he believed that Saugus's characterization of that record did not provide a fair assessment of his current fitness for the job of a SFD Firefighter. (*Testimony of Appellant*)

12. In particular, Mr. Wallace proffered his own CORI and RMV history which, he noted, showed that, in fact, none of the criminal offenses with which he was charged resulted in a conviction and that he was found not responsible for most of the driving infractions on which Saugus relied to bypass him. For example, the serious charges of Assault with a Dangerous Weapon, Disturbing the Peace and Driving to Endanger were dismissed outright. The OUI was thirteen years ago (2003) and dismissed after a CWOF in 2004. He was found not responsible for most of the driving citations on his record. His most recent surchargeable at-fault accident was in 2005 and his most recent driving infraction for which he was found responsible (failure to wear a seat belt) was in 2007. Mr. Wallace credibly explained that, while three 2013 driving infractions appeared on the driver history used by Saugus, he was found not responsible for all three. (*Exhs. 7, 14 & 15; Testimony of Appellant*)

13. Mr. Wallace pointed out that, although the bypass letter said that the other lower ranked candidates' background investigations "were without deficiencies", a number of those candidates did, in fact, have driving infractions and criminal charges on their re-

cords, some dating more recently than those on his own record. (*Exhs. 9 through 13*)

14. Mr. Wallace also pointed out that Saugus discounted or overlooked that his employment record also included work for an HVAC company which required the same type of mechanical ability as the similar work Saugus cited as justification for the other candidates being "better" qualified. (*Testimony of Appellant*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1. The mechanism for ensuring adherence to basic merit principles in hiring and promotion is the provision for regular competitive qualifying examinations, open to all qualified applicants, from which eligible lists of successful applicants are established, ranking them according to their scores on the qualifying examination, along with certain statutory credits and preferences, which then may be used by appointing authorities to make civil service appointments based on a "certification" of candidates according to their standing on the applicable eligible list. G.L. c. 31, §§6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.L. c. 31, §27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person "other than the qualified person whose name appears highest", an appointing authority must provide written reasons, 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.

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 determines whether, by a preponderance of evidence, the bypass decision was made after an "impartial and reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and that there was "reasonable justification" for the decision. *Police Dep't. of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012) *citing Massachusetts Ass'n. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259 (2001); *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 241 (2006) and cases cited; *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003). *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (appointing authority must prove, by a preponderance of evidence, that the reasons assigned to justify the bypass were "more probably than not sound and sufficient"); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) (same) "Reasonable justification in this context means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006) and cases cited; *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971), *citing Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928).

ANALYSIS

Saugus had not established that the preponderance of the evidence proves that its decision to bypass Mr. Wallace met the standard of reasonable justification under basic merit principles of civil service law.

First, Saugus misconstrued Mr. Wallace's driver history and criminal record, overstating the actual number of incidents for which he was held legally responsible. When fairly considered, Mr. Wallace has had a clean driver's history (save for a 2007 seat-belt violation) and a clean criminal record for more than thirteen years. Similarly, although comparisons of one candidate's background with another are not always relevant, I find that the conclusion that other hired candidates had records that "were without deficiencies" was clearly taken by looking through a different perspective than the one used to examine Mr. Wallace's flaws.

Second, on the particular fact of this case, Mr. Wallace's one OUI infraction (and two minor in possession infractions) are not sufficient, when taken together with the impeccable record of his family life, employment and strong evidence from references and the Commission testimony, to fairly raise any serious question about his present suitability and fitness for appointment to the position of an SFD Firefighter. The evidence simply contains no reasonable suspicion that Mr. Wallace has any character traits that presents him as a risk of substance abuse or calls into question his present ability to use good judgment under stress, to operate a motor vechicle safely or perform any of the other duties required of a firefighter. *See, e.g., Stylien* v. *Boston Police Dep't*, 31 MCSR 154, 209 (2018) and cases cited.

Third, I cannot say whether or not Saugus would have made a different decision in deciding Mr. Wallace's suitability, had full and fair consideration been given to all of the facts which Saugus knew or should have known about him. Certainty, however, is not the standard; a conclusion based on a preponderance of the evidence after de novo review of the facts is what basic merit principles require. In sum, Mr. Wallace presented a strong and compelling case that he was bypassed for reasons that a reasonably thorough review do not justify. 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 SFD.

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Jonathan W. Wallace, is ***allowed.*** Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/

or the Town of Saugus in its delegated capacity take the following action:

- Place the name of Jonathan W. Wallace at the top of any current or future Certification for appointment to the position of Firefighter with the Saugus Fire Department (SFD) until he is appointed or bypassed after consideration consistent with this Decision.
- If Mr. Wallace is appointed as an SFD Firefighter, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Wallace who was appointed from Certification No. 05324. This retroactive civil service seniority date is not intended to provide Mr. Wallace with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 17, 2019.

Notice to:

Jonathan Wallace
[Address redacted]

Eugene J. Sullivan, Esq.
Sullivan & Reed LLP
485 Massachusetts Avenue, Suite 300
Cambridge MA 02139

Patrick Butler, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

* * * * * *

JEFFREY WHEELER

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION

D1-17-034

January 17, 2019
Paul M. Stein, Commissioner

***Disciplinary Action-Discharge of MCI Concord Industrial Inspector-Threats and Intimidation-Failure to Disclose Brother's Status as MCI Inmate*—**Commissioner Paul M. Stein affirmed the discharge of an MCI Concord Industrial Inspector with a long record of offensive threats and intimidation of co-workers and law enforcement officers. The Appellant also admitted to have failed to disclose his brother's status as an MCI inmate on his initial job application although this omission, standing alone, would probably not have not been enough to warrant his discharge. Evidence established this omission had occurred ten years earlier and there had been no contact between the two while the brother was in custody.

DECISION

The Appellant, Jeffrey Wheeler, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §43,[1] from a decision of the Respondent, the Massachusetts Department of Correction (DOC), that discharged him from employment with DOC as an Industrial Instructor II. The Commission held a pre-hearing conference at the Commission's offices in Boston on March 7, 2017, and a full evidentiary hearing at that location on April 21, 2017 and May 31, 2017. The full hearing was declared private, with witnesses sequestered. The hearing was digitally recorded.[2] Twenty (20) exhibits were received in evidence at the hearing (Exhs.1 through 20). The Commission received post-hearing submissions from each party on July 10, 2017.

FINDINGS OF FACT

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

Called by the Respondent:

- DP, DOC Sergeant (Correction Officer II)
- AC, DOC Lieutenant (Correction Officer III)
- MM, former DOC Captain (Correction Officer IV)
- WM, Shirley MA Police Officer

Called by the Appellant:

- Jeffrey Wheeler, former DOC Industrial Inspector II, 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 hearing recordings were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to transcribe the recordings and supply the court with a written transcript 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:

1. The Appellant, Jeffrey Wheeler, was appointed to the position of DOC Industrial Instructor I in March 2006. In August 2012, he was promoted to Industrial Instructor II. He held the functional title of General Maintenance Worker (what Mr. Wheeler called a "glorified repairman"). (*Exhs. 1 through 4, 7 & 16; Testimony of Appellant*)

2. Prior to the incidents that gave rise to the Appellant's termination which is the subject of this appeal, Mr. Wheeler had the following disciplinary history:

1/16/2009	Letter of Reprimand - Irregular Inventory
2/7/2008	Verbal Warning - Approached Supervisor and Said Obscenity
8/29/2011	Letter of Reprimand - Engaged in Verbal Argument with Fellow Co- Worker/Obscenities
6/2/2013	5 Day Suspension - Misuse of State Property[3]
9/30/2015	Letter of Reprimand - Continuous Tardiness

(*Exh. 4*)

3. Mr. Wheeler considers himself a well-known "whistleblower", claiming to have regularly exposed wrongdoing at DOC and elsewhere, especially misconduct affecting him. In particular, while working at MCI Shirley, he accused others of targeting him with personal harassment and violation of his privacy, unlawful surveillance, theft and concealment of other illicit activity. He attributes misconduct directed as retaliation for his 2012 promotion to Industrial Instructor II at MCI Shirley, a position that he said another employee believed Mr. Wheeler "stole" from him. DOC never found evidence to conclusively substantiate the retaliatory misconduct Mr. Wheeler asserted. (*Exhs. 4, 6, 16 through 20; Testimony of Appellant*)

4. Eventually, after two periods of medical leave, Mr. Wheeler sought a transfer away from MCI Shirley and was administratively reassigned to MCI Concord. (*Exhs. 4, 7 & 9; Testimony of Appellant, AC & MM*)

5. The events which ultimately led to Mr. Wheeler's termination began in September 2016, approximately six months after his transfer to MCI Concord, when Mr. Wheeler filed a Confidential Incident Report charging certain of his former MCI Shirley co-workers with resuming their harassment of him. (*Exh. 4*)

6. In particular, Mr. Wheeler reported an encounter on September 14, 2016, with an MCI Concord co-worker who said to him that two of his former co-workers at MCI Shirley said "hi". Mr. Wheeler replied: "Yes tell them hello and I'll see them in Federal court if I can afford it." He alluded to his harassment by the DOC Industrial Instructors at MCI Shirley and "that somebody at the top finally gets it and I finally have peace and quiet and can do my job, To kill the weed by ripping out the root of the problem." (*Exhs. 4, 7 & 9*)

7. On September 20, 2016, DOC Superintendent's Investigator Lt. AC interviewed Mr. Wheeler concerning his most recent allegations of harassment. Although Lt. AC had made clear that Mr. Wheeler was being interviewed as a victim, not a suspect of misconduct, at Mr. Wheeler's request, his Union Representative also attended. (*Exhs. 4 & 5; Testimony of AC*)[4]

8. At the outset, Mr. Wheeler expressed disdain for how he believed the DOC had been ignoring his complaints, becoming so agitated that he was escorted out of the room by his Union Representative. After calming down, he returned and proceeded with the interview, during which he continued to harken back to his prior grievances. (*Exh. 5; Testimony of AC*)

9. Among the statements reported by Lt. AC that Mr. Wheeler made during the interview, one remark stood out. Mr. AC reported that, at the conclusion of the formal interview, Mr. Wheeler said: "Off the record, if this were old school, I'd put a bullet in [one of the former co-worker's head." He also made an obscene, graphic remark about the former co-worker's personal sex life. (*Exhs. 4, 5 & 7; Testimony of AC*)[5]

10. Lt. AC interviewed the MCI Concord employee whom Mr. Wheeler had said passed along the former coworkers' request to say "Hi". This witness did verify that the conversations occurred essentially as stated. (*Exhs. 4 & 5; Testimony of AC*)

11. Lt. AC spoke with Mr. Wheeler's supervisor at MCI Concord who confirmed that someone (he did not recall who) did tell him before Mr. Wheeler was transferred: "Be careful, Jeff is a loose cannon". The supervisor knew Mr. Wheeler from working with him previously, however, and discounted the remark because he wanted to give him a chance. (*Exhs. 4 & 5*)

12. Lt. AC verbally briefed his Superintendent and prepared a written report dated September 21, 2016 AC was directed by the Superintendent to file an intake with DOC Internal Affairs to upgrade the matter for a formal "Category II" investigation. (*Exhs. 4 & 5; Testimony of AC*)

13. On September 23, 2016, Internal Affairs Capt. MM conducted recorded interviews with the two MCI Shirley employees whom Mr. Wheeler accused of harassment. Both employees confirmed that they did have a speaker-phone conversation with the MCI Concord employee in question and remembered saying something

3. This offense involved Mr. Wheeler's use of a DOC van to remove some furniture from his home which Mr. Wheeler acknowledged was a violation of departmental rules. (*Exh. 16*)

4. Sgt. AC did not record his interviews.(*Testimony of AC*)

5. Mr. Wheeler later stated that he did not recall using the words "bullet in [his] head", but acknowledged the gist of the remark, stating he may have said he would "kick his ass" or should have "fucking knocked his head in and this shit would have stopped right from the get go, and that's what he needs." (*Exhs. 4, 7 & 9;Testimony of MM & DP*)

to the effect: "Tell Wheels that I said hello", but denied malevolence or animus toward him. (*Exhs. 4 & 7;Testimony of MM*)

14. On September 23, 2016, Mr. Wheeler was detached from duty with pay pending further investigation of the allegations that he asserted and the threatening statement he made during the September 20, 2016 interview. (*Exh. 4*)

15. Also, on September 23, 2016, Capt. MM reported the matter to the Shirley Police Chief, whom he thought had issued Mr. Wheeler his License to Carry. (*Exh. 4; Testimony of MM*)[6]

16. On October 6, 2016, Internal Affairs Sgt. DP conducted a recorded interview with Mr. Wheeler who acknowledged making offensive remarks about the coworker as reported by Lt. AC (although he claimed the words he used were not exactly what Lt. AC had reported). He denied any intent to commit physical harm, stating that he was "very upset" and "deeply hurt" but "I'm perfectly fine." (Exh. 4 & 7)

17. Throughout the interview Mr. Wheeler reverted back to his many past grievances. He also stated that animus against him had increased after his coworkers discovered that Mr. Wheeler's brother had served time for criminal conduct. Mr. Wheeler admitted to Sgt. DP that, when he applied for a job at DOC, he did not disclose his brother's incarceration on his employment application, as he knew was required. (*Exhs. 4 & 7*)[7]

18. By Memorandum dated October 7, 2016, Sgt. DP reported the results of his investigation. As to the allegations of harassment made by Mr. Wheeler, he found those allegations were "Not Sustained." (*Exhs. 4 & 7*)

19. Sgt. DP also concluded that Lt. AC's report of Mr. Wheeler's statements about the coworkers were "highly . . . reliable and worthy of belief", and "not only of considerable concern", but also a violation of DOC rules regarding interpersonal relationships and workplace violence. He further concluded that Mr. Wheeler's admission to concealing on his employment application that his brother was then in MCI custody violated DOC rules requiring disclosure of such information. (*Exhs. 4 & 10 through 13; Testimony of DP*)

20. Capt. MM signed off on the report on October 17, 2016 and the report was accepted by his supervisor, the Chief of Internal Affairs, on October 28, 2016. (*Exh. 4*)

21. Beginning on October 13, 2016 and continuing until October 22, 2016, Mr. Wheeler left a total of 23 voice mail messages on Sgt. DP's DOC-issued cell phone. Most of the messages were angry rants against the DOC in general (which he referred to as the "Department of Corruption"). Among the messages were several that had a more sinister tone, such as:

- "You don't know me, but now you do . . . and you are going to lose so f------g bad it ain't funny."
- "I'm pretty good at wiping smiles off people's faces."
- "[T]here won't be any backing out now. You guys can f--k off and die. I'm gonna ride you guys face first down in to the f-----g dirt. . . [G]ame on bro."
- Sgt. [DP], why don't you tell [the Internal Affairs Chief] to rub a little Vaseline on his ass, it won't hurt so bad. Good day."

Sgt. DP downloaded these messages and a CD of the recorded messages was introduced in evidence at the Commission hearing.. Sgt. DP wrote an addendum, dated November 10, 2018, to his original report, detailing the messages. (*Exhs. 4 & 6; Testimony of Appellant & DP*)

22. On October 22, 2016, with the foregoing investigation pending, Mr. Wheeler targeted an employee in the DOC Employee Assistance Program (EAP)[8] , bombarding her DOC-issued cell phone her with more than one hundred text messages from 3:13 AM through 9:23 PM. (*Exh. 4*)

23. These messages, copies of which were introduced into evidence at the Commission hearing, included, among others:

- "Suicide I don't think so . . . Homicide hell yaa"
- "No more bars I'm packing heat 24/7"
- "Your [sic] the lead again [first name of employee] but I'm leading all of u this time too [sic] the gates of hell welcome."
- "Mark me down for premeditated murder temporary insanity do [sic] to doc [sic] . . ."
- Tick tock tick tock goes the angry angry clock"
- "I mean no harm to anyone . . . unless they get involved but . . . now just one will be fine . . . Anything more is a f-----g bonus"

(*Exh. 4; Testimony of WM*)

24. Based on these additional developments, Capt. MM again contacted the Shirley Police Department. He spoke with Officer WM and requested that Mr. Wheeler's LTC be revoked. After consulting his commanding Sergeant, who followed up with Capt. MM (explaining that Shirley had not issued the LTC and, therefore could not revoke it), but agreed to order Officer WM to visit Mr. Wheeler's home and attempt to convince him to agree to voluntarily relinquish his firearm. (*Exh. 4; Testimony of Appellant, WM & MM*)

25. Officer WM and another Shirley Police Officer proceeded to Mr. Wheeler's residence (a trailer) to find no one there. Mr. Wheeler arrived, pulling his vehicle within a foot of Officer WM's

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6. In fact, the issuing authority was the Salisbury Police Chief. (*Exh.4;Testimony of WM, MM and DP*)

7. Mr. Wheeler testified at the Commission hearing that he later cleared up what he, himself called a "lie by omission" on his application with senior DOC personnel at least a year earlier, as a condition to his return to duty after medical leave. He believed the fact was then well-known to DOC. The brother has long been released from MCI custody. (*Exh. 4; Testimony of Appellant, MM & DP*)

8. The employee was a Sergeant with whom Mr. Wheeler had previous contact in her professional capacity with the EAP. (*Exhs. 4 & 9; Testimony of Appellant*)

marked cruiser before stopping and began to rant. When Officer WM asked for the voluntary surrender of his firearm, Mr. Wheeler refused and said if he came back he should bring "Tack Vest and the Goods." The officers cleared the scene and returned to the station to report to Sgt. Violette. (*Exhs.4 & 14; Testimony of WM*)

26. Shortly after Officer WM's return to the police station, the EAP employee walked in. With his assistance, she obtained a Harassment Prevention Order, which remained in effect for one year, and ordered Mr. Wheeler to stay away from her and refrain from abuse. (*Exh. 4; Testimony of WM*)

27. At approximately 10:30 p.m. that evening, Officer WM and two other police officers, along with several Massachusetts State Troopers who had been called in for support, arrived at Mr. Wheeler's residence. Officer WM had "Section 12" papers to take Mr. Wheeler to a hospital for mental health evaluation. (*Exh. 4; Testimony of WM*)

28. Mr. Wheeler came to the door and a colloquy ensued in which Officer WM informed him that he was there to take him into "Section 12" custody. Mr. Wheeler turned his body around and, as he did so, a clearly visible handgun was seen tucked in his waist band. Officer WM drew his service revolver. Mr. Wheeler went back into his trailer. Eventually, Mr. Wheeler emerged, complied with orders to drop his firearm (a loaded .45 semi-automatic). He was taken into custody and transported to a hospital for evaluation. His handgun, several loaded magazines and loose ammunition were confiscated. (*Exhs. 4, 9 & 14; Testimony of WM*)

29. While at the hospital, Mr. Wheeler placed a telephone call to the Shirley Police Department and spoke to Officer WM. This call was recorded and the audio CD was introduced in evidence. Among other things, during this telephone call, Mr. Wheeler stated:

- "If they piss me off enough I don't need a gun. I beat someone up 30 years ago retarded."
- I am getting pissed off, really pissed off. . . . If I make up my mind to go trample someone to teach them a lesson, there is going to be just little bitty pieces of them left . . . but I promise you, no one will die, I'm going to make sure they live to be disabled for the rest of their life."

(*Exhs. 4 & 8; Testimony of WM*)

30. On October 24, 2018, DOC Internal Affairs opened another investigation concerning Mr. Wheeler's alleged harassment of the EAP employee and related conduct. Capt. MM was assigned to conduct the investigation. He conducted recorded interviews with the EAP employee and with Mr. Wheeler. (*Exhs. 4 & 9; Testimony of MM*)

31. Mr. Wheeler admitted to sending the EAP text messages and stated that "they are what they are". He realized that his behavior was inappropriate but said he meant her no harm. He explained that he had come to learn information recently from an acquaintance that led him to suspect that the EAP employee was part of the "rogue group of individuals" whom he suspected regularly recruited other DOC employees and inmates, as well as medical and law enforcement personnel, to further the long-standing conspiracy against him and, most recently, to break into his home, confiscate his property and alter his personnel and medical records. He provided Capt. MM with no specific evidence or information to corroborate these suspicions. (*Exhs. 4 & 9; Testimony Appellant & MM*)

32. On November 17, 2016, Capt. MM submitted his written report that sustained the allegations of misconduct by Mr. Wheeler regarding his texting to the EAP employee and his interactions with the Shirley Police Department (which were largely supported by documentary evidence). He concluded that this behavior violated DOC policy against workplace violence as well as his duty as a DOC employee to conduct himself with dignity, to treat other employees with respect, and to cooperate with all other law enforcement officers. (*Exhs. 4, 10 through 13*)

33. On November 28, 2016, the DOC Deputy Commissioner signed off on Sgt. DP's report and, on November 30, 2018, signed off on Capt. MM's report, requesting a Commissioner's Hearing to address the allegations. (*Exh. 4*)

34. After due notice, a Commissioner's Hearing was convened on December 21, 2016 before a duly designated Hearing Officer on seven enumerated charges preferred against Mr. Wheeler. The Hearing Officer's report, dated January 10, 2017, found that the DOC had established five charges in full (threatening an MCI Shirley employee; sending offensive voice mail messages to Sgt. DP; sending inappropriate and threatening text messages to the EAP employee; failing to cooperate with Shirley Police; and threatening physical violence in a telephone call with Shirley Police) and two charges in part (lying on his application by omitting the fact that his brother was then an MCI inmate; and being the subject of a Harassment Prevention Order). (*Exhs. 1 & 2*)

35. By letter dated February 3, 2017, the DOC Commissioner found that Mr. Wheeler's behavior, as established at the Commissioner's Hearing, violated DOC General Policy I, Rules 1, 2(a), 6(a), 6(b), 9(a), 103 DOC 100.3, 103 DOC 237.01 & 237.02 and 103 DOC 215. The DOC Commissioner concluded that this was serious misconduct and ordered that Mr. Wheeler be terminated from his position with DOC, effective immediately. This appeal duly ensued. (*Exhs. 3, 10 through 13; Claim of Appeal*)

APPLICABLE LAW

A tenured civil service employee may be disciplined only for "just cause" after due notice, hearing and a written decision that states "fully and specifically the reasons therefore." G.L. c. 31, §41. An employee aggrieved by that decision may appeal to the Commission, pursuant to G.L. c. 31, §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.

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." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997). *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).

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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (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, *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. 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 "separating employees whose inadequate performance cannot be corrected." G.L. c.31, §1.

The Commission is entitled to "due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . . . This standard . . . is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.'" *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 241-42 (2006) and cases cited. It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. *See, e..g., Covell* v. *Dep't. of Social Services*, 439 Mass. 766, 787 (2003) *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 729 (2003) *See Embers of Salisbury, Inc.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988); *Doherty* v. *Retirement Bd. of Medford*, 425 Mass. 130, 141 (1997). The Commission takes account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g., Massachusetts Ass'n. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 264-65 (2001).

G.L. c. 31, Section 43 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") *Id.*, (*emphasis added*). *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 DOC established just cause to terminate Mr. Wheeler's employment based on the preponderance of evidence that established a pattern of offensive and threatening behavior toward multiple DOC personnel and law enforcement officers. Even Mr. Wheeler acknowledged that his outbursts of uncontrolled anger were inappropriate, but pleaded that they did not rise to the level of a terminable offense, as he never acted on any of his threats. I cannot agree.

First, this is not a case of a single, uncharacteristic outburst. DOC's decision is based on a pattern of behavior toward multiple DOC personnel that represents a classic example of the type of workplace harassment that is utterly intolerable in any society, and certainly cannot be condoned in an employee of a para-military organization such as the DOC. DOC was fully entitled to choose to terminate Mr. Wheeler, who repeatedly demonstrated that he cannot control his ability to conduct himself in a professional and non-threatening manner. Indeed, DOC has a duty to its entire staff to ensure that no person within its organization be subjected to the type of workplace violence that Mr. Wheeler inflicted on his coworkers, or to accept the risk of such violence in the future. Removing an employee with a proven record of disruptive behavior is not only justified; often, as here, it becomes the only effective option an employer has available.

Second, the severity of Mr. Wheeler's misconduct is not mitigated by the absence of proof of actual physical harm. The emotional harm that his verbal threats and intimidation caused are equally significant and just as important to be deterred in the future. The credible evidence, largely documented, established that Mr. Wheeler's continued employment would pose an unreasonable risk to other employees of such emotional harm through further disruptive, threatening and intimidating behavior which Mr. Wheeler had shown no ability to control.[9]

Third, it is a closer call whether Mr. Wheeler's concealing his brother's status as an MCI inmate should be treated as grounds for termination. On the one hand, the offense occurred over ten years

9. I take note that the EAP employee chose, on advice of DOC counsel, not to appear and testify at the Commission hearing. Mr. Wheeler argues that her failure to testify shows bad faith on DOC's part, but, after considering the overwhelming and credible independent evidence of the emotional harm that she has suffered, her reluctance actually tends to persuade me that she held a very reasonable fear that an appearance pput her at risk of additional emotional harm.

ago and there was no evidence that, so long as the brother was in custody, there was any undue contact between the two. I also credit Mr. Wheeler's contention that he did eventually "come clean" with DOC. On the other hand, the concealment clearly weighed on Mr. Wheeler and, in part, contributed to his intemperate behavior toward others whom he believed harbored animus against him for having a convicted felon for a brother. Had this offense been his only transgression, Mr. Wheeler might have had a fair argument for mitigation, but it does not mitigate the severity of his threat of workplace violence which, alone, justifies his termination.

Finally, Mr. Wheeler raised a variety of other substantive and procedural defenses during the course of the hearing. I have no doubt that Mr. Wheeler is convinced that he is the victim of DOC's wrath. To the extent I have not addressed the many other issues he raised, however, they "have not been overlooked. . . . [N]othing in them . . . requires discussion." *McCormack* v. *Department of State Police*, 92 Mass. App. Ct. 1103, 2017 WL 3469601 (Rule 1:28), *citing Commonwealth* v. *Domanski*, 332 Mass. 66, 78 (1954).

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Jeffrey Wheeler, in CSC Docket No. D1-17-034 is ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 17, 2019.

Notice to:

Jeffrey Wheeler
[Address redacted]

Amy Hughes, Esq.
Division of Human ResourcesDepartment of Correction
Industries Drive, P.O. Box 946
Norfolk, MA 02056

* * * * * *

GERALD ALSTON

v.

TOWN OF BROOKLINE

D1-16-170

February 14, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge of Brookline Firefighter-Racially Hostile Work Environment-Failure to Comply With Return to Work Conditions-Inability to Work Caused by Town's Own Actions-Civil Service Commission Jurisdiction-Chapter 151B Discrimination Claims—Commission Chairman Christopher C. Bowman reversed the discharge of a Brookline firefighter that had unfairly been imposed for his failure to adhere to various town-imposed conditions for his return to work. This case has received extensive press coverage and originated when the Appellant's supervisor inadvertently left a voice mail on his cell phone while driving that included a racist epithet directed against a discourteous driver. Chairman Bowman found that Brookline had failed to impose meaningful discipline on the supervisor, choosing instead to actively promote his career, and then overlooked various acts of retaliation against the Appellant made by his colleagues. Brookline officials also pushed a false narrative that painted the Appellant as paranoid and unable to move on from an "ancient" racist comment made by a remorseful superior years earlier. The remedy ordered was reinstatement and payment of any lost compensation.

SUMMARY OF DECISION

A white Brookline Fire Lieutenant made the racist comment "fucking [n-word]" to describe a motorist who the lieutenant believed to be black or Hispanic. That racist comment inadvertently ended up on the voice mail of the lieutenant's employee, Gerald Alston, an African American firefighter in the Brookline Fire Department.

Town officials responded with a minor, short-term suspension of the lieutenant followed by his almost-immediate promotion. Thereafter, Town officials: granted further promotions of the lieutenant; failed to prevent retaliatory behavior against Firefighter Alston; and enabled the lieutenant to use his position to lobby many other members of the force against Firefighter Alston and paint himself as the victim.

These actions by the Town were arbitrary, capricious, and in violation of Firefighter Alston's rights under the civil service law to be treated fairly. " … without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for . . .basic rights outlined in [the civil service law] and constitutional rights as citizens …" G.L. c. 31, § 1.

The Town's own actions and inactions were the reasons that made it impossible for Firefighter Alston to return to work, which formed the basis of the Town's decision to terminate his employment.

When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position For these reasons, Firefighter Alston's appeal is allowed.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Gerald Alston (Firefighter Alston) filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Appointing Authority, the Town of Brookline (Town), to terminate him as a firefighter from the Brookline Fire Department (Department). The Commission denied the appeal on April 13,

2017 in a summary decision [30 MCSR 179 (2017)]. Firefighter Alston appealed the decision pursuant to G.L. c. 31, § 44. On April 11, 2018, the Superior Court (Wilkins, J.) vacated the Commission's decision and remanded Firefighter Alston's appeal for an evidentiary hearing. A pre-hearing conference was held on June 21, 2018. A full hearing was held over ten days between July 12, 2018 and August 30, 2018. A stenographer produced the official record of the proceedings by agreement of the parties. The hearing was declared to be public at the request of Firefighter Alston, except that exhibits were impounded pending this decision. Following the close of the hearing, proposed decisions were submitted by the parties on October 30, 2018.

FINDINGS OF FACT

A series of stipulated facts and 280 exhibits (Respondent 1-180 and Appellant 1-100) were entered into evidence at the hearing. Based upon the documents admitted into evidence, the stipulated facts, and the testimony of:

Called by Firefighter Alston:

- Gerald Alston (Firefighter Alston)
- Cynthia Carter, M.D. (Dr. Carter)
- Former (now-retired) Temporary Deputy Chief Paul Pender (Pender)[1]

Called by the Town:

- Former (now-retired) Chief of Operations Michael O'Reilly (COO O'Reilly)
- Former (now-retired) Chief Peter Skerry (Chief Skerry)
- Former Human Resources Director Sandra DeBow (DeBow) (now employed elsewhere)
- Lieutenant Justin Robinson (Lt. Robinson)
- Firefighter Cormac Dowling (Probationary Firefighter Dowling)
- Firefighter Ryan Monahan (Firefighter Monahan)
- Former Chief Paul Ford (Chief Ford)
- Marilyn Price, M.D. (Dr. Price)
- Town Counsel Joslin Murphy (Murphy)
- Former Select Board Chair Kenneth Goldstein (Chairman Goldstein)
- Select Board Chair Neil Wishinsky (Chairman Wishinsky)

I make the following findings of fact:

Gerald Alston

1. Firefighter Alston, an African-American male in his late 40s, was born and raised in Boston. He has four children. Firefighter Alston comes from a close-knit family, including five siblings, and he credits the support of his family, particularly his mother and father, for his successes in life. Firefighter Alston's family has a tradition of public service; three cousins are firefighters and his uncle was a deputy superintendent in the Boston Police Department. (Tr. Vol. 1 at 32-33 (Alston)); Resp. 73, p. 5).

2. Firefighter Alston attended Natick High School as part of METCO, a voluntary desegregation program. He was an active participant in the school, playing on the football team and acting in school performances, and formed lifelong bonds with several of his classmates. (Tr. Vol. 1 at 33-36 (Alston)).

3. After graduating from Natick High School, Firefighter Alston pursued a singing career with the group, "Classic Example," which toured with the "New Kids on the Block" in the early 1990s. After the group dissolved in the mid-1990s, Firefighter Alston worked as an administrative assistant at the Board of Registration of Medicine and a train operator for the MBTA before taking and passing the firefighter's civil service examination. (Tr. Vol. 1 at 36-37 (Alston)).

4. Firefighter Alston became a Brookline Firefighter in August 2002 and served on a full-time basis for eleven (11) years. The Town's Select board serves as the Appointing Authority for the Fire Department. (Stipulated Facts).

5. During his career, Firefighter Alston was regarded as a "very good firefighter." (Tr. Vol. 6 at 794-795 (O'Reilly)).

6. At all times relevant to this appeal, Firefighter Alston was assigned to Group 2, Station 5, located in Coolidge Corner on Babcock Street in Brookline. That station includes a tower truck and an engine (pump truck). (Tr. Vol. 1 at 42 (Alston)).

7. During the Spring of 2010, Firefighter Alston suffered an on-duty injury (fractured tailbone) that put him out of work. (Tr. Vol. 1 at 56 (Alston)).

Paul Pender

8. Paul Pender joined the Brookline Fire Department in 1984. As of May 30, 2010, he was a fire lieutenant in Group 2, Station 5, serving as Firefighter Alston's supervisor. (Tr. Vol. 5 at 662 (Pender)). As will be referenced in findings that follow, Mr. Pender would subsequently be promoted to Temporary Fire Captain, Permanent Fire Captain and Acting Deputy Fire Chief.

9. Mr. Pender " … saw things in a fire that not all officers would as far as having that presence of mind of where he was, what was going on. He was a … very good fire officer and firefighter." (Tr. Vol. 6 at 802 (O'Brien)).

10. Mr. Pender and others were commended by the Town for their acts of heroism that occurred at a fire on Harrison Street in Brookline in 2008. As recounted by Mr. Pender during his testimony before the Commission:

> "It was a call for a man trapped on the second floor with a wheelchair so we had a lot of guys up there looking for him and the

1. Paul Pender held four different titles with the Fire Department during the relevant time period (Lt. Acting Captain, Captain and Acting Deputy Fire Chief). To avoid confusion, the decision refers to him as Mr. Pender.

> house was going pretty good and it got going to the point there was a back draft and the deputy called to evacuate the entire building and the entire building was evacuated. You do a personnel count and we were missing a guy; it turned out to be the deputy's brother. And I was standing right next to him and he said, 'Paul, my brother is missing' and I just ran up to the stairs, ran in, dove in with another guy and we were lucky enough he was only 10 or 15 - we couldn't see him because the fire was from the ceiling right to the floor but we were lucky enough to just kind of bump into him. He was facing us and lying like this on the floor and we saw the bright things, the fluorescent stuff, and we were able to get him out of there but we got burned up pretty bad." (Tr. Vol. 5 at 755-756 (Pender)).

11. During that fire, Mr. Pender received burns all over his face, head, ears, eyes, nostrils and throat. Four firefighters, including the rescued firefighter, went through the burn unit at Massachusetts General Hospital and were treated for Post Traumatic Stress Syndrome (PTSD). (Tr. Vol. 5. at 757 (Pender)).

12. Prior to May 30, 2010, Mr. Pender and Firefighter Alston had a good working relationship. Firefighter Alston described it as follows:

> " … Paul Pender was someone I attached to when I got on the job because he knew, as far as I could tell, everything about the station, everything about firefighting, everything about the ladder, everything about the engine … I would ask certain questions and Paul always had the answer. He would go as far as, we had a white board in the back of the station and he would talk me through certain occasions, if a fire happened here or this happened … he was a teacher ... we had a real nice relationship." (Tr. Vol. 1 at 45-45 (Alston)).

May 30, 2010 Voicemail Message[2]

13. On May 30, 2010, Mr. Pender and his son had just completed repairing their lobster traps in South Boston and were driving down Columbia Road in Dorchester. Mr. Pender was the passenger and his son was the driver. (Tr. Vol. 5 at 670-671 (Pender)).

14. While his son was driving, Mr. Pender placed a call to Firefighter Alston's cell phone and the call went to Firefighter Alston's voicemail. (Tr. Vol. 5 at 672)[3]

15. Mr. Pender thought he had terminated the phone call with Firefighter Alston. He had not. (Tr. Vol. 5 at 673)

16. Meanwhile, Mr. Pender's son had been trying unsuccessfully to get out of a left hand turn-only lane in order to go straight up Columbia Road. Sensing a break in traffic, Mr. Pender told his son to switch lanes. The driver of the vehicle in the other lane, who Mr. Pender describes as "black or Hispanic"[4] , did not yield. Mr. Pender then said "that fuck"; his son asks, "What?" at which point Mr. Pender said: "fucking [n-word]." (Tr. Vol. 5 at 674 (Pender); App. 1).[5]

17. Mr. Pender then realized that his racist comment may have been inadvertently left on Firefighter Alston's voicemail, as he had not properly terminated the call on his cell phone. (Tr. Vol. 5 at 675-676 (Pender)).

18. Firefighter Alston's wife was the first to hear the racist comment on the voicemail message that day. (Tr. Vol. 1 at 56-57)

19. When she heard the racist comment made by Mr. Pender, "her face changed, her whole expression changed" and she told Firefighter Alston "you want to hear this." (Tr. Vol. 1 at 56-57 (Alston)).

20. Firefighter Alston was shocked and hurt by the racist comment. (Tr. Vol 1 at 58-60 (Alston)).

May 30, 2010 - July 27, 2010

21. Not knowing whether Firefighter Alston had heard his racist comment, or had simply deleted the message without hearing it, Mr. Pender made multiple calls (including that day) to Firefighter Alston saying words to the effect, "we need to talk." Firefighter Alston did not return his calls. (Tr. Vol. 5 at 676 (Pender)).

22. Mr. Pender shared what had happened with other firefighters and "sort of expressed relief [to them] that, you know Gerald was my buddy and I'm sure nothing was going to happen." (Tr. Vol. 5 at 679 (Pender)).

23. After seeking the counsel of senior firefighters about what to do, Firefighter Alston, shortly after May 30, 2010, played the voicemail for Chief of Operations Michael O'Reilly (COO O'Reilly). COO O'Reilly did not report the incident to the Fire Chief or other Town officials. Rather, he and Firefighter Alston agreed that he (Alston) would reach out to Mr. Pender directly. (Tr. Vol. 6 at 796-798 (O'Reilly)).

24. On July 8, 2010, Mr. Pender, after learning through another firefighter that Firefighter Alston had reported the voicemail to COO O'Reilly, called Firefighter Alston. Mr. Pender told Firefighter Alston that the racist comment had not been intended for him, but for "some young gangbanger[6] " who cut him off in

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2. I have not overlooked Firefighter Alston's testimony that other firefighters had made racially charged comments to or in front of him in the past. For many reasons, including that Firefighter Alston was unable to recall a timeframe (i.e. - year) when these comments were made, I did not make a finding in this regard.

3. In his deposition testimony in the federal civil rights case, Mr. Pender alleged that the voicemail introduced into evidence had been "doctored" as it did not include a message that Mr. Pender left for Firefighter Alston checking in on his well-being. I credit Mr. Pender's testimony that the purpose of the call was to check on Firefighter Allston's well-being.

4. In his October 25, 2017 deposition related to the federal civil rights case, Mr. Pender stated that the driver of the other vehicle was a "young black kid." (App Ex. 4 at p. 43) In his August 2, 2010 investigatory interview with Town officials, Mr. Pender stated that he couldn't remember the ethnicity of the driver.

5. Firefighter Alston, in his post-hearing brief, argues that Mr. Pender's testimony regarding the traffic incident is not credible. Rather, Firefighter Alston argues that Mr. Pender was referring to him (Firefighter Alston) when he said "fucking [n-word]." To the extent that it is relevant, I have, after listening (and re-listening) to Mr. Pender's testimony, found Mr. Pender's testimony in this regard to be credible.

6. Mr. Pender: "I recall saying a kid cut me off. Probably said something like a wise guy or something and hemight have looked like a gang banger or something like that." (Tr. Vol. 5 at 683-684 (Pender)).

traffic. Firefighter Alston was offended by Mr. Pender's explanation and terminated the call. (Resp. 3; Tr. Vol. 1 at 62 (Alston)).

25. On July 10, 2010, Mr. Pender called Firefighter Alston again. After seeking to again explain the context in which he made the racist comment, Mr. Pender told Firefighter Alston words to the effect that his (Alston's) decision to report this matter to COO O'Reilly was the stupidest thing he (Alston) could have done and then asked Firefighter Alston "Do you want me to lose my job?" (App. 4 at 56-57)

Filing of Formal Complaint by Firefighter Alston & Discipline Against Mr. Pender

26. On July 28, 2010, then-Fire Chief Peter Skerry received a formal complaint letter with the Town's Fire Department about the voicemail and his subsequent interactions with Lt. Pender. Chief Skerry immediately notified the Town's Director of Human Resources at the time, Sandra DeBow (Ms. DeBow) (Tr. Vol. 6 at 833-834 (Skerry)).

27. On July 30, 2010, a meeting was held which was attended by: Firefighter Alston, his wife, Chief Skerry, COO O'Reilly and then-Town counsel Jennifer Depazo to address the letter. (Tr. Vol. 6 at 837 (Skerry)). Ms. DeBow did not attend the meeting as she was out of town at the time. (Resp. 3 at p.3).

28. At the meeting, Firefighter Alston played the voicemail after questions were raised about precisely what Mr. Pender had said. After hearing the voicemail, Chief Skerry determined that Mr. Pender's racist comment constituted a firing offense and told Firefighter Alston that he would fight for Mr. Pender's termination. (Tr. Vol. 1 at 75-76 (Alston); Tr. Vol. 6 at 840 (Skerry)).

29. Firefighter Alston stated that he did not want Mr. Pender terminated. (App. 17, p. 8; Tr. Vol. 1 at 75-76 (Alston); Tr. Vol. 6 at 840 (Skerry)).

30. Although Chief Skerry testified he did not recall discussing Mr. Pender's eligibility for promotion to Captain during the meeting, I credit Firefighter Alston's testimony that Chief Skerry said that Mr. Pender would be ineligible for promotion. Chief Skerry's notes specifically reference (with a "?" next to it) Pender's ineligibility for promotion to Captain as a contemplated disciplinary consequence in his notes, and I find that Chief Skerry made this promise to reassure Firefighter Alston that the department took his complaint seriously. (Tr. Vol. 1 at 76, 80 (Alston); App. 17, p. 17)

31. That day (July 30, 2010), Chief Skerry transferred Mr. Pender to another station. (App. 17 at 2, 19 and 20; Tr. Vol 6 at 832, 836) (Skerry)).

32. Sometime after the July 30th meeting[7] , a three-way phone call took place between Firefighter Alston, then-local union President Shaun Fay and the Town's Director of Human Resources, Sandra DeBow. During that conversation, Firefighter Alston expressed concern that the Town's Human Resources Director was conducting the investigation into his complaint, rather than an outside counsel. Ms. DeBow disagreed. Ms. DeBow and Firefighter Alston engaged in a heated verbal exchange during which both of them used profane language. (Tr. Vol. 10 at 1840-1841 (Fay)).

33. On August 2, 2010, Mr. Pender admitted during an investigatory interview with Town officials that he said the word "[n-word]" heard on the voicemail, but that it was not intended for Firefighter Alston. (Resp. 3 at 6).

34. On August 16, 2010, HR Director DeBow released her investigation report which stated in part:

> "The facts here establish that Lt. Pender made a work-related call to a subordinate and left an inflammatory race-based message on FF Alston's cell phone. Using profanity and a well-recognized, racially-inflammatory term rises to the level of conduct unbecoming to a firefighter as it would tend to lower the service in the estimation of the Public, and further that such conduct is also prejudicial to good order." (Resp. 3)

35. The report concluded that while Mr. Pender had directed the racial comment at another driver on the road, he was still responsible for conduct unbecoming a firefighter. (Resp. 3 at 9-10; Tr. Vol 6 at 894-95 (DeBow)) The report recommended progressive discipline and Mr. Pender's permanent transfer, mediation between Firefighter Alston and Mr. Pender, development of an anti-discrimination policy, and anti-discrimination training including regarding supervisors' duty to report. (Resp. 3 at 10-12; Tr. Vol. 6 at 891, 895-96, 1056 (DeBow))

36. On August 17, 2010, the Select Board conducted a closed-door disciplinary hearing for Mr. Pender. Firefighter Alston was not called as a witness. After hearing from Mr. Pender and his counsel, the Board authorized the Town to enter into a disciplinary agreement with Mr. Pender that included serving a two (2)-tour suspension (42 hours of lost pay) with two tours held in abeyance, pending no further misconduct, along with a permanent transfer out of Station 5. The agreement also required mediation with Firefighter Alston, anger management and diversity training. The Board rejected the Fire Chief's proposal that Mr. Pender serve all four tours of the suspension. (App. 21).

37. On August 26, 2010, Mr. Pender and Firefighter Alston engaged in mediation. Firefighter Alston recalled the mediation as follows:

> " … Paul Pender, his demeanor was not too good; it seemed like he wasn't really happy. At one point the mediator asked Paul why he was so angry with me and I remember Paul saying I think this guy is trying to take my job."

(Tr. Vol. 1 at 79 (Alston)).

38. On August 27, 2010, Chief Skerry issued a special order regarding Mr. Pender's discipline stating that that Mr. Pender had committed "conduct prejudicial to good order." Mr. Pender was

7. Firefighter Alston testified that this phone call took place before the July 30th meeting. To me, it appears that the phone conversation took place sometime after the July 30th meeting. However, given the passage of time (over 8 years), there is uncertainty about this date (and others) for which there is no written record.

suspended for two tours between August 30, 2010 and September 6, 2010 resulting in a loss of 42 hours of pay[8]. (App. 22).

Pender Promotion to Temporary Captain

39. On September 10, 2010, the Town made a series of promotions due to the absence of then-Deputy Chief Robert Ward. As part of these promotions, Mr. Pender was promoted to Temporary Fire Captain. (App. 30 at 2)

40. On September 15, 2010, Firefighter Alston found the general order announcing Mr. Pender's promotion to temporary Captain on the station bulletin board. (App. 30 at 2) Firefighter Alston was "not happy" when he saw the general order, particularly in light of the statement made at the July 30, 2010 meeting that Mr. Pender would not be receiving any promotions. He immediately called Ms. DeBow and voiced his objection. (Tr. Vol. 1 at 82-85 (Alston)).

Firefighter Alston's Return to Work

41. On September 17, 2010, in anticipation of Firefighter Alston's return to work the following week, Chief Skerry met with officers. (App. 23; Tr. Vol. 6 at 847-48 (Skerry)) At the time, Chief Skerry's impression was that there had been rumors about and some backlash against Firefighter Alston after Mr. Pender's transfer from the station, and he wanted to make certain that it stopped. (Tr. Vol. 6 at 847-48, 863 (Skerry)) Chief Skerry reminded the officers that the Town has zero tolerance for discrimination and *retaliation*, that a firefighter had exercised his right to file a complaint, and that he was coming back to work and was to be treated cordially. (App. 23; Resp. 20 at 4; Resp. 160; Tr. Vol. 6 at 820-21 (O'Reilly))

42. Soon after discovering that Mr. Pender had been promoted, Firefighter Alston learned that Mr. Pender would be receiving a medal of valor at the White House on September 22, 2010 for his heroism in the previously-referenced 2008 fire. Firefighter Alston believed that Mr. Pender deserved the medal but that it was not appropriate for the Town to "parade" him so soon after his discipline for the racial slur. Firefighter Alston believed that Mr. Pender was being built up in a way that detracted from the seriousness of his offense. (Tr. Vol. 1 at 81-82 (Alston)).

43. On September 21, 2010, Firefighter Alston returned to work. (Resp. 20)

44. On September 23, 2010, two (2) days after Firefighter Alston's return, Firefighter Joseph Canney, posted a derogatory message on the Union's blog which I find was referring to Firefighter Alston. The post stated:

> "FACELESS COWARD
>
> by Joe Canney
>
> To the faceless coward who for no good reason, except of course his own self interest leaked to the media about one of our BROTHER"S (sic) alleged acts of misconduct on what should have been the proudest day of their professional lives is _____. I honestly can't even find an appropriate word for it. I have been around this job a long time and seen and heard a lot, but this even exceeds my wildest expectations of someones (sic) having a personal agenda to destroy another. This union went through this type of personal, meritless attacks before and it almost destroyed us, don't let this ever happen again, for all our sakes!"

(Firefighter Alston 9, Attachment 2).

45. On September 27, 2010, Firefighter Alston reported the message to Chief Skerry. The Town did not conduct an investigation regarding whether this message constituted retaliation against Firefighter Alston. Rather, Chief Skerry indicated that he would call the Union President and ask him to have the posting removed. (Tr. Vol. 6 at 832 (Skerry)).

46. On October 5, 2010, Chief Skerry informed his deputy chiefs that Mr. Pender was not to be assigned to supervise Firefighter Alston under any circumstances. (App. 24).

47. On October 12, 2010, Chief Skerry called Firefighter Alston to "check-in" on his wellbeing. According to Chief Skerry's hand-written notes, Firefighter Alston " … was extremely agitated that Town let him down with 'slap on the wrist' suspension and Pender Temp Promotion. Last 30 seconds was screaming that Pender called him 'a f…. n…..' then hung up the phone." (App. 17 at 3)

48. That same day, Chief Skerry penned a letter to Firefighter Alston stating in part:

> "After our phone conversation earlier today I felt compelled to write and offer my thoughts on several issues. We spoke of the difficulties you've faced over the past several months while you've been both recovering from your injury and attempting to reconcile the offensive act that you experienced in late May. After today's conversation it is my belief that you would benefit from speaking with a counselor either through the Town's EAP or one that your physician can recommend."

(App. 31)

Visits / Evaluations at Beth Israel Deaconess Medical Center (BIDMC)

49. On October 14, 2010, Firefighter Alston visited Beth Israel Deaconess Medical Center (BIDMC) in Boston. A physician's note from BIDMC states:

> "Pt. seen and discussed with Dr. Meyer. Pt. comes into to transfer / establish care and to get note for work as he is very angry / upset and worries about hurting someone at work or otherwise losing control." (Resp. 35 at 123)

50. The physician at BIDMC had Firefighter Alston see a social worker by the name of Elizabeth Simpson that same day. (Resp. 35 at 132)

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8. The Town, via a settlement agreement dated March 21, 2013, agreed to "place 42 hours in Lt. Pender's vacation bank." Mr. Pender testified that this was unrelated to his loss of 42 hours of pay in August 2010, but, rather, related to longstanding issues related to vacation accrual. I left the record open for the Town to provide additional documents that may support this contention, but received none. Based on the limited information available, I was unable to reach a conclusion regarding whether the two events were related or not.

51. Ms. Simpson penned a series of notes regarding her observations of Firefighter Alston on October 14, 2010, including the following:

> " … Pt is a local firefighter and reports that he is experiencing racism at work. He states a particular incident occurred in May where he was the target of racist comments by a co-worker. He relays how this has been responded to by his supervisors and colleagues, and he feels their response has only exacerbated his anger over the situation. He states that lately, he has become increasingly upset by this, and he has decided to consult with an attorney about it on Monday as he is considering pursuing legal action …. [H]e states that recently, he has felt so upset that he has had passing thoughts of hurting his co-workers. He firmly denies homicidal plan and intent. He states repeatedly that he does not want to hurt anyone and that he has been trying to control his anger and impulses in various ways … Pt states he has no history of psychiatric treatment or counseling, though OMR indicates one initial SW eval by [LS], LICSW in 2004." (Resp. 35 at 128)

52. A physician at BIDMC issued a note excusing Firefighter Alston from work until October 19, 2010. (Resp. 35 at 124)

53. On October 18, 2010, Firefighter Alston had a follow-up visit with Social Worker Simpson at BIDMC. At that time, Ms. Simpson diagnosed Firefighter Alston with "Adjustment Disorder, unspecified." During this visit, Firefighter Alston requested " … additional time off work (one week) to continue to stabilize mood and manage sometimes overwhelming affect." (Resp. 35 at 132-133)

54. On October 21, 2010, a physician at BIDMC excused Firefighter Alston from work through October 27, 2010 due to "Psychosocial stressors." (App. 32)

55. On October 25, 2010, Firefighter Alston had another follow-up visit with Social Worker Simpson at BIDMC. Her notes state in part:

> " … He [Firefighter Alston] states he is planning to return to work on Wednesday and he is trying to 'stay positive' about this. He speaks of how it has continued to feel supportive to spend time with family, and uncle in particular, this past week … He speaks of the 'unresolved' quality of the situation as being especially hard, and unusual for him." (Resp. 35 at 133)

56. On November 24, 2010, Firefighter Alston, while at work, became upset by driving assignments made by Lt. Justin Robinson pertaining to Firefighter Alston, FF Mike Bresinski, and a probationary firefighter who is the nephew of Mr. Pender. Lt. Robinson made the assignments based on a desire to spread senior firefighters among the two apparatuses and to develop Firefighter Alston's driving experience.[9] (Resp. 13 at 3-4; Tr. Vol. 1 at 94-98, 207-09 (Alston); Tr. Vol. 7 at 1066-69, 1074-77, 1103-5, 1155-57 (Robinson))

57. FF Bresinski assured Firefighter Alston that the assignments had nothing to do with Mr. Pender, but the mention of Mr. Pender's name increased Firefighter Alston's agitation. (Tr. Vol. 1 at 99 (Alston); Tr. Vol. 7 at 1076, 1112 (Robinson); Resp. 13 at 4-5, 9-10) Given his level of agitation, Firefighter Alston agreed to be transported by ambulance to BIDMC (Tr. Vol. 1 at 98 (Alston) Tr. Vol. 7 at 1077, 1120 (Robinson); Resp. 8; Resp. 13 at 5).

58. Then-incoming Union President Shaun Fay visited Firefighter Alston at the hospital on November 24, 2010. At that time, Firefighter Alston's wife told Captain Fay that Firefighter Alston had recently lost forty (40) pounds which she attributed to stress at work. (Resp. 13 at 15)

59. At the BIDMC, Firefighter Alston tested positive (urine test) for cocaine. According to the physician's notes, " … [H]e [Firefighter Alston] … said he used cocaine yesterday with friends in his neighborhood. He says this is the first time in 20 years and he does not want to use cocaine again." (Resp. 35 at 8, 20, 21, 22, 25, 24-25)

60. Also, while at the BIDMC on November 24, 2010, Firefighter Alston stated that: " … he began smoking marijuana in July to deal with [his] anger and anxiety …" (Resp. 35 at 24)

61. Notes from a psychological evaluation completed at BIDMC that day state in part:

> "Patient was able to discuss essentially feeling singled out at his job for bringing up issues around being openly discriminated against. This situation has impacted patient's appetite to the point that he has lost 40 pounds over past several months. His weight loss has probably also been brought up by his tendency to work on walking away when he feels stressed or angry. He frequently takes long walks to control his anger. He has also had some trouble sleeping. Unfortunately, he has also turned to marijuana to make him feel calmer since this seemed like the only option. More recently, he tried cocaine because a friend thought it might help his anxiety (not really clear that it did)." (Resp. 35 at 27)

62. As part of his evaluation that day, Dr. Eva Matthews, MD, at BIDMC, diagnosed Firefighter Alston with "Adjustment Disorder with depressed mood." Dr. Tina Lusignolo, MD, wrote, "Mr. Alston may be suffering from some s/o adjustment d/o related to his current stressors, but, in my opinion, he does not have a major mental illness that would require more secure containment." (Resp. 35 at 28)

63. Between December 14, 2010 and January 15, 2011, Firefighter Alston was excused from work duties for evaluation and treatment for "psychosocial stressors." (Resp. 35, pp. 144-149)

64. On December 16, 2010, Firefighter Alston attended an individual psychotherapy session with Social Worker Simpson at BIDMC. Ms. Simpson's notes from that session state in part:

> "Gerald presents with overwhelmed mood and tearful affect. Towards beginning of session, he speaks of how he is 'done' with his work situation and considers resigning from his position. He verbalizes feelings of anger, frustration and a wish to disengage from his struggle with this over the past several months. He speaks of how saddened he is to observe the emotional toll it seems to be taking on his family and on himself and identifies

9. I considered Firefighter Alston's suggestion that the assignment here was motivated by other factors. After reviewing all relevant exhibits and testimony, I don't believe it was. Rather, the decision, although ill-timed, was a routine scheduling decision.

> feeling especially protective of his family. He denies SI/HI. He continues to endorse occasional violent thoughts, but he denies any plan or intent to act on them and contracts for the safety of himself and others. Explored the range of Gerald's thoughts and feelings about this situation and the meaning it might have for him. Supported him in identifying how he might like to proceed with either pursuing FMLA, resigning or continuing to work while trying to cope (he states he does not have a short-term disability policy to use). By the end of today's session, he states he is still unsure what he wants to do and will continue to give it thought and talk it over with his family who remain a strong support for him. Reiterated my support re the FMLA option if this is what he chooses."

Under the "diagnosis" section, Ms. Simpson wrote: "Adjustment Disorder with mixed disturbance of emotion and conduct." (Resp. 35 at 145)

Training / Adoption of Anti-Discrimination Policy

65. Beginning in October 2010, through the Spring of 2011, MCAD trainers conducted discrimination prevention training for Town employees. (Resp. 7)

66. In January 2011, the Town's Select Board approved an anti-discrimination policy which was distributed to all Town employees. (Resp. 14)

February 2011 Conversation between Firefighter Alston and Paul Pender

67. On February 8, 2011, while off-duty, Mr. Pender was driving a plow in Brookline with another off-duty firefighter when Firefighter Alston flagged him down to have a conversation. (App. 4, Attachment 1)

68. After the conversation, Mr. Pender penned a transcript-like summary of his version of the conversation. (App. 4, Attachment 1) Approximately two years later, as referenced in findings below, Mr. Pender would submit this document to HR Director Sandra DeBow stating in part words to the effect: "Here is the kind of people you are dealing with." (App. 4 at 63 (Pender Deposition)).

69. The document prepared *by Mr. Pender* states:

> "Alston: Hey man, I just want to tell you we're good.
>
> Pender: What do you mean, "We're good?"
>
> Alston: You know, all this shit that's going on…I just want you to know that me and you we're good.
>
> Pender: Well, I don't really understand what you mean Gerald, I just want to move on from this.
>
> Alston: Well just so you know, between me and you is good.
>
> Pender: I don't know how we can be good Gerald, you destroyed my life and ruined my career. But I'm glad you're good.
>
> Alston: Good, I'm not good, I'm getting a divorce.
>
> Pender: Well Gerald, I tried to tell you when we talked on the phone that if you went to the Chief this would create a huge shit storm.
>
> Alston: Yah man, I know.
>
> Pender: I begged you and I apologized to you up and down, not to do what you did. You could see that this was gonna happen.
>
> Alston: Well, there's a bunch of shit gonna happen, and I just want you to know, when it does, you and me are good.
>
> Pender: What do you mean, "there's a bunch of shit gonna happen?" What's that mean?
>
> Alston: I got fucking lawsuits against the Town and everybody.
>
> Pender: Gerald, what are you talking about.
>
> Alston: They all been fucking me over man.
>
> Pender: What are you talking about?
>
> Alston: The fucking town, that cunt Sandra DeBow and that fucking asshole Skerry.
>
> Pender: Oh, that's great Gerald, you're going to bring this all up again. Where do you think that's gonna leave me?
>
> Alston: You're going to be fine. This got nothing to do with you.
>
> Pender: Gerald, you can't be that naïve. Look, I gotta go.
>
> Alston: All right man, I'll see you."

(App. 4, Attachment 1)

2011 Counseling Sessions with Dr. Kahn

70. In 2011, Firefighter Alston participated in multiple counseling sessions with Dr. Michael Kahn, a doctor at BIDMC who specializes in psychiatry. (Resp. 127)

71. During the initial visit on January 3, 2011, Dr. Kahn wrote in part:

> "[Firefighter Alston] does appear to be very stressed and overstimulated by the ongoing psychosocial stressors related to his job, experiencing symptoms of automatic hyperarousal and difficulty sleeping. Pt would benefit from an agent that would improve his sleep (such as trazadone), as well as something to control autonomic hyperarousal (such as clonidine or indural)." (Resp. 127 at 37)

72. During this initial visit, Dr. Kahn diagnosed Firefighter Alston with "Adjustment disorder NOS". (Resp. 127 at 38)

73. On January 20, 2011, Firefighter Alston contacted Dr. Kahn via telephone and indicated that he "is interested in trying clonidine to help with explosiveness." (Resp. 127 at 34)

74. Dr. Kahn's notes from a January 25, 2011 counseling session with Firefighter Alston state:

> "Mr. Alston is back at work, but continues to be quite upset about his perception of the way he was treated. Several days ago, we began clonidine [] to help with anger management and he has found this helpful. I discussed with him strategies to put in perspective his difficulties and to keep first and foremost the fact that he wants to be a good husband and provider for this family." (Resp. 127 at 33)

75. On February 14, 2011, six (6) days after the previously-referenced encounter with Mr. Pender, Firefighter Alston contacted

Dr. Kahn "to say he was very depressed, anxious, sleeping badly, crying, not focusing … will try citalopram …" (Resp. 127 at 32)

76. Dr. Kahn's notes from a February 22, 2011 counseling session state in part:

> "He [Alston] is obviously having a very hard time dealing with the events of the past several months at work as well as with the new breakdown in his marriage. He will continue in supportive counseling and will also continue with Celexa, and I will see him in one month."

(Resp. 127 at 31)

77. Dr. Kahn's notes from a March 22, 2011 counseling session state in part:

> "Gerald seemed much less angry than in our last few meetings. He has been using the clonidine and citalopram with good benefit, and has been seeing his therapist weekly … He showed his sense of humor again for the first time in several weeks."

(Resp. 127 at 30)

78. Dr. Kahn's notes from a May 17, 2011 counseling session state in part:

> "Gerald is back at work … and is much less angry. He discontinued all of his psychiatric medication, and really does not want to continue it or therapy. I was struck by his being much less rageful during our meeting today, and he seems at least for the time being to have made peace with the recent events at the fire department, and plans to make the best of a difficult situation …" (Resp. 127 at 29)

2012: New Fire Chief / Filing of MCAD Complaints / Continued Counseling

79. On May 29, 2011, Chief Skerry retired; the Select Board appointed Paul Ford as his successor on November 7, 2011. (Resp. 16 at 4) Chief Ford previously worked for the City of Fall River's Fire Department, starting in 1983. He worked his way up the ranks in Fall River, eventually serving as the City's Fire Chief up until the time he accepted the Fire Chief's position in Brookline. (Tr. Vol. 8 at 1352 (Ford)).

80. On May 17, 2012, Chief Ford, together with then-Chief of Operations (COO) Robert Ward met with Firefighter Alston (App. 37; Resp. 15). "Chief Ford asked [Firefighter Alston] how things were going regarding Lt. Pender. [Firefighter Alston] said fine, he had no problems; he moved on from that situation. [Firefighter Alston] explained he went through a lot and just wanted to move on. Chief Ford said he was glad to hear that. [Firefighter Alston] said he did not know if Pender had moved on; he said he once stuck his hand out to Pender to shake and that Pender did not shake his hand. [Firefighter Alston] repeated he has moved on …" (App 37 (Ward hand-written notes regarding meeting)).

81. On May 24, 2012, Firefighter Alston filed a pro se complaint with MCAD alleging that the Town had discriminated against him by promoting Mr. Pender after Mr. Pender made the racist comment on his voicemail. The MCAD complaint also references the May 17th meeting with Chief Ford, stating:

> "On May 17, 2012, I was called into meet with Chief Paul Ford and he asked me 'If I still was going to have problems with the (sic) Paul Pender if I we were ever to be assigned to work together?' I feel as though the Town of Brookline has not handled the situation in the way they would have had it been an employee of a different race. I feel as though as a result of this situation supervisors and coworkers are treating me. (sic)"

(Resp. 15)

82. On August 22, 2012, Firefighter Alston had what appears to be the first counseling session with Dr. Kahn since the Spring of 2011. Dr. Kahn's notes from this session state in part:

> "Gerald came in today to blow out steam … he continues to obsess about the way he was treated in the department and his perception of the department has been insufficiently attentive to making changes. We discussed this at some length, and it appears that many of those close to him tell him to just 'move on' but he has been unable to do so. He and his wife are in the process of a divorce, which is obviously quite stressful, and when he works at his home fire house, he has no problems. However, when he is assigned to another fire house temporarily, he believes he is getting the 'cold shoulder' from other firefighters, which is intensely distressing to him. He is not interested in medication, nor do I necessarily think it is indicated. He does find it helpful to vent once in a while as he has no other opportunity to do so." (Resp. 127 at 26)

83. On August 24, 2012, the Town filed its Position Statement in response to Firefighter Alston's May 24, 2012 MCAD Charge, arguing in part that Firefighter Alston had not been subjected to an adverse employment action and that most of the allegations fell outside the 300-day statute of limitations for filing an MCAD complaint. (Resp. 16; Tr. Vol. 6 at 918 (DeBow))

84. On September 5, 2012, Firefighter Alston had another counseling session with Dr. Kahn. Dr. Kahn's notes state in part:

> "Continues to deal with his sense of being wronged, and I continue to urge him to try to put matters in perspective and focus on moving on with his life. We will keep open the possibility for p.r.n., clonidine or trazadone."

(Resp. 127 at 25)

85. On September 11, 2012, Firefighter Alston called Dr. Kahn to "say he was losing his temper too easily and wants to try some medication for it … " (Resp. 127 at 24)

86. On October 5, 2012, Firefighter Alston called Dr. Kahn. According to Dr. Kahn's notes:

> "He was in tears, and apparently had discovered that he was not granted a sick leave. It was difficult to understand what he was saying, but he was obviously upset. I encouraged him to come in to our meeting at 10:40 but he chose to remain at home. He is obviously feeling overwhelmed, and feeling he is being treated poorly by the department … He felt that the clonidine was not helpful in managing his impulses, and I phoned him some Risperdal … and we will check back with him later in the day." (Resp. 127 at 22)

87. On October 11, 2012, Firefighter Alston called Dr. Kahn to tell him that the Risperdal had "worked wonders." (Resp. 127 at 21)

88. On November 19, 2012, Firefighter Alston, now represented by counsel (not the same attorney who is representing him before the Civil Service Commission), filed an Amended Charge of Discrimination with MCAD. The Amended Charge alleged in part that, since reporting the racist comments left by Mr. Pender on his voice mail, that Firefighter Alston: a) " … has been shunned, isolated and mocked by his fellow firefighters at the direction and instruction of his superiors for three years with significantly worsening conditions"; and b) had "made repeated complaints to his chiefs and human resources on a monthly, if not weekly basis through the entire year of 2011 and up until May 2012; and c) there was no intervention by management. (Resp. 17)

89. By letter dated December 5, 2012, the Town's HR Director notified Firefighter Alston that the Town, based on the allegations in the amended MCAD complaint, had initiated an investigation. In this letter, Ms. DeBow asked Firefighter Alston to participate in an interview, at which time he could provide more detailed description of the alleged offensive conduct. (Resp. 18)

90. On December 7, 2012, Ms. DeBow sent an email to Fire Captain Shaun Fay, the Union President, stating:

> "forgot to give you a buzz. I sent Alston a letter indicating I will be moving forward with an investigation based on his amended complaint at the MCAD alleging retaliation by his co-workers who are ignoring him, etc. and the failure of his supervisors and the Town to respond to his complaints.
>
> The letter went out yesterday. I expect to hear from his attorney next week. I will give you a heads up as to the process going forward, after I confirm the process with the Chief."

(App. 39)

91. Dr. Kahn's notes from a December 11, 2012 counseling session with Firefighter Alston state:

> "Overall, Gerald has continued to struggle with his sense of grievance with the town of Brookline, and I am trying to help him put it into perspective. His anger gets overwhelming at times, and although responded well to Risperdal, this medication is too expensive for him instead we will use some p.r.n. Vistaril." (Resp. 127 at 20)

92. On December 17, 2012, counsel for the Town sent an email to Firefighter Alston's then-counsel to determine if his client (Alston) would participate in an interview, as requested via letter on December 5th. (Resp. 19)

93. On December 20, 2012, Firefighter Alston's then-counsel replied, stating: "The case is being investigated by the MCAD and the Town has no authority to force him to consent to an interview regarding pending litigation." (Resp. 19)

94. Also on December 20, 2012, the Town filed an "Amended Position Statement" with MCAD , asking, in part, for pre-determination discovery in light of Firefighter Alston's decision not to participate in an interview. (Resp. 20)

95. On December 27, 2012, Firefighter Alston's then-counsel withdrew the MCAD complaint in order "to file a private right of action in civil court." (Resp. 21)

96. Dr. Kahn's notes from a December 28, 2012 counseling session state in part:

> "Gerald continues to be quite upset about his treatment in the department … he gets along well with his co-workers in his local fire house, but feels that when he goes elsewhere, people look at him with ill feelings. He apparently revised his complaint with MCAD and it was accepted, and this has …. opened something of a 'can of worms." (Resp. 127 at 19)

2013

97. On January 4, 2013, Lt. Ron Cronin (a firefighter through mid-2013 (Resp. 163)) wrote to COO Ward asking permission to assign Firefighter Alston to work under his direct supervision at street level, since Firefighter Alston claimed he did not feel safe. (App. 5 (Ford Dep. Ex. 1) Chief Ford rejected the proposal in a January 7, 2013 response, as he was concerned that a change in assignment following an MCAD complaint would be viewed as retaliatory, Firefighter Alston's current assignment worked well operationally and Firefighter Alston had not come to him directly with concerns, and his claims were ambiguous. (App. 5 at 193-205 and Ex. 2 thereto)

98. In connection with the investigation, Lt. Robinson told HR Director DeBow that he was not aware of shunning or any other safety concern but he wanted to change Firefighter Alston's assignment during the pendency of the investigation. Lt. Robinson explained in his testimony that he felt that Fire Firefighter Alston's expression of safety concerns reflected poorly on him as a supervisor. (Tr. Vol. 6 at 1054-55 (DeBow); Tr. Vol. 7 at 1084-86, 1122, 1124, 1140, 1143-44, 1168-69, 1176-77 (Robinson)). HR Director DeBow warned Lt. Robinson that a change in assignment could be viewed as retaliatory. (Tr. Vol. 7 at 1122 (Robinson)

99. On January 18, 2013, HR Director Debow issued her investigatory report concerning the Amended MCAD Charge. (Resp. 22) The report stated that the shunning allegations could not be corroborated based on the information available without Firefighter Alston's participation. (Resp. 22 at 8-11)

100. On May 1, 2013, Chief Ford wrote to the Select Board through the Town Administrator recommending Paul Pender for a permanent promotion to Captain. (Resp. 119) In regard to whether he considered that Mr. Pender had left a racist comment on Firefighter Alston's voicemail, Chief Ford stated in part: " I mean, we all know that he said something he should [not] have. Whether we can all agree or not that he didn't say it directly to Gerald - I looked at that he was disciplined, so, sort of paid his price." (App. 5 (Ford Dep. at 189)).

101. On May 7, 2013, the Select Board permanently promoted Mr. Pender to permanent Captain. (Resp. 118 at 8, 18-19; Resp. 120; Tr. Vol. 10 at 1911-15 (Goldstein); Tr. Vol. 10 at 1965-66, 1991 (Wishinsky))

102. Mr. Pender served as Captain of Training. According to Mr. Pender, as the Captain of Training, "you run a lot of training sessions, you keep everyone up to date on all of the current changes in firefighting. And during the recruit classes, you are like the second in command under the deputy, up there, in charge of training new guys." (App. 4 (Pender Dep. at 94)

103. While training new recruits, Mr. Pender would tell the recruits: a) "my side of the story" regarding the matter involving Firefighter Alston; and b) what they read in the local paper about this matter "is a bunch of lies." (App, 4 (Pender Dep. at 95)).

104. Mr. Pender recalled discussing the matter involving Firefighter Alston with five new recruits that were former Fall River firefighters, stating: " … we had five guys from Fall River, who were all minorities, and I told them as a group, because they were - we had them, just the five of them, for like a week or two or something. And they were pretty shocked that it had turned into what it had turned into, you know … That something they thought was so benign is going on seven-and-a-half years later. At the time, it was only three or four years later, but …" (App. 4 (Pender Dep. at 97-98)).

105. On May 14, 2013, Firefighter Alston attended a counseling session with Dr. Kahn whose notes state in part:

> "Gerald called me to say that he had taken a few days off of work because of stress and needed a letter clearing him for return to work. Apparently, someone had come to work in the fire station, who, he felt, was spreading malicious rumors about him. Gerald said up until this point, he has been doing well, but this aggravated him, and he wanted to take time off before he erupted verbally …" (Resp. 127 at 16)

106. On June 17, 2013, Firefighter Alston's then-counsel filed a discrimination complaint against the Town in Norfolk Superior Court based on the same claims asserted in his MCAD action. (Resp. 23).

107. On June 19, 2013, Leslea Noble, Assistant HR Director, wrote to Firefighter Alston asking to interview him about certain complaints he had made to coworkers. (Resp. 24; App. 44). He did not respond. (Tr. Vol. 2 at 347-48, 366 (Firefighter Alston))

108. On June 24, 2013, Ms. Noble met with COO Ward and Lt. Robinson to discuss Firefighter Alston's complaint. As part of that meeting, it was stated that Firefighter Alston had no problem working with anyone in his station, but that when he worked at other stations he had concerns about "what he was walking into." (App. 46).

109. In late August 2013, the Brookline TAB published a story detailing the allegations of Firefighter Alston's discrimination complaint against the Town. (App. 90)

110. On September 12, 2013, Firefighter Alston's attorney in the discrimination action responded to the Town's request for an investigatory interview of Firefighter Alston in connection with his state court complaint. He proposed that the meeting be videotaped or transcribed and that Firefighter Alston be permitted to have an attorney present and to refuse to answer certain questions on the grounds of the pending litigation. He asked the Town to forward a counter-proposal if those terms were not acceptable. (App. 52).

111. On October 31, 2013, Firefighter Alston was attending a training session being held by Mr. Pender at which time Firefighter Alston asked to speak with Mr. Pender. Mr. Pender prepared a detailed, transcript-like summary of their conversation. Mr. Pender's notes state in part:

> "I asked him [Alston] what he needed to talk to me about and he stated 'all this stuff that's going on, it's not personal.' I asked how it could not be personal since it was my name and my families' names that were being dragged through the mud. And that my wife, mother and mother-in-law had cried a river over the weekend that it came out in the papers. He told me that I didn't understand what was going on and that it had nothing to do with me. He said that it was about respect and that he had a lot of respect for me and that the lawsuit was against the town. At this point I told him that I had read the lawsuit and that as far as I could see it was a bunch of lies. He then stated 'you are not reading it right' I told him I read exactly what it said and that there was very little truth in it. I stated that 'you know I didn't make those comments to you and that it was a mistake that I had apologized profusely for.' He acknowledged that I had apologized many times but said ' this is against the town and had nothing to do with me.' He said 'how do you think I liked hearing [n-word] on my phone?" Again I told him I was sorry and that it wasn't directed at him, it was road rage from a traffic incident, which can be a side effect of PTSD which I had been treated for after a bad fire the previous year. He stated that the town had screwed us both over and that he was doing this for both our benefits. I told him I understand his benefit because the lawsuit had a dollar figure attached to it, to which he stated 'fuck the money." He then said it was the MCAD's fault which I did not understand.
>
> Mr. Alston was getting agitated and raising his voice, I told him he would have to calm down or I would have to end the conversation. He did calm down and continued to tell me that I didn't get what was going on. I asked him about the quote in the lawsuit that stated in January 2011 he started telling people that I should not be promoted to Captain. He told me that I had misread the lawsuit and that was not what it said. Again he began raising his voice."

(App. 4, (Pender Dep. Attachment 2)

112. That same day (October 31, 2013), Firefighter Alston spoke with Dr. Kahn via phone. Firefighter Alston reported to Dr. Kahn that he felt like "beating someone up". According to Dr. Kahn's notes, Firefighter Alston remained: "very focused on his wanting to get retribution and satisfaction for his having been called a racial slur allegedly two to three years ago." (Resp. 127 at 14)

113. On November 7, 2013 Ms. Debow, via email, asked Chief Ford whether the Alston matter "was about to explode or quiet?" and Chief Ford responded: "So, so … never know but I do think it's a powder keg." (App. 53)

114. On November 19, 2013, Mr. Pender submitted his summaries of the February 2011 and October 2013 conversations with Firefighter Alston to Ms. DeBow. (App. 4 (Pender Dep. at 63-65)).

115. On or about December 6, 2013, John Martin, Esq., Firefighter Alston's counsel in the Norfolk Superior Court case, supplied answers to the Town's First Set of Interrogatories. Firefighter Alston's Answers stated in part:

> "I was sent to Station 4 in December of 2011 or January of 2012. When I arrived I entered the kitchen and said 'good morning guys.' One of several firefighters replied. I approached one firefighter to shake his hand at which point he stood up and walked away. I worked twenty-four hours. Prior to finishing my shift I went to the dining area to find out when dinner would be held. I found all of the firefighters on duty eating together as is the norm. I asked why I hadn't been told that dinner was happening and they replied 'what are you talking about."
>
> The next morning I woke up and went to breakfast where several firefighters were sitting with Lt. Pender. Again, I stated 'good morning guys' and once again no one responded. When I began to prepare my breakfast they left the room. This was the standard response each and every time I worked in a station other than my usual Station Five for several years, until recently when this case was publicized in a local newspaper article.
>
> ….
>
> Prior to the incident with Lt. Pender I attended many family social events for my fellow firefighters including weddings, parties, cookouts, Baptisms, graduations etc., etc. After the Lt. Pender incident I was never invited to those events. Before the Lt. Pender incident I was proud and privileged to serve as the singer of the national anthem at graduations and retirement services. After the Lt. Pender incident, to this day, I have never been invited to participate in those ceremonies in any way."(Resp. 27, Answer to Interrogatory No. 5).

December 2013 LEAVE Incident

116. On December 18, 2013, after Lt. Robinson spoke to Firefighter Alston about his late arrival for work that day, Firefighter Alston told Lt. O'Leary that he planned to put in for a transfer to another station. (Tr. Vol. 7 at 1165-66 (Robinson); Resp. 39 at 15-16)

117. On December 19, 2013, as he was going to get his gear at the end of his shift, Firefighter Alston found the word "Leave" written on the door to his seat on the fire engine under his jacket. Firefighter Alston photographed the message and informed the officer at the watch desk, Lt. Patrick Canney, about the writing. Firefighter Alston asked Firefighter Ryan Monahan and another firefighter on the floor, Probationary Firefighter Cormac Dowling, to come over and see the writing. Both Monahan and Dowling saw the word "Leave" written on the door to Alston's seat. (Tr. Vol. 1 at 124-126, 134, 139 (Alston)).

118. While speaking with two (2) firefighters, Firefighter Alston made statements to the effect that he was not going to put up with this anymore, he had kept quiet for a long time, and he said something to the effect of shooting up the place. (Tr. Vol. 7 at 1191-93, 1197, 1202, 1207-08 (Dowling); Resp. 39 at 24, 32)[10]

119. On Sunday, December 22, 2013, Firefighter Alston returned for his next shift and addressed the group about the past, beginning with the Pender 2010 voice mail through the "leave" writing. (Tr. Vol. 1 at 127-29 (Alston)) He became very agitated and said, to the effect, "people go postal over matters like this". (Tr. Vol. 7 at 1092-93, 1160-61 (Robinson)) Lt. Robinson conferred with Lt. O'Leary. The two decided that Firefighter Alston was probably just blowing off steam, but reported the statement and their conclusion to the Deputy Chief. (Tr. Vol. 7 at 1092-93, 1160-61)

120. Chief Ford called Lt. Robinson on the morning of December 22, 2013 to request that he obtain reports about December 19 from all group members. (Tr. Vol. 8 at 1367-70 (Ford); Resp. 158 at 1) Lt. Robinson reported to him Firefighter Alston's "going postal" comment to the group that morning, and that immediately afterward, FF Dowling reported that Firefighter Alston had made "shooting" statements on December 19. (App. 5 at 135-38; Tr. Vol. 7 at 1094, 1162-64, 1180 (Robinson); Resp. 158 at 1) After the Deputy Chief obtained confirmation from FF Monahan of Firefighter Alston's December 19 "shooting" statements, Chief Ford updated the Town Administrator and the Police Chief and drove to the station. (App. 5 at 128-29, 135-36; (Tr. Vol. 8 at 1345-46 (Monahan); Tr. Vol. 8 at 1368-69, 1375 (Ford); Resp. 158 at 1)

121. Upon his arrival at the station that night (December 22), Chief Ford reviewed the reports and met with Firefighter Alston, Lt. Robinson, Lt. O'Leary, and Deputy Nelson. (App. 5 at 135-36; Tr. Vol. 7 at 1094-95 (Robinson); Tr. Vol. 8 at 1370 (Ford); Resp. 29) During the meeting, Firefighter Alston discussed the original 2010 incident and was, at times, very agitated. (App. 5 at 122; Tr. Vol. 8 at 1371 (Ford)) Firefighter Alston admitted making a "going postal" statement that morning. (Tr. Vol. 8 at 1371 (Ford)) He pointed to Chief Ford and the Deputy and said to Chief Ford, while extremely agitated, "Look, he's my friend, and you're my friend, and even you could get caught in a cross-fire." (App. 5 at 126-28; Tr. Vol. 2 at 221-22 (Firefighter Alston); Vol. 8 at 1372 (Ford)) Chief Ford felt that Firefighter Alston was very angry and aggrieved and could pose a danger to himself or coworkers, and told him to go home (with pay) and to come see him the next day (on December 23, 2013). (App. 5 at 122-23, 127-28, 134; Tr. Vol. 8 at 1369-70, 1372, 1396 (Ford); Resp. 158 at 1-2)

122. Chief Ford met with Firefighter Alston on the afternoon of December 23, 2013. (Tr. Vol. 8 at 1377-78 (Ford)) Chief Ford reviewed with Firefighter Alston that he had made inappropriate "going postal" and shooting comments. (Resp. 158 at 2 (12/23/2013); Tr. Vol. 8 at 1369-70 (Ford)) Firefighter Alston agreed that he was not in good mental shape and was receptive to evaluation by the Town's psychiatrist, Dr. Andrew Brown. (Tr. Vol. 1 at 131-33 (Firefighter Alston); Tr. Vol. 8 at 1380, 1382 (Ford)) Firefighter Alston was continued on paid leave. (Tr. Vol. 1 at 140 (Firefighter Alston); Resp. 29)

123. On December 27, 2013, Chief Ford telephoned Firefighter Alston and informed him that he was not to be on Town property pending Dr. Brown's evaluation. (Tr. Vol. 1 at 134 (Firefighter

10. While Firefighter Alston maintains that he never referred to shootings and had only made a remark about "going postal", he acknowledged on cross-examination to explicit "shooting" statements. (Tr. Vol. 1 at 139 (Firefighter Alston); Tr. Vol. 2 at 218, 220, 222 (Firefighter Alston))

Alston); Tr. Vol. 8 at 1385-86, 1388-89 (Ford)); App. 5 at 142-43, 156-57, 251)

124. After Chief Ford issued the order, the Police Department internally circulated a flyer to all sworn Brookline police officers. The flyer included two (2) color photographs of Firefighter Alston and a color photograph of the type of vehicle he drives. Underneath the photographs, the flyer includes Firefighter Alston's name, address, date of birth and height. The flyer then states in part:

> **"Overview**: Brookline Firefighter Gerald ALSTON (DOB: [redacted]) has made statements referring to 'going postal', obtaining a firearm and returning to a firehouse to cause harm. He is assigned to Station 5 on Babcock St. ALSTON has been advised to stay away from all Town of Brookline property until certain steps have been completed. BFD supervisors have been made aware of the situation and have been advised to call police should ALSTON appear on Fire Dept. property."
>
> The flyer went on to state that although Firefighter Alston "does not have a LTC/FID", he "does have an expired (2000) FID Card."

(App. 86)

2014

125. On January 6, 2014, Firefighter Alston was evaluated by the Town's psychiatrist, Dr. Andrew Brown, at the Town's public safety building to determine whether he was a risk for workplace violence. Dr. Brown told Chief Ford and Ms. DeBow that Firefighter Alston did not pose any threat to himself or others. Soon after, Chief Ford informed Firefighter Alston that the stay away order against him had been withdrawn. (App. 5 (Ford Dep. Ex. 15); Tr. Vol. 1 at 138, 140 (Alston)).

126. Via letter dated January 13, 2014, Ms. Debow informed Firefighter Alston that: a) the Town was conducting an investigation to determine who wrote the word "leave" on the Engine; and b) the Town was conducting an investigation regarding the "shooting" comments allegedly made by Firefighter Alston. (Resp. 32)

127. On January 21, 2014, Dr. Brown issued a report to the Town regarding his Fitness for Duty (FFD) Evaluation of Firefighter Alston. Dr. Brown's 19-page report states in part:

> "Impairment in the domain of emotional regulation is present to an extent that it would compromise FF Alston's capacity to consistently perform the duties of a Firefighter for the Town of Brookline Fire Department.
>
> FF Alston is in need of psychiatric treatment to address the impairment that presently precludes his capacity to work as a Firefighter for the Town of Brookline." (Resp. 33 at 15-16)

128. On January 28, 2014, Firefighter Alston attended a counseling session with Dr. Kahn. Dr. Kahn's notes state in part that Firefighter Alston spoke about the leave incident, the allegations against him regarding whether he made threatening statements and that:

> "Gerald was quite upset about this, would like to return to work, and was emphatic with me that he has absolutely no intention of harming anyone else …"
>
> ….
>
> Overall, Gerald is obviously quite upset by the recent turn of events, and is quite focused on achieving what he calls 'zero tolerance' for racial discrimination within the department …"

(Resp. 127 at 9-10)

129. On January 31, 2014, Dr. Brown issued a report to the Town summarizing his communications with Firefighter Alston's treating psychiatrist, Dr. Michael Kahn. (Resp. 34; Tr. Vol. 6 at 935-37 (DeBow); Tr. Vol. 8 at 1398-99 (Ford)) The report stated that the two doctors agreed that Firefighter Alston's work capacity was contingent on his adherence to an appropriate medication regimen and that a reevaluation should be scheduled after at least 2 weeks on medication. (Resp. 34)

130. On February 11, 2014, Chief Ford called Firefighter Alston. Chief Ford's written notes of that conversation state:

> "I called Gerald today and told him that the 2 doctors had conversed and come up with a plan to return him to duty asap. He was to call Dr. Kahn and make an appointment. He stated they had already called and made on (sic) for the end of the month.
>
> Gerald told me he wasn't happy with Chief Ward. During their last call Gerald mentioned that guys had been calling him, asking what was going on and how he was. The chief mentioned they shouldn't be harassing him. This got Gerald upset as he didn't view it as harassing. (Chief ward said the reason Gerald called was because he felt he was being harassed.)
>
> …
>
> …
>
> Like always, he went right back to the original incident and the subsequent promotion."

(Resp. 158 at 6)

131. On February 13, 2014, Dr. Brown sent an email to Dr. Kahn which stated in part:

> "I met with the Fire Department leadership and HR at Brookline yesterday. From what I hear from them I have the idea that high levels of paranoia persist. I have the idea that consistent adherence to treatment probably is not occurring. I am concerned that if there is no improvement I will not be able to clear him to return to full duty as early as we would both like." (Resp. 127 at 8)

132. On March 17, 2014, Dr. Kahn and Firefighter Alston had the following email exchange:

> Dr. Kahn: Gerald-How are things going?
>
> Alston: Could be better, I do need to see you. I've been feeling very depressed lately, I'm not sure what it is, but it's not good.
>
> Dr. Kahn: Would Tuesday or Wednesday next week be soon enough? Call [] asap to make an apt if it is.

(Resp. 127 at 6)

133. On March 19, 2014, Firefighter Alston submitted a written request for a transfer to a smaller station, asking for Station 4 if possible. (Resp. 37).

134. In approximately mid-March 2014, in connection with discovery in Plaintiff's Norfolk Superior Court Chapter 151B case, the Town obtained Firefighter Alston's medical records from the BIDMC revealing his admitted cocaine and marijuana use. (Resp. 35; Tr. Vol. 6 at 1051-52 (DeBow))

135. The Town provided Firefighter Alston's BIDMC records to Dr. Brown on or about March 21, 2014. (Resp. 38 at 9; Tr. Vol. 6 at 1051-52 (DeBow))

136. On or about April 5, 2014, Dr. Brown submitted to the Town a report concerning his reevaluation of Firefighter Alston on or about March 19, 2014, his review of the records received since the last reevaluation, and his finding that Firefighter Alston was not fit for duty. (Resp. 38 at 15-17, 20; Tr. Vol. 6 at 938 (DeBow); Tr. Vol. 8 at 1404-05, 1409 (Ford))

137. On or about May 14, 2014, HR Director DeBow issued investigatory reports under the Town's workplace safety policy into Firefighter Alston's "shooting" statements and under the anti-discrimination policy into the "leave" writing. (Resp. 39; Resp. 40; Tr. Vol. 6 at 944 (DeBow))

138. The May 14, 2014 report under the anti-discrimination policy concluded that it could not be determined who wrote "leave" or why.[11] (Resp. 40; Tr. Vol. 6 at 945, 947-48 (DeBow); *see also* Tr. Vol. 7 at 1166-67 (Robinson); Tr. Vol. 7 at 1237 (Trahon); Tr. Vol. 8 at 1346 (Monahan); App. 5 at 178)

139. The May 14, 2014 report under the workplace safety policy concluded that Firefighter Alston had violated the policy by his inappropriate "shooting" and "going postal" statements, which were repeated and not inadvertent and which "caused his co-workers to be reasonably afraid of violent acts in the workplace." (Resp. 39 at 11-12)

140. That day (May 14, 2014), HR Director DeBow, Chief Ford, and Town Counsel Joslin Murphy met with Firefighter Alston, an attorney from Attorney Martin's office, and a union representative to discuss the results of the investigations, the discipline to be imposed under the workplace safety policy (a 2-tour suspension), and a return-to-work plan for Firefighter Alston. (Tr. Vol. 4 at 628 (Stipulation); Tr. Vol. 6 at 949-51 (DeBow); Tr. Vol. 7 at 1269 (Trahon); Tr. Vol. 8 at 1422-24 (Ford); Tr. Vol. 9 at 1707 (Murphy))

141. On May 14, 2014, Chief Ford wrote to Firefighter Alston summarizing the investigation results and Dr. Brown's report. In regard to Dr. Brown's report, Chief Ford's letter to Firefighter Alston states:

> "Findings - Fitness for Duty Evaluation: In consultation with your treating psychiatrist Dr. Michael Kahn, the Town's Psychiatrist Dr. Andrew Brown has found that you are not presently fit for duty as a Brookline Firefighter because of the 'high level of risk that functional impairment in the domains of behavioral control, emotional regulations and judgement would compromise your capacity to consistently and reliably perform the duties of a firefighter' in the event you were return to work. Moreover, it is his opinion that the presence of any ongoing use of cocaine or marijuana will further compromise your capacity to sustain job performance in the line of duty.[].
>
> Required Actions to Return to Duty: Based on the foregoing, in order to return to duty as a Brookline Firefighter, you must do the following:
>
> 1. Seek regular and ongoing psychiatric treatment to address the functional impairment described by Dr. Brown under a treatment plan that is recommended by Dr. Kahn or other Massachusetts licensed mental health provider.
>
> 2. Execute a release authorizing the Town of Brookline's Occupational Health Nurse to discuss your treatment and progress with your provider for the purpose of monitoring your compliance with the recommended treatment plan.
>
> 3. Successfully complete an Anger Management course, approved by the Town's Human Resources Department.
>
> 4. Satisfactory re-evaluation of your fitness to return to duty by the Town's psychiatrist.
>
> 5. Upon your return to work, undergo random urine drug testing for a period of 24 months or longer as recommended by your treatment providers."

(Resp. 41 at 2)

142. Chief Ford's May 14, 2014 letter also stated that Firefighter Alston's request for a transfer to another fire station "will be addressed upon your return to duty." (Resp. 41 at 3)

143. During the Summer of 2014, Firefighter Alston successfully completed an Anger Management course. (Tr. Vol. 1 at 147 (Alston)).

144. Firefighter Alston also executed a medical release. (Inference from Resp. 45)

145. Subsequent to Chief Ford's May 14, 2014 letter, Firefighter Alston had counseling sessions with Dr. Kahn on: August 7, 2014; September 2, 2014; and October 7, 2014. (Resp. 46-48)

146. On July 8, 2014, on procedural grounds and without addressing the merits, the Norfolk Superior Court entered Final Judgment Against Firefighter Alston. (Resp. 44)

147. In regard to Firefighter Alston's October 7, 2014 visit with Dr. Kahn, the Town's Occupational Health Nurse penned the following email on October 9th:

> "Sandra / Chief:
>
> Dr. Kahn returned my call today regarding his last evaluation of GA on 10-7-14. Dr. Kahn expressed concern that GA is 'not in good shape.' 'has had a decline since last visit one month ago.' Dr. Kahn stated GA is angry at everyone. Did not refill medication. Dr. Kahn states GA tells him he is in desperate financial

11. Ms. DeBow's report states in part: "Finally, the possibility cannot be discounted that the word 'Leave' was written by a member of the MIT fraternity to which the truck had made a run the previous evening or some other neighbor or member of the public passing by who saw a ready canvas of salt and sand and took the opportunity to write the word 'leave'. Again, there is no evidence to establish that this scenario occurred nor is there any evidence that it did not occur."

straits and that he is living out of his car. Dr. Kahn does NOT feel that he would harm anyone however GA feels he is badly treated by everyone. Angry that lawsuit was dismissed. Feels that his attorney is lying to him as is Dr. Brown. Dr. Kahn is meeting with GA again in one week. At EARLIEST he feels RTW would be November 1st but this is only a fluid date. He will update me after next evaluation date." (Resp. 48)

148. On October 23, 2014, the Town sent correspondence to Firefighter Alston stating in part:

"I have been informed by your department that you have exhausted all available leave and are currently not receiving a pay check. You can continue to make contributions to your health insurance at the 17% contribution rate, so that you can maintain your health and basic life-insurance coverages. Below are the details of the payments that will be required to ensure uninterrupted coverage." (Resp. 49)

149. On November 3, 2014, Ms. DeBow wrote the following to Firefighter Alston:

"Dear Gerald:

You have been on authorized medical leave. However we want to make you aware that your Family Medical Leave expired on or about August 10, 2014. We have not heard recently as to when you believe you will be returning to work. Therefore, we would like to meet with you to discuss your ongoing leave status.

The Town of Brookline, in accordance with Federal and State law, makes reasonable accommodations for employees who are on medical leave due to a serious condition. Although not definitive, it appears that you may have a physical or mental impairment which substantially limit you in one or more major life activities and therefore had this protection. We will continue to work with your physician to determine the nature, severity and duration of such impairment(s) and what, if any, reasonable accommodations would enable you to perform the essential functions of your job for the Town. And, while a short-term leave or modified work assignment may be one option for a reasonable accommodation, a leave of an indefinite duration may not be a reasonable accommodation.

We have scheduled a meeting for Monday, November 10, 2014 @ 10:00 P.M. (sic) in Room 214 located at Town Hall to discuss whether there are any reasonable accommodations your physician may suggest that would allow you to perform the essential functions of your job in the near future." (emphasis added) (Resp. 50)

150. On November 10, 2014, Chief Ford wrote the following letter to Firefighter Alston:

Dear Gerald:

You were informed by the Human Resources Office by letter dated November 3, 2014 that the Human Resources Director and I sought to meet with you regarding your ongoing leave status. You did not appear at that meeting nor did you contact us indicating you would not attend. I understand your attorney told you not to attend the meeting, but please note, for future reference, that when the Town or Fire Department requests that an employee is required to attend and a failure to attend or at least contact your supervisor or department could result in discipline.

I was happy to hear that you will be evaluated by Dr. Kahn on November 18, 2014. I am hopeful that will have some news about a target date for you to return to duty. I have scheduled a meeting with you and Sandra DeBow, Director of Human Resources for Monday, November 24th at 10:00 in the Fire Department conference room on the third floor.

At that meeting we will discuss your ongoing status, a target date of return and whether there are any reasonable accommodations your physician may suggest that would allow you to perform the essential functions of your job in the near future even if on a modified duty basis.

We look forward to speaking with you on Monday, November 24th." (Resp. 51)

151. On or about November 10, 2014, Attorney Ames (counsel in the instant appeal before the Commission) sent a letter to Select Board Chair Ken Goldstein stating: "This letter will confirm that I am representing Gerald Alston in all matters relating to his employment with the Town of Brookline. I look forward to meeting with you on Wednesday. (Resp. 52)

152. On November 12, 2014, First Assistant City Solicitor Patricia Correa wrote to Attorney Ames suggesting that the meeting with Chair Goldstein be rescheduled for a date after Attorney Ames has obtained an opinion from the State Ethics Commission about his representation of Firefighter Alston against the Town, given his prior involvement with Firefighter Alston's issues on behalf of the Town (as a Town committee member).[12] (Resp. 53 at 2, 3, 9 (re: racial climate review))

153. After Firefighter Alston's November 18, 2014 visit with Dr. Kahn, Nurse Payton communicated to HR Director DeBow and Chief Ford the following:

"I spoke with Dr. Kahn today who met with GA yesterday (11-19-14). Synopsis of this conversation:

1. GA 'drew the line in the sand' about NOT taking any medications.

2. GA maintains that he has been treated badly by the Town of Brookline.

3. GA focuses on his 'crusade' that he has been wronged.

4. GA states he wants to do his job and be left alone.

5. GA maintains that 'there is nothing wrong with me.'

Dr. Kahn states Dr. Brown has emailed the criteria that must be met for GA to return to work as a firefighter and Dr. Kahn will respond to Dr. Brown.

Dr. Kahn's opinion is:

1. GA is not suicidal or homicidal.

12. Attorney Ames served on the Town's Human Relations/Youth Resources Commission from April 17, 2012 through June 11, 2014, at which time he resigned. At that time, he was serving as the Commission's Chair.

> 2. GA is not too depressed or angry to work at this time but he cannot predict the future. GA could return and 'keep his head down' or maybe not.
>
> 3. Dr. Kahn cannot say if GA could return to work as a firefighter successfully.
>
> 4. Dr. Kahn does not feel the GA will 'change' therefore he cannot predict the outcome of his return to work
>
> Will evaluated (sic) him again in one month." (Resp. 54)

154. On November 24, 2014, Firefighter Alston and Attorney Ames appeared for the meeting with Chief Ford and HR Director DeBow accompanied by supporters. (Tr. Vol. 8 at 1432-33 (Ford)) Because Firefighter Alston and Attorney Ames insisted that the third parties also attend, the meeting did not take place. (Tr. Vol. 2 at 273-74 (Firefighter Alston); Tr. Vol. 6 at 955-56 (DeBow); Tr. Vol. 8 at 1433 (Ford)) Attorney Ames handed the Town officials a November 24, 2014 letter from Firefighter Alston to Select Board Chair Ken Goldstein stating that he (Firefighter Alston) was appealing certain matters under the Town's anti-discrimination policy, requesting an outside attorney to conduct a review, and requesting a racial climate review of the Fire Department. Firefighter Alston's letter also asked for paid leave. (Resp. 55; Resp. 158 at 7 (11/24/2014); Tr. Vol. 2 at 233-35, 268-69 (Firefighter Alston); Tr. Vol. 6 at 956 (DeBow); Tr. Vol. 8 at 1369-70, 1433-34 (Ford))

155. On November 25, 2014, Ms. DeBow sent a letter to Firefighter Alston that: a) faulted Firefighter Alston for not attending meetings "to discuss your return to work with or without reasonable accommodations; b) established a deadline of *December 4, 2014* for Firefighter Alston to identify reasonable accommodations; and c) notified Firefighter Alston that he was required to attend a follow-up fitness for duty evaluation with Dr. Brown on *December 5, 2014*. (Resp. 56)

156. After Firefighter Alston informed the Town that he no longer trusted Dr. Brown[13] , the Town scheduled a re-evaluation of his fitness for duty with Dr. Marilyn Price for February 12, 2015. (Tr. Vol 1 at 156-157)

157. On December 19, 2014, Select Board Chair Ken Goldstein wrote to Firefighter Alston stating that the Town would retain an outside attorney in connection with certain of the items cited in Firefighter Alston's November 24, 2014 as the basis for a claimed appeal, and request the outside attorney to review the Town's processes with respect to the remainder of the items cited by Firefighter Alston that were not appealable under the policy. Mr. Goldstein agreed to a racial climate review of Town Departments. (Resp. 59)

158. In Mr. Goldstein's December 19, 2014 letter to Firefighter Alston, he writes in part:

> "The Board of Selectmen acknowledged more than four years ago, and this Board acknowledges today, that unspeakable words were left on your voicemail that should never have been said. We acknowledge the deep hurt that those words caused you, and we acknowledge the wrongdoing of your supervisor. We are also informed that the supervisor who uttered those words to you and was formally disciplined for the incident offered his apology to you, and has since repeatedly expressed remorse and regret for his conduct." (Resp. 59)

159. On February 12, 2015, Firefighter Alston participated in the psychiatric reevaluation with Dr. Price. (Resp. 73 at 1; Tr. Vol. 4 at 635 (Stipulation))

160. On February 13, 2015, the Town restored Firefighter Alston to paid leave. (Resp. 71; Resp. 138 at 19; Tr. Vol. 1 at 155 (Firefighter Alston); Tr. Vol. 2 at 280-81, 292 (Firefighter Alston))

161. On March 24, 2015, Ms. DeBow sent Select Board member Nancy Daly an email stating:

> "Nancy - I just want you to be aware, if you were not, that the Union voted to remove Gerald from the union when he did not pay the union dues. He is aware of this and expressed his discontent with Trahon. He is not happy with the union, which is very different from his fellow firefighters, and view his removal from the union and it's protection as another reason that he cannot trust the Union. (And unfortunately for the union, I believe they did this after he came back on the payroll and was, in fact, a dues paying member.)
>
> I think the firefighters have a lot of mixed feelings about this matter and the majority of them want to just move forward and put it behind them. You should take what the union says with a grain of salt, as they have put themselves in a very difficult situation when they removed Gerald from the union. And I know the president's remarks are not always representative of the unions, or the memberships.
>
> That said, we have a lot of work to do in preparing the workplace for his return, if it occurs." (App. 77)

Dr. Price's Evaluation and Report

162. Dr. Marilyn Price is board certified in psychiatry as well as forensic psychiatry. She is an assistant professor at Harvard Medical School where she is the associate director of the forensic training programs. Dr. Price has written published articles on various topics in forensic psychiatry. She was the corroborator to the American Academy of Psychiatry and Law Guidelines on disability and was the co-author of the section addressing fitness for duty of the police officers. Dr. Price has written numerous chapters on fitness for duty in various publications. (Tr. Vol. 9. at 1530-1532 (Price)).

163. Dr. Price has specific experience working with public safety employees (approximately 50) that have been diagnosed with adjustment disorder. (Tr. Vol. 9 at 1534 (Price)).

164. Dr. Price described "adjustment disorder" as follows:

> "Adjustment disorder is a DSM-5 diagnosis in which a person has a psychological response to specific stressors, however the response is more severe or lasts longer than one would normally expect. And there can be symptoms such as anxiety, depression,

13. According to Firefighter Alston, his concern was based in part that Dr. Brown did not disclose that he had once been a student of Dr. Kahn's.

> you can have mood disorder, but, again, in contrast to depression this is seen as being a response to specific stressor.
>
> ….
>
> In terms of bereavement, for example, it's generally a six month period that one has serious stress. The issue is if there continue to be - there is the initial stressor and then there are continued to be again more and more stressors, the symptoms can persist and still be called an adjustment disorder because they're in response to the—another new or some other continued stressor that's occurred.

(Tr. Vol. 9 at 1534-1535 (Price)).

165. Dr. Price has done "one or two" fitness for duty evaluations *per month* over the past approximately twenty (20) years. She had never worked for the Town of Brookline before being retained to conduct an evaluation of Firefighter Alston, for which she was compensated at a rate of $450 per hour. (Tr. Vol. 9 at 1536-1537 (Price)).

166. Dr. Price, at the request of the Town, provided an opinion regarding three (3) questions: 1) whether Firefighter Alston was able to perform the essential functions of his job with or without a reasonable accommodation; 2) whether Firefighter Alston was now "able to control his behavioral outbursts at work"?; and 3) whether Firefighter Alston had "sufficient insight, the ability to regulate his emotions and the ability to exercise sound judgment on the job so that he will be able to function under the stress of responding to fire calls and medical emergencies, working side by side with other firefighters." (Resp. 73 at 1-2; 40 and Tr. Vol 9 at 160 (Price)).

167. Dr. Price met with Firefighter Alston for approximately three (3) hours, reviewed all medical notes and other information, including those from BIDMC and prior evaluations completed by Dr. Brown; spoke directly with Dr. Kahn and reviewed the duties and responsibilities of a Brookline firefighter. (Tr. Vol 9 at 1541-1543 (Price)).

168. Dr. Price was not provided with Mr. Pender's summary of the 2011 conversation between him and Firefighter Alston. (Tr. Vol. 9 at 1615 (Price))

169. Dr. Price was not provided with Mr. Pender's summary of the 2013 conversation between him and Firefighter Alston. (Tr. Vol. 9 at 1615 (Price))

170. I infer that Dr. Price was not provided with information regarding Mr. Pender's role as Training Captain during which he (Pender) gave "his version of events" to new recruits. (Inference, Tr. Vol. 9 (Price))

171. Dr. Price viewed her role as: "to say can he [Alston] go back and work and under what circumstances can he go back to work …" (Tr. Vol. 9 at 1612 (Price)).

172. On March 19, 2015, Dr. Price sent HR Director DeBow her report. (Resp. 73; App. 99)

173. Dr. Price's report states in part that:

> "Firefighter Alston did not have any history of psychiatric treatment prior to the 2010 incident other than some marital counseling years earlier. Hearing a racial slur from a Lieutenant he trusted, was especially troubling to Firefighter Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations.
>
> There is evidence that Firefighter Alston developed psychological symptoms in response to hearing the racial slur from his Lieutenant …"

(Resp. 73 at 41-42)

174. Dr. Price identified the following four (4) stressors experienced by Firefighter Alston:

> 1) The May 2010 voice mail message from Mr. Pender;
>
> 2) Upon returning to work in September 2010, discovering that Mr. Pender had been promoted to Temporary Captain;
>
> 3) The reference to the Pender incident by a superior officer in November 2010 regarding a change in assignments;
>
> 4) Discovering the word "leave" under his jacket on the engine in December 2013.

(Tr. Vol. 9 at 1598-1599 (Price)).

175. Dr. Price diagnosed Firefighter Alston with Adjustment Disorder. During her testimony, Dr. Price confirmed that she was making a diagnosis of adjustment disorder *as of February 2015* stating:

> " … the reason was that over that time there was a lot of - there were a lot of issues that he [Alston] was having, should he go back, who should see him. He was having evaluations - Dr. Brown's, I think the last one was in 2014. There was interaction about his going back with the town and as a result you have this incident in the end of 2013, but it's perpetuated because there are legal issues, there are negotiations during the whole period that keep the stressor alive, essentially." (Tr. Vol. 9 at 1597-1598 (Price)).

176. It weighed heavily on Dr. Price that Firefighter Alston, during the three (3) hour interview, stated that he wanted to come back to work stating:

> "That played very heavily in terms of my recommendation. If he said he couldn't come back then I would have looked at whether or not he was permanently unfit to come back and what would the - what would be the factors in that whether or not he could come back after it. That's not what he said to me." (Tr. Vol. 9 at 1622-1623 (Price)).

177. Dr. Price states in her report that:

> "In my opinion Firefighter Alston would be able to return to work full time if a plan can be arranged with sufficient accommodations to reduce his stress and if Firefighter Alston commits to appropriate treatment."

(Resp. 73. At 47)

178. Dr. Price identified three (3) conditions for Firefighter Alston's return to work. (Resp. 73 at 47-59)

179. The first condition was that Firefighter Alston be in treatment with a psychiatrist (monthly) and therapist (weekly) starting at least one month prior to his return in order to have support in place, with compliance monitoring for at least one year and execution of a release by him to permit monitoring. (Resp. 73 at 47-48; Tr. Vol. 6 at 965 (DeBow); Tr. Vol. 8 at 1476 (Ford); Tr. Vol. 9 at 1563, 1577, 1580, 1666-69 (Price)).

180. The second condition recommended by Dr. Price states, in its entirety:

> "**Recommendations for workplace accommodations**:
>
> During the interview, Firefighter Alston mentioned that there had been problems, especially when assigned to other fire stations. He was given the opportunity to recommend specific accommodations that would decrease the level of stress, such as avoiding contact with certain firefighters in addition to Captain Pender, or minimizing work at other stations or being assigned to work with a specific person whom he trusts. It would be helpful for Firefighter Alston to have a designated workplace monitor to whom he can bring concerns so that issues can be addressed.
>
> Firefighter Alston has not cooperated with investigations regarding his allegations of continued discrimination. As a result he has not named those persons whom he believes have engaged in discriminatory conduct. If he had done so this would help in assigning him to a Station where he would be most likely to succeed.
>
> It would be very difficult for Firefighter Alston, or any firefighter to work effectively and feel secure that he would be backed up in dangerous situations if he/she does not trust member of the team. Firefighter Alston would like the Town to take further steps to prevent any racial discrimination for all its employees and thus make the working environment safe. However, there would need to be a plan specifically tailored for Firefighter Alston so that he is not assigned to work with persons whom he perceives as acting previously in a discriminatory manner. Unless there can be accommodations so that Firefighter Alston feels safe in returning, then there would be a continued risk of Firefighter Alston displaying the types of behavior that led to this evaluation.
>
> Unless the work environment can be modified so that Firefighter Alston's level of stress is decreased, it is very unlikely that he would be able to work effectively and have the level of trust of his fellow firefighters that is required. Irritability and anger would interfere with his ability to respond effectively in dangerous situations.
>
> If a less stressful work environment cannot be arranged with Firefighter Alston's input, then it is likely that symptoms of the Adjustment Disorder would intensify and Firefighter Alston would be at greater risk of behavioral outbursts." (Resp. 73 at 48-49)

181. The third condition was that Firefighter Alston undergo random drug screens for two (2) years calculated from his pre-return to work drug screen. (Resp. 73 at 49)

182. On March 25, 2015, Fire Chief Ford wrote to Firefighter Alston enclosing Dr. Price's report and notifying him of an April 2, 2015 meeting to discuss it. (Resp. 74; Tr. Vol. 2 at 290, 295, 347 (Firefighter Alston); Tr. Vol. 4 at 636 (Stipulation))

183. On April 2, 2015, Firefighter Alston and Attorney Ames appeared for the meeting with Chief Ford with two other individuals. Chief Ford's notes of that meeting state the following:

> "At approximately 1:30PM Firefighter Gerald Alston arrived for our pre-arranged meeting. He had with him his attorney Brooks Ames [and two others]. I greeted them in the lobby area of my office. I asked Gerald if we could speak alone first. Mr. Ames was very cordial, but notified me that they were not really there to meet with me but rather to deliver a message. He acknowledged and appreciated my willingness to meet and discuss the findings of Dr. Price. However, he suggested that I had no authority to negotiate any of the stipulations in the report and therefore we would just be 'spinning our wheels".
>
> We spoke candidly about the findings in the report, which he described as basically more of the same (my words). He told me he had requested a meeting with all the people who had the authority to discuss this report and negotiate a resolution. He reiterated several times that while he wished I had the power to settle this, I don't, and therefore a meeting with me would not prove fruitful.
>
> I asked him directly 'can I then assume that you've read the report, read the recommendations, and do not agree with or plan on fulfilling those stipulations?" He confirmed that was the case.
>
> As they prepared to leave Gerald asked me if we could speak alone. We went into my office. Gerald told me in no uncertain terms he was not going to agree to drug testing and was not going to agree to therapy (though he said he was already seeing a therapist). He said to do either would be a lie, and he wasn't a liar. He related it to pleading guilty to a lesser charge, a crime you didn't commit, in order to get a reduced sentence. It would be a lie and he wasn't raised like that.
>
> Gerald is very angry and doesn't understand why the Town wants him to go to anger management. He things the Town has done nothing in the way of resolving any part of this whole issue. He told me he never threatened anyone and the Town never investigated it. I explained the 'other side' to him. I explained that if he did do the testing he would prove to everyone that he wasn't on drugs. Nope! I told him there isn't a person who doesn't think he was subjected to an event that has triggered all of this. He said he was fine when he got on the job and he's fine now. I explained that everyone would agree he had an event that was basically job related, it changed him and now he needs help dealing with it. Nope! Not being an expert, I would say the anger is blinding. He truly believes what he says.
>
> I told them I would report back to the Town their desire to sit down with all those who had the decision making authority." (Resp. 158 at 9-10)

184. No union representative attended this or any similar meeting regarding Firefighter Alston's potential return to work. According to Chief Ford, there was a "strained relationship" between the union and Firefighter Alston. Chief Ford compared the lack of union involvement here with another firefighter who was in jeopardy of losing his job, stating: " … I had the union in my office saying what the heck can we do to save this guy's job, they were willing participants in whatever it's going to take, let's not let him lose his job. I had zero interaction with the union as far as they being Gerald's representative." (Tr. Vol 8 at 1483-1484 (Ford)).

185. On April 10, 2015, Town Counsel Murphy wrote to Attorney Ames summarizing her understanding of the position asserted by

Firefighter Alston and Attorney Ames at the April 2, 2015 meeting. (Resp. 76)

186. In May and June 2015, Town Counsel Murphy enlisted the assistance of Juan Cofield of the New England NAACP and Kim Gaddy of MAMLEO to serve as intermediaries between the Town and Attorney Ames and Firefighter Alston. (Tr. Vol. 8 at 1278-1330 (Cofield); Tr. Vol. 9 at 1736-37 (Murphy)) Mr. Cofield and Ms. Gaddy " … both felt that Mr. Alston had been wronged by the Town in the first initial [incident], and we talked about the town's efforts to address the issue of Mr. Alston's concern and we felt that the town had not taken sufficient steps to address Mr. Alston's concerns." (Tr. Vol. 8 at 1288 (Cofield)). I asked Mr. Cofield whether, as of 2015, he felt that the Town's response to the initial voice mail message had been sufficient. He replied: "Well, they couldn't undo the promotion of the firefighter who was promoted who made the comment, they couldn't undo that, that had already happened. I thought that they were making concessions to address the other issues that Mr. Alston had stressed concern about. When I say they couldn't undo, in reality they couldn't demote him, for all practical purposes." (Tr. Vol. 8 at 1329-1330 (Cofield)).

187. Firefighter Alston told Mr. Cofield that he did not intend on complying with Dr. Price's conditions. (Vol. 8 at 1295-97 (Cofield)). Mr. Cofield felt impasse was reached when Firefighter Alston and Attorney Ames unreasonably insisted on negotiating directly with the Select Board. (Tr. Vol. 8 at 1298-1302, 1305-07, 1318-20 (Cofield))

188. On June 11, 2015, Attorney Ames filed a motion in Firefighter Alston's Norfolk Superior Court Chapter 151B case seeking relief from the Court's July 8, 2014 Final Judgment. (Resp. 79)

189. On June 24, 2015, Firefighter Alston wrote to Select Board Chair Neil Wishinsky. That letter stated in part:

> "I am writing to request a one-on-one meeting with you in an effort to resolve the stalemate that has occurred between me and the Town. Right now the Town is asking me to comply with a number of conditions in order to return to work, but the Town is not agreeing to make changes that will make the fire house safe for me and for all Brookline firefighters.
>
> This is not about my not wanting to comply with reasonable conditions. I have always been willing to play by the rules, and I will comply with the rules if I am allowed to return to work. But it is absolutely necessary for me to know that the rules apply to everyone and protect everyone. You cannot promote my supervisor, Paul Pender, after he leaves a voice mail for me saying 'fucking [n-word]' and then tell me the Town has a 'zero tolerance' policy for racism. You cannot expect me to believe that Paul Pender or anyone else has learned a lesson about zero tolerance. Paul Pender approached me years after the incident and told me that I had a vendetta against him and that I should have sued 'Jay Z' for using the n-word. He refused to shake my hand.
>
> This is about my life. I have to know that my fellow firefighters will have my back in a fire. The last time I was in the fire house one of my fellow firefighters left a message on my door that said 'Leave'. He did not have the courage to say it to my face. I do not know who that firefighter is but I am being asked to put my life in his hands. Do you think that is fair?
>
> My lack of trust in the work environment will not be changed by therapy, treatment or monitoring. It is not being caused by something in my head but by real incidents like having 'Leave' written on my door. The way that incident was handled give me no confidence that I will be fairly treated by the human resources department and the office of town counsel if another incident comes up.
>
> …
>
> ...
>
> The report written by human resources claims that the message 'Leave' on my door could have been written by someone from the MIT fraternity across the street. Please think about whether that sounds reasonable to you and think about why human resources would write something so ridiculous.
>
> I love being a firefighter and I want to return to work. I only ask that I be treated fairly and you give me an opportunity to be heard."

(Resp. 80)

190. On July 10, 2015, the Norfolk Superior Court denied Firefighter Alston's relief from judgment in his Chapter 151B case. (Resp. 84)

191. Sometime in July 2015, Firefighter Alston stopped by and spoke one-on-one with Chief Ford. A few weeks later, on August 7, 2015, Chief Ford memorialized that conversation in an email to Firefighter Alston as follows:

> "Gerald,
>
> Thank you for stopping by a few weeks ago, it's always good when we get the chance to talk. I wanted to reiterate some our conversation and please let me know if I understood you correctly.
>
> We discussed the requirements placed upon you, by the Town, in order for you to return to work. We discussed each of the items, and as I remember, we came to a mutual understanding on each item.
>
> - While you thought the length of time you would be required to undergo drug testing was excessive, you agreed to do it. You mentioned that you had nothing to hide and when we discussed the length of time as compared to other situations you seemed to be understanding and willing to do it.
>
>   The other two items that the Town has imposed (all of which are on the advice of Dr. Price and others) is that you see a psychologist weekly and a psychiatrist monthly. You told me you felt this was unnecessary as you were already seeing someone. I asked you if you would be willing to agree to the terms if the person you are now seeing was Board certified and acceptable to the Town and you could stay with him. You stated that you hadn't seen him in 30 days and I mentioned that you would, in all likelihood, be required to see him more often, especially in the beginning, and later less frequently if that is what he determines. Of course the Town would need to be privy to the information from him, not so much of exactly what was going on but rather that you were complying with his recommendations. You seemed more than willing to do this. Could you also provide me with the name of the gentleman you are seeing?

- On the Towns side, the racial climate review must be, and is being started. I know the Town has engaged an independent organization to get this going. Whatever recommendations come out of the review will be implemented.

- On my end, I tried to get Ron Marlow involved in some department-wide training that would focus on both standard refresher training of appropriate behavior in the workplace and also spend time on your re-entry into the stations and what behavior is acceptable and what behavior will not be tolerated. While Ron was not able to do it himself, he did provide me with some recommendations and I am in discussions with several of them at this time. The training will be accomplished.

Please let me know if you agree with this, and if so, I will present this to the Town in order to get you returned to work ASAP, where I know you want to be.

I look forward to speaking with you again. Stop by my office the next time you're at headquarters.

Paul D. Ford, Fire Chief

Brookline, MA" (Resp. 85)

192. On September 4, 2015, Chief Ford again emailed Firefighter Alston asking him about his treatment provider. (Resp. 86; Tr. Vol. 4 at 641-42 (Stipulation)) Firefighter Alston responded by emailing Chief Ford with a blank email that attached the CV of Dr. Cynthia Carter. (Resp. 87; Tr. Vol. 4 at 447 (Carter); Tr. Vol. 4 at 641-42 (Stipulation); Tr. Vol 8 at 1456-57 (Ford))

193. On September 30, 2015, COO Ward emailed the link to the Town's racial climate review to all Fire Department personnel. Firefighter Alston forwarded the email to Attorney Ames on October 2, 2015 but did not participate in the survey. (Resp. 129; Tr. Vol. 2 at 307-09, 315 (Firefighter Alston))

194. In mid-November, the Town's racial climate review consultant provided a summary of the results, which Attorney Ames obtained. (Resp. 88; Tr. Vol. 2 at 234, 306 (Firefighter Alston); Tr. Vol. 8 at 1458-59 (Ford))

195. On December 1, 2015, Firefighter Alston filed a complaint in the United States District Court alleging discrimination and retaliation by the Town. (Resp. 89; Tr. Vol. 9 at 1745 (Murphy))

196. Also on December, 1, 2015, Firefighter Joseph Canney wrote an email to Ms. Debow stating in part:

> "As for the matter of Mr. Alston when will this matter be resolved. Despite the fact that Mr. Alston threatened to shoot his co-workers he continued to be payed (sic) for longer than most can even remember." (App. 80)

197. In December 2015, an outside trainer conducted refresher anti-discrimination training for the Fire Department that was developed on a custom basis at Chief Ford's request to specifically address Firefighter Alston's concerns and requests. (Tr. Vol. 8 at 1455, 1461-62 (Ford); App. 5 at 164, 168-70, 172; Resp. 96)

198. On January 8, 2016, Town Counsel Murphy wrote to Attorney Ames asking him to provide her with the psychiatric opinion finding Firefighter Alston fit for duty that he referenced in Firefighter Alston's federal court complaint. (Resp. 90) Attorney Ames did not respond. (Tr. Vol. 9 at 1745-46 (Murphy))

199. On February 5, 2016, Town Counsel Murphy wrote to Attorney Ames. The letter makes no reference to the communication between Chief Ford and Firefighter Alston in July / August 2015. Rather, the letter states in part:

> "In her March 2015 report … Dr. Price established certain conditions for Mr. Alston's return to work, which the Fire Chief sent to him on March 25, 2015. Thereafter, I wrote to you on April 10, June 29 and July 3, 2015, seeking to move forward with Mr. Alston's return to work in light of these conditions. In view of this, and in particular the amount of time Mr. Alston has been on paid administrative leave without any reported progress or further communications from you, the Town is now anticipating his return to work as a Brookline Firefighter on March 7, 2016".

(Resp. 91)

200. In the letter, Town Counsel Murphy states that Firefighter Alston and/or his counsel must take the following steps:

> 1. Identify and execute a release from Firefighter Alston's treating psychiatrist by February 10, 2016;
>
> 2. By February 10, 2016, provide Town Counsel with an acceptable date for Firefighter Alston to meet with Chief Ford "to discuss reasonable accommodations";
>
> 3. Attend a "pre-return toxic drug screen" at New England Baptist Hospital at 8:00 A.M. on February 10th.

(Resp. 91)

201. Firefighter Alston did not appear for the February 10, 2016 drug test. (Tr. Vol. 4 at 647 (Stipulation)

202. On February 16, 2016, the Town's Board of Selectmen met in Executive Session. The minutes from this meeting state:

> "Attorney Murphy requested authorization to terminate Gerald Alston's leave pay. He has been placed on administrative leave for over a year, and some conditional requirements were to be met for a return to work status. Some of the conditions were prompted by Dr. Price's report that he was unfit for duty. The Town gave him a timeline to complete the obligations and to date he has not done any of them.
>
> Attorney Murphy gave a brief update of the case and provided a memo in support of partial motion to dismiss amended complaint.
>
> The board discussed how long Mr. Alston has been on paid leave.
>
> Chief Ford gave a brief status of his leave and sick time.
>
> On motion it was,
>
> Vote 4-0 termination of Administrative Leave for Gerald Alston effective February 17, 2016 (8:00 A.M.)
>
> Roll Call:
>
> Aye: Wishinsky
>
> Fanco
>
> Heller

Greene

Absent: Daly"

(App. 5, Attachment 19)

203. On February 17, 2016, Town Counsel Murphy wrote to Attorney Ames notifying him that Firefighter Alston's paid leave was terminated due to Firefighter Alston's non-compliance with the return-to-work process. The Town subsequently allowed Firefighter Alston's request to be placed on sick leave. (Resp. 92; Resp. 94; Resp. 138 at 39)

204. On February 23, 2016, Attorney Ames and Firefighter Alston addressed the Select Board during the public comment portion of the hearing. Firefighter Alston told the Board that his health was deteriorating, he could not afford his medication for diabetes and thyroid cancer and, referring to the racial slur by Mr. Pender, said: "I just need him to know what he did was wrong, and now it appears that anyone can say what they want and get promoted …" (Resp. 93)

205. On or about March 15, 2016, HR Director DeBow wrote to Select Board Chair Wishinsky and Town Administrator Melvin Kleckner enclosing proposed amendments to the Town's anti-discrimination policy as recommended by Juan Concepcion in his March 2015 report. (Resp. 95)

206. On March 15, 2016, Chief Ford wrote to Firefighter Alston notifying him that the racial climate review was completed in December 2015 and that an outside trainer provided MCAD refresher training to the Fire Department. (Resp. 96; Tr. Vol. 2 at 318-19 (Firefighter Alston))

207. On March 22, 2016, Firefighter Alston telephoned Chief Ford distraught, stating that the Town had done nothing to return him to a safe working environment and that he wanted to meet with the Select Board. (Resp. 158 at 11 (3/22/2016); Tr. Vol. 2 at 319 (Firefighter Alston); Tr. Vol. 8 at 1369-70, 1460-61 (Ford))

208. On March 24, 2016, April 15, 2016, and April 26, 2016, First Assistant Town Counsel Correa wrote to Attorney Ames informing him that the Town had retained Charles Walker, former MCAD Chair, to hear Firefighter Alston's appeal issues raised in his November 24, 2014 and January 6, 2015 letters, and that the Select Board would personally hear these matters after receiving Mr. Walker's reports. (Resp. 97; Resp. 98; Resp. 100) Attorney Ames wrote to the Select Board on April 25, 2016 and April 29, 2016 calling Mr. Walker's participation a "kangaroo court" and stating that Firefighter Alston would not participate. (Resp. 99; Resp. 100; Resp. 101; Tr. Vol. 2 at 320-21 (Firefighter Alston); Tr. Vol. 4 at 649-50 (Stipulation); Tr. Vol. 10 at 1955 (Wishinsky))

209. On May 5, 2016, Town Counsel Murphy emailed Attorney Ames stating that, under Fire Department rules, the Town could not accommodate Firefighter Alston's request to work in an outside job while he was on sick leave, but offered that Chief Ford was available to discuss reasonable accommodations and asked for Firefighter Alston's availability between May 9 and May 13. (Resp. 102; Resp. 139 at 6 (Ch. 5, S. 3); Tr. Vol. 1 at 163-64 (Firefighter Alston); Tr. Vol. 6 at 996-97 (DeBow)) Attorney Ames did not respond. (Tr. Vol. 9 at 1750 (Murphy))

210. On May 11, 2016, Fire Chief Ford wrote to Firefighter Alston asking him to meet on May 18, 2016 at 10 a.m. (Resp. 103) Firefighter Alston did not appear. (Resp. 158 at 12 (5/18/2016); Tr. Vol. 2 at 323 (Firefighter Alston); Tr. Vol. 8 at 1369-70 (Ford))

211. On May 19, 2016, Fire Chief Ford telephoned Firefighter Alston and left a voice mail message asking Firefighter Alston to call him back. Firefighter Alston did not respond. (Resp. 158 at 12 (5/18/2016); Tr. Vol. 8 at 1369-70 (Ford))

212. Fire Chief Ford retired effective May 20, 2016. (Tr. Vol. 8 at 1465 (Ford))

213. On May 25, 2016, Acting Fire Chief Robert Ward wrote to Firefighter Alston notifying him of a meeting on June 1, 2016 at 10 a.m. (Resp. 104; Tr. Vol. 4 at 650 (Stipulation)) Firefighter Alston did not appear. (Tr. Vol. 4 at 651 (Stipulation))

214. Also on May 25, 2016, the Town notified Firefighter Alston that he had exhausted his accrued leave and that he was no longer being paid by the Town. (Resp. 105)

215. Firefighter Alston met with Acting Chief Ward on June 9, 2016. Chief Ward's notes from that meeting state:

> "Gerald arrived on time, he was pleasant with his greetings, we spoke for a little over 20 minutes.
>
> He mentioned that his attorney had just called him and said his Dr. report came back and that his attorney would call him again after he read it. I believe he said psychologist.
>
> I told him that I could not give him permission to work on the side and he asked 'because the town considers me sick' and I said yes.
>
> I asked Gerald if he wanted to return to work in a modified duty position, he said yes and asked what he had to do - I told him I would have to speak to town counsel about what exactly was needed but that that at the least he would have to cleared (sic) by a medical professional like everyone else that comes back on modified duty.
>
> He told me he had to see his surgeon that took the 'cancer out' to fix the scar that was left, I asked him if he ever checked into a cancer disability. He said he started to but wanted to come back to work as a firefighter., he said he would speak to his attorney and get back to me real soon about modified duty.
>
> He then said he likes being a firefighter but that he recently talked to Church (retired f.f.) and that Church told him to look into all the injuries and stress he has had on the job and think about disability.
>
> I told Gerald that he could file for stress, he then told me he had high blood pressure also.
>
> I told him to check with his doctor and see if between the stress and blood pressure if his Dr. thought he would qualify for a job related disability.
>
> He said he would, I told him I could help him with that but if he felt more comfortable he could call Chief Riley - Gerald said he

> trusts me and that he has known Chet since he was a teenager and thinks Chet is a good guy.
>
> We shook hands and Gerald again said he would get back to me as soon as he could." (App. 81)

216. On June 14, 2016, Town Counsel Murphy emailed Attorney Ames asking Attorney Ames to provide to the Town's occupational health nurse the psychiatric evaluation report Firefighter Alston had mentioned to Acting Chief Ward and a signed copy of a release she attached to her email. (Resp. 106) Attorney Ames did not respond. (Tr. Vol. 9 at 1751-52 (Murphy))

217. On June 16, 2016, Acting Captain Ward wrote to the Select Board and Town Administrator informing them that he was recommending the promotion of Mr. Pender to Temporary Deputy Fire Chief. He wrote in part that:

> "In making this recommendation, I note that Captain Pender was disciplined for an off duty incident that occurred in 2010 … This incident has been the subject of significant public debate and is in litigation. Following this incident, then Lieutenant Pender willingly fulfilled all of the obligations outlined in the agreement. In addition to willingly participating in diversity training and mediation with Firefighter Alston he openly apologized to him and has expressed and continue to express remorsefulness for what has occurred. For those reasons and his good work record following the incident, he was promoted to Captain in 2013 by the Board of Selectmen with the then Fire Chief and Human Resources Director's recommendation." (Resp. 123)

218. On June 21, 2016, the Town's Board of Selectmen met in Executive Session with Mr. Pender to discuss his potential promotion. Captain Pender read a written statement to the Board which began by apologizing to the Board "for any repercussions, you as a board, have faced because of me." Mr. Pender told the Board that he had "apologized countless times for my action that day" and reviewed his compliance with the agreement at the time which included a suspension, diversity training and mediation." Mr. Pender then told the Board that:

> " … it seemed like we resolved the incident and it was behind us. I don't know what happened back then between Mr. Alston and the Town, but apparently he felt slighted somehow. His course of action, which gets the most attention, is to drag me into it all over again. He and his attorney, Mr. Ames, are using the same tactic to this day. I can't believe it's six years later. I am deeply sorry that something I said in frustration and quite likely in the aftermath of a PTSD diagnosis after a serious fire in 2008, gave someone that type of ammunition to sully the Towns, my own and my families' reputations." (App. 10, Attachment 17 at p. 4)

219. Mr. Pender's statement goes on to talk about what he believes had been unfair, intrusive media coverage of him and his family. He then stated:

> "I have addressed this issue with many of the firefighters over the last 6 years. I addressed the issue with all new recruits I was training. Surprisingly, the conversations weren't as uncomfortable as you may think. The overwhelming sentiment is that this should have been settled with an apology and handshake." (App. 10, Attachment 17 at p. 5)

220. Mr. Pender went on to detail what happened on May 30, 2010 when he left the racist comment on Firefighter Alston's voicemail, stating "I have told the truth since Day 1. My story has not changed or evolved, as has theirs." He then stated that over 100 fellow firefighters in Brookline had signed a petition supporting his promotion. In closing, he told the Board:

> "I would like to say that I feel I deserve this job, that I've earned it. I have certainly been punished enough. I have been a loyal soldier for this town for almost 32 years. I have maintained silence for the past 6 years through some very difficult personal attacks, as the town requested of me. If you vote against this, you will be voting for Brooks Ames and his untruthful agenda. You will in fact validate the lies he has told about me and the Town. I ask you, beg you, to do the right thing. Thank you."

(App. 10, Attachment 17 at p. 6)

221. The minutes of the June 21, 2016 Executive Session minutes state in part:

> "Selectman Greene asked Captain Pender to review what he has learned from this incident and how he would react should it happen again within the Fire Department in the future.
>
> Captain Pender explained how the department has evolved and there is no place for discrimination at all, and there have been no incidents. Should an incident occur, he would follow policy and if required charges brought up for conduct unbecoming.
>
> Selectman Greene asked about his experience in this position in responding to racist, sexist comments.
>
> Captain Pender responded that the department is a big happy family going in the same direction, he does not witness comments like that.
>
> Selectman Greene asked why he believes he deserves this promotion.
>
> Captain Pender replied that he will let his colleagues address that [at] public comment session in open session.
>
> Selectman Greene noted that the replies are vague and non-specific, and asked for specific details on what Captain Pender has done in the past 5 years to address his actions.
>
> Captain Pender responded since he was promoted to Captain, he has had the opportunity to train this young group of guys from all ethnic backgrounds, and has become a more open person, because in training you deal closely with everyone. He has also attended diversity and mediation sessions.
>
> Selectman Heller added that this journey needs to continue to evolve, noting that Captain Pender took the punishment and has taken important steps forward."

(App. 10, Attachment 17 at 1-2).

222. On June 23, 2016, Select Board Chair Wishinsky forwarded an email to other members of the Board with a link to an article in the local paper titled: "Brookline Firefighters Stand Up for Paul Pender." Select Board member Greene sent a reply email to Chair Wishinsky stating:

> "Neil:
>
> The article says 'the Selectmen chose to hold a vote?" When was that?

> My position remains that no vote is necessary. Chief Ward has the authority to promote Pender temporarily. He informed us of his decision to do so and provided a reasonable explanation of why he believes it is in the department's best interest to promote Pender. We appropriately did our due diligence and, in my opinion, did not uncover anything that would justify our countermanding Ward's recommendation. There is nothing left to do but let Chief Ward do his job. For the Selectmen to vote (whether yes or no) is an intrusion into his area of responsibility and politicizing an administrative decision.
>
> Some staff seem to think that the Selectmen should draw the political heat from Ward and take a public vote to support his recommendation, thereby putting the bulls-eye on our backs.
>
> Chief Ward will not draw political heat, so what's the point?
>
> The Selectmen will take the heat from whatever we do so there is no point deviating from the normal procedure. We should respect Chief Ward's authority in this matter. If it's on the agenda, I will abstain and present my objection.
>
> Bernard."

(App. 10, Attachment 18 at 1-2)

223. Chair Wishinsky forwarded Mr. Greene's email to the Town Administrator with the following message:

> "fyi. I spoke with him and emphasized that we need to have a public discussion and he agreed. His point is that Chief Ward's recommendation (sic) we are reacting to and if Chief Ward thinks he is going to escape the fallout, he is mistaken. This is Chief Ward's decision and he needs to take ownership.
>
> We may need to thread the needle with a vote as I suspect at least 1 Selectman will want to be on record against it. The vote may need to be something like voting not to overturn Chief Ward's recommendation or something like that. Obviously, more to come.
>
> Would be helpful to get that summary of actions Mr. Pender has taken and been subjected to as a result of the incident."

(App. 10, Attachment 18 at 1)

224. During the public comment portion of the Select Board's June 21, 2016 meeting, several current and former Town firefighters spoke in favor of Mr. Pender's promotion to Temporary Deputy Fire Chief. Each spoke passionately about Mr. Pender's character, work ethic and heroism, including the firefighter whose life Mr. Pender helped save in 2008. The speakers also spoke about the "narrative fabricated" against Mr. Pender and the Town and the "agenda" against the Town and Mr. Pender. Deputy Chief Corbett stated that "we should have all moved on" and lamented the "smear campaign" being orchestrated by "a few people with a separate agenda." A retired firefighter recounted his activism in the civil rights movement, but said that Broolkine was "not the place" for these battles. At the end of the public comment period Chair Wishinsky stated that no vote would be taken on Mr. Pender's promotion that night. (Resp. 108)

225. On July 12, 2016, the Select Board met in public session. During the public comment period, a few citizens spoke against the promotion of Paul Pender to Temporary Deputy Fire Chief. One of those citizens read a "letter to the editor" of a local newspaper sent by Firefighter Alston opposing Mr. Pender's promotion. The letter stated in part:

> " … My life has been ruined and my family has split because of Brookline's refusal to deal honestly with racism and reprisals against me for reporting it. My health is deteriorating.
>
> ….
>
> I needed Paul Pender to understand what he did was wrong. And I needed the punishment to be severe enough the next person would think twice before they did something racist.

(App. 95)

226. Later at the July 12, 2016 public meeting, under the agenda item "Temporary Fire Promotion Process", Chief Ward stated in part:

> "The collective bargaining agreement between the Town and the Brookline Fire union mandates that vacancies be filled once the Department is aware that a vacancy will last for more than 30 days. It is the Department's longstanding practice to make temporary promotions by offering the top candidate on the civil service list. It is my intent to follow this process when making these temporary promotions. Please be assured that any future permanent promotions will follow a formal civil service process and be approved by the Board of Selectmen.
>
> The following individuals will be appointed temporarily.
>
> To Deputy Chief - Captain Paul Pender
>
> To Captain - Lieutenant Todd Cantor
>
> To Lieutenant - Firefighter Joseph Canney
>
> Unless I am advised differently by the Board, I intend to make these temporary promotions effective July 18, 2016. " (App. 95)

227. In response, Chair Wishinsky stated in part that he was "willing to let the process continue" and that: " … my concern is when someone has done everything that was asked of them to do, how long do we continue to punish them, especially given leadership quality and public statements of his colleagues." (App. 95)[14]

228. Select Board member Daly stated in part: " … We have heard from almost every minority of the department with the exception of Gerald Alston either through a petition or spoken before us, and they all indicated that they have not found Captain Pender to be a racist, and in fact has gone out of his way to help many minorities in training, and he reached out and apologized for the statements he has made." (App. 95)

229. Select Board member Franco appeared to suggest that while the punishment against Mr. Pender in 2010 was not severe enough, " … Brookline needs to move on and cease debating past rights and wrongs. A better future is not possible if we remain trapped

14. All of the quotes from this public meeting come from the official minutes of the meeting.

in conversations about perceived past misdeeds or mistakes …" (App. 95)

230. Selectman Greene stated in part that: " … The unforgiving view prevalent in this Town that we should have 'zero tolerance' for any use of the N word, or any of the other words that have vile and hurtful histories and usages, would not be good policy where that use is a one-time and isolated act. Such an act warrants discipline, but the use of racist slur six years ago, without more, cannot be justification to permanently preclude someone form the benefits of employment he would otherwise be entitled to receive." Selectman Greene also noted that Mr. Pender: " … after having made this grievous mistake, did come around and begin to repair the damage he caused and sought to become a better human being." (App. 95)

231. The Board took no vote and the promotions became effective July 18, 2016. (App. 95; Tr. Vol. 5 at 724, 762 (Pender); Vol. 10 at 1991-92 (Wishinsky))

232. On July 21, 2016, Ms. DeBow penned a letter to Firefighter Alston "regarding your ability to perform outside work" stating in part: " … given your representation that you have some work capacity, we have a scheduled a return to work evaluation at New England Baptist Occupational Health …" The letter went on to state: "This evaluation will include a physical examination and a toxic screen. I am also working with Dr. Marilyn Price's office to schedule a return to duty examination. Once the medical evaluation, drug screen and psychological evaluation are complete we can work with you to determine which modified duty, if any, may be appropriate for you … Please report to New England Baptist … on Tuesday August 2, 2016 at 11:00 A.M. for your medical evaluation and toxic screen." (Resp. 109)

233. Firefighter Alston did not appear at the New England Baptist Hospital on August 2, 2016 for the evaluation and drug test. (Tr. Vol. 2 at 261, 326 (Firefighter Alston); Tr. Vol. 4 at 653 (Stipulation))

234. On August 17, 2016, Town Administrator Melvin Kleckner wrote to Firefighter Alston notifying him of contemplated discharge and the reasons therefor and of a hearing before an outside hearing officer scheduled for August 30, 2016. The letter stated in part:

> "Our last medical / psychological evaluation of March 2015 indicated that you are unable to perform the essential functions of your job as a Brookline firefighter, unless certain conditions were met. Unfortunately, to date you have not provided any medical documentation that indicates you have complied with these conditions or may have some work capacity. (Resp. 111)

235. On August 30, 2016, an outside Hearing Officer conducted a pre-termination hearing. Firefighter Alston submitted a written statement that Attorney Ames read into the record. (Resp. 112 at 5, 11-12, 136 (tr. at 92-93); Tr. Vol. 2 at328-29 (Stipulation)

236. Town Administrator Kleckner wrote to Firefighter Alston on September 30, 2016, enclosing the hearing officer's report and attachments and notifying him that the Board of Selectmen would take up the question of his termination on October 5, 2016. The enclosed report from the hearing officer found just cause for termination based on Dr. Price's opinion regarding Firefighter Alston's non-fitness for duty unless certain conditions were met, which, according to the Town and the hearing officer, Firefighter Alston did not meet. (Resp. 112)

237. On October 5, 2016, the Select Board held a hearing concerning the question of Firefighter Alston's termination. The Board voted to terminate Firefighter Alston based on the hearing officer's report and recommendations. (Resp. 114)

238. That same day, the Town issued a press release outlining their position on why Firefighter Alston was terminated. In response to an online newspaper article published that day, the Town's in-house legal counsel penned the following email to the reporter:

> "I have read your article concerning Firefighter Gerald Alston and see that it includes none of the important facts that we outlined in the press release you were given. In particular, the article make no reference to Mr. Alston's threatening behavior at work or his cocaine use, both of which are incompatible with employment as a public safety employee. Nor does the article report any of the facts of what the town has done and tried to do over the last almost three years to work with Mr. Alston to return to work. The decision to omit this information is unfair to the town and does not paint an accurate picture. Will you be including these points when you update the story? If not, I need to speak to you or your editor as soon as possible. Regards, Joslin Murphy."

The reporter responded three (3) hours later with the following:

> "We have expanded the story this afternoon and emphasizes the town's position he was fired for just cause and the reasons behind that position. I have also passed along your note to my editor [] so she is aware of your concerns."

(App. 6, Attachment 14)

Town's Argument

The Town argues that there was just cause for terminating the employment of Firefighter Alston after Firefighter Alston failed to demonstrate his fitness for duty by failing to comply with return-to-work conditions established by Dr. Price that would permit his safe return to work. The Town argues that Firefighter Alston "steadfastly refused" to comply with the conditions, including the required drug testing, notwithstanding his admitted use of cocaine.

The Town argues that the Commission lacks jurisdiction to rule on whether the work environment was discriminatory or retaliatory, but, rather, can only rule on whether there was just cause for the termination. In addition, the Town argues that any claims of discrimination or retaliation pre-dating July 8, 2014 are precluded by the Norfolk Superior Court judgment on Firefighter Alston's discrimination and retaliation claims and that and that his discrimination and retaliation claims more generally, are barred by the Chapter 151B doctrines of the exclusivity of remedies, statutes of limitations, and administrative exhaustion.

Finally, the Town argues that, even if the Commission had such jurisdiction, all of its steps were focused on returning Mr. Alston to work by ensuring that he complied with sound return-to-work

conditions established by psychiatrists, and that there is no evidence that the Town's implementation of such conditions were discriminatory or retaliatory.

Firefighter Alston's Argument

Firefighter Alston makes multiple arguments regarding why the Town did not have just cause for terminating his position. He argues that the Town terminated him for declining to prove his ability to return to and endure an unlawful, racially hostile environment. Therefore, according to Firefighter Alston, the Town acted in bad faith, without just cause and in violation of basic merit principles in terminating him.

Firefighter Alston argues that the Town failed to meet their obligation to ensure a safe working environment for his return and actually made it worse. Firefighter Alston cites several examples of the Town's action and inaction in this regard including, but not limited to, failing to act on his complaint in a timely manner, failing to sufficiently discipline Mr. Pender and promoting him multiple times.

Firefighter Alston then argues that he has not been found unfit for duty, but that no treatment or accommodation would have permitted him to return safely to work because the stress of racial hostility had left him unable to trust his fellow firefighters in life-threatening situations.

Alternatively, Firefighter Alston argues that the return to work conditions were either too vague or unreasonable for him to be found in non-compliance of the conditions. He argues that the Town was not justified in requiring random drug testing and that the Town itself failed to comply with the return-to-work conditions.

Firefighter Alston asks the Commission to conclude that no treatment or accommodation would have permitted him to return safely to work because the stress of racial hostility had left him unable to trust his fellow firefighters.

Finally, Firefighter Alston asks the Commission to order his reinstatement to his civil service position without loss of pay or benefits, retroactive to his termination date of October 5, 2016 and for him to be placed on paid administrative leave "until further notice from the Commission.

Civil Service Law / Just Cause Standard

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

> " … retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected"; and … 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; "assuring that all employees are protected … from arbitrary and capricious actions." G.L. c. 31, § 1. (emphasis added)

G.L. c. 31, § 41 states in part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days …"

G.L. c. 31, § 43 states in part:

> "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission …
>
> 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)

To determine whether "just cause" existed to terminate Firefighter Alston, the Commission:

> " … must focus on the fundamental purpose of the civil service system - to guard against political considerations, favoritism, and bias in governmental employment decisions … and to protect efficient public employees from political control. 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 …" *Boston Police Dept.* v. *Collins & another*, 48 Mass. App. Ct. 408 (2000), citing *Cambridge* v. *Civ. Serv. Comm.*, 43 Mass. App. Ct. 300, 304 (1997) (citations omitted). (emphasis added)

Jurisdiction

As a preliminary matter, the state's anti-discrimination law does not preclude the Civil Service Commission from determining whether there was just cause to terminate Firefighter Alston from his permanent, tenured civil service position as a Brookline Firefighter. As stated above, the Legislature explicitly charged the Commission with ensuring adherence to basic merit principles, which includes assuring fair treatment of public employees in all aspects of personnel administration without regard to various factors, including race. The Court has also stated unequivocally that intervention by the Commission is warranted when objectives unrelated to merit standards (i.e. - race) result in an employee's termination.

It is not necessary to conclude whether the Town violated the state's anti-discrimination law to decide this appeal and I have not attempted to do so here. The Commission is not mandated to function as an alternative to MCAD or the Court as an adjudicator of the rights of those who have experienced discrimination or retaliation in violation of their civil rights or other laws. However, when a civil service appointing authority commits acts which are fun-

damentally unfair and fall within the penumbra of the prohibited conduct of those laws, it is appropriate for the Commission to take notice of that misconduct in order to fulfil the statutory mandate to assure "fair treatment" of civil service employees, free from "arbitrary and capricious" acts, "without regard" for an employee's "race" or other protected status, and "with proper regard" for civil service law and an employee's "constitutional rights, as citizens." G.L. c. 31, § 1. It is with this framework in mind that I turn to the merits of Mr. Alston's appeal.

Just Cause Analysis

This case began with the ugly racial epithet, "fucking [n-word]" being spoken by a white fire lieutenant in the Brookline Fire Department, which ended up on the on the voice mail of his employee, Gerald Alston. Town officials have repeatedly noted that the vile comment was not meant for Firefighter Alston. To the extent that it matters, Mr. Pender acknowledges that the comment *was* made in reference to a motorist who Mr. Pender believes was black or Hispanic. As referenced by Dr. Price, the fact that Mr. Pender would make this racist comment made Firefighter Alston question how he was really perceived by his supervisor, who Firefighter Alston considered a mentor. Also, to the extent that it is relevant, no evidence was presented to support Mr. Pender's repeated assertions that making the racist comment could be attributed to PTSD.

Prior Civil Service Commission decisions have stated unequivocally that racist behavior by a public employee is grounds for termination, stating in *Duquette* v. *Department of Correction*, 19 MCSR 337, 341 (2006): "One would have hoped that this century's workplace had been purged of such offenses … There is no place for such behavior in the workplace and there is no place for [Mr. Duquette] - or others that would engage in such behavior at the Department of Correction." When the Appellant in that appeal argued that employees who engaged in similar behavior were not terminated in the past, the Commission stated that it would not " … use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements …" *Duquette* at 340.

In *Green* v. *Harvard Vanguard Medical Associates, Inc*., 79 Mass. App. Ct. 1 (2011), the Appeals Court, describing the word "[n-word]" as a " … racial epithet that is widely regarded as the most hateful and offensive in our culture", concluded that " … as a matter of law, a supervisor's use of an offensive and racial epithet in a single, brief conversation was sufficiently severe or pervasive to give rise to a claim of a racially hostile work environment …" *See also*, *Augis Corp.* v. *MCAD*, 75 Mass. App. Ct. 398, *rev. den*., 455 Mass. 1105 (2009);and *Thomas O'Connor Constructors, Inc.* v. *MCAD*, 72 Mass. App. Ct. 459 (2008).

After reviewing all of the evidence, including the testimony of Firefighter Alston, I have concluded that Mr. Pender's use of the racial epithet "fucking [n-word]", coupled with subsequent actions and inactions by Town officials at all levels, which compounded the racist comment into an avalanche of unfair, arbitrary, capricious and retaliatory behavior that infringed on Firefighter Alston's civil service rights, made it impossible for him to perform his job as a Brookline firefighter.

I credit those portions of Dr. Price's report in which she concluded that " … hearing a racial slur from a Lieutenant he trusted was especially troubling to Firefighter Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations. There is evidence that Firefighter Alston developed psychological symptoms in response to hearing the racial slur from his Lieutenant …"

I also credit those portions of Dr. Price's report in which she diagnosed Firefighter Alston as of 2015 with "Adjustment Disorder", the same diagnosis issued by Firefighter's Alston's own psychiatrist (Dr. Kahn) and social worker (Ms. Simpson) shortly after the racist comment was left on his voice mail.

When an Appointing Authority relies on scientific evidence provided through expert witnesses, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion was grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., *Canavan"s Case*, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing *Commonwealth* v. *Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., *Letch* v. *Daniels*, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., *Sacco* v. *Roupenian*, 409 Mass. 25, 28-29, 564 N.E.23d 386, 388 (1990).

Dr. Price was well qualified to make her diagnosis. She has extensive education and experience regarding fitness for duty evaluations of public safety employees; she reviewed the duties and responsibilities of a Brookline firefighter; she reviewed relevant medical and other documents related to Firefighter Alston and she met with Firefighter Alston for three (3) hours. Finally, during her testimony before the Commission, she was able to answer questions in a coherent manner that showed a command of the subject matter.

I did not rely on the testimony of Dr. Carter, a psychiatrist hired by Firefighter Alston. She does not have education or experience regarding fitness for duty evaluations; she did not review the duties and responsibilities of a Brookline firefighter; and, during her testimony before the Commission, she effectively acknowledged that her goal here was to provide a conclusion that was helpful to Firefighter Alston, as opposed to an independent review of Firefighter Alston's fitness for duty as a Brookline firefighter.

While I have accepted and credited the conclusions of Dr. Price referenced above, I did not find that the evidence supported her conclusion that Firefighter Alston would be able to return to work upon meeting the conditions outlined in her report. I am

not required to accept all parts of Dr. Price's testimony, even if Firefighter Alston failed to offer expert testimony to the contrary. (*See Police Department of Boston* v. *Jill Kavaleski*, 463 Mass. 680 (2012) citing *Daniels* v. *Board of Registration in Medicine*, 418 Mass. 380, 392 (1994), *quoting Commonwealth* v. *DeMinico*, 408 Mass. 230, 235 (1990) ("[t]he law should not, and does not, give the opinions of experts on either side of . . . [a]n issue the benefit of conclusiveness, even if there are no contrary opinions introduced at the trial"). *See* also *Boston Gas Co.* v. *Assessors of Boston*, 334 Mass. 549, 579 (1956) ("That a person qualifies as an expert does not endow his testimony with magic qualities").

Dr. Price's evaluation was thorough and based on sound medical evidence, but she simply did not have the benefit of the entire record that was presented to the Commission through two hundred eighty (280) exhibits and fourteen (14) witnesses over ten (10) days of hearing. While Dr. Price was able to specifically identify four (4) "stressors" that contributed to Firefighter's Alston ongoing diagnosis of Adjustment Disorder, the entirety of the record shows multiple other actions and inactions of Town officials and employees that served as "stressors" which Dr. Price was not aware of and which resulted in Firefighter Alston being permanently unable to serve as a Brookline firefighter. Those actions and inactions included the following additional intolerable behavior:

> A. Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace.
>
> B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim.
>
> C. Attacking Firefighter Alston's credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.

A. Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace.

The Town's failure to respond to the report of the racial epithet in a timely manner; their failure to impose a proper level of discipline; and their decision to repeatedly promote Mr. Pender showed that the Town failed to comprehend the seriousness of Mr. Pender's use of the racial epithet and the damaging impact it had on Firefighter Alston.

The Town failed to act on Firefighter Alston's report of the racist comment for four (4) to five (5) weeks. As noted in the findings, Firefighter Alston played the voice mail message for the Fire Department's Chief of Operations shortly after May 30, 2010. It was not until July 8, 2010, after Firefighter Alston filed a written complaint, that the Town finally took action against Mr. Pender. This caused Firefighter Alston legitimate concern that the Town did not take this matter seriously.

Even more troubling, Town officials, at the time and on later occasions, would suggest that their actions were taken in accord with Firefighter Alston's wishes. This is simply not true. Firefighter Alston's only input on the level of discipline was to tell Town officials that he didn't want Mr. Pender to be terminated. Town officials may have received more clarity on this point had they actually conducted a bona fide local disciplinary hearing regarding Mr. Pender's misconduct, which would have included hearing from witnesses including, but not limited to, Firefighter Alston. That didn't happen. Rather, Town officials, during an Executive Session, engaged in what turned into an informal discussion with Mr. Pender and his attorney, focusing on turning this event into a "learning moment". In the end, even Chief Skerry's recommendation for a relatively short-term suspension of four (4) tours of duty was rejected by the Board. The Board should have taken more serious steps to discipline Mr. Pender for his racist comment and to prevent any retaliation by Mr. Pender against Firefighter Alston (i.e. - a demotion; ineligibility for promotion for 5 years; and a last chance agreement stating that any retaliation against Mr. Alston would result in immediate termination.) Throughout these proceedings, the Town sought to equate other actions taken (i.e.- mediation and diversity training) as a form of discipline. They are mistaken. The Town's failure to issue discipline commensurate with the seriousness of the offense caused Firefighter Alston to question if they understood the impact the racist comments had on him and his family.

Further, in one of the more perplexing actions taken in the aftermath of this incident, the Town *promoted* Mr. Pender to Temporary Fire Captain *less than two weeks after the effective date of his two-tour suspension* for making the racist comment. Firefighter Alston was in shock. So am I. The promotion gave Firefighter Alston further grounds upon which to reasonably conclude that the Town was not taking the matter seriously. The Town's attempt to cloak its decision as somehow being required by the civil service law (since Mr. Pender was at the top of the eligible list) is disingenuous. The Town had, for example, the option of bypassing Mr. Pender for this temporary appointment for the time being in favor of someone else who had not been disciplined two weeks prior for making a racist comment, a decision that has long been permitted by well-established civil service law.

For many of the reasons already discussed above, the Town's decision to permanently promote Mr. Pender to Captain on May 1, 2013 was another sign to Firefighter Alston that the Town failed to recognize the seriousness of what occurred here.

Finally, the Town's decision to further elevate Mr. Pender to Temporary Deputy Fire Chief in July 2016 took the overtones of bad faith to yet another level by using that promotional process to orchestrate a public rebuke of Firefighter Alston condoned and sometimes led by Town officials, that served as a final message to Firefighter Alston that he was not welcome in the Brookline Fire Department.

In preparation for a public meeting where the promotion to Temporary Deputy Fire Chief would be discussed, the Chair of the Town's Select Board penned an email to the Town Administrator stating in part, " … Would be helpful to get that summary of actions Mr. Pender has taken and been subjected to as a result of the

incident" (in reference to comments Mr. Pender had made during an Executive Session.) Six years later, the narrative of what occurred here had officially been turned on its head, with the Town portraying Mr. Pender as the victim.

During the public comment session, Town officials and employees repeatedly referenced the remorse and apologies of Mr. Pender and appeared to explicitly call out Firefighter Alston for his inability to "move on". One member of the Select Board stated that "…Brookline needs to move on and cease debating past rights and wrongs. A better future is not possible if we remain trapped in conversations about *perceived* past misdeeds or mistakes." While subtle, it is noteworthy that Town officials were now apparently referring to the racist comment left by Mr. Pender as a "perceived" past misdeed or mistake.

Another Board member stated that " … the use of a racist slur, six years ago, *without more*, cannot be justification to permanently preclude" Mr. Pender from being promoted. At this point, the Board had information, discussed more below, showing that *in addition to making the racist comment*, Mr. Pender had, on multiple occasions, verbally attacked Firefighter Alston for reporting the incident and repeatedly minimized his misconduct to fellow firefighters, including all new recruits.

Another Board member explicitly stated that " … We have heard from *almost every minority of the department with the exception of Gerald Alston* …" stating their support for Mr. Pender.

Members of the Department spoke about the "narrative fabricated", with the Town's Deputy Fire Chief stating that "we should have all moved on" and lamenting the "smear campaign" against the Town.

The collective message from the Select Board and the Town's Fire Department was clear: Gerald Alston stood alone.

B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim.

On multiple occasions, including during Mr. Pender's initial "apology" and after all Department employees were purportedly provided with diversity training, Mr. Pender and others repeatedly engaged in retaliatory behavior against Firefighter Alston, leading him to reasonably question whether he could ever return to the Brookline Fire Department.

When Mr. Pender first spoke to Firefighter Alston to "profusely apologize", he compounded the problem by seeking to turn the tables on his employee and attacking Firefighter Alston's decision to report the racist comment, telling Firefighter Alston words to the effect that it was "the stupidest thing [Alston] had ever done". To drive home the point, Mr. Pender asked Firefighter Alston, "do you want me to lose my job?" It is difficult to imagine a more stressful situation for an employee than when a supervisor, who had recently made a racist comment, is now attacking the employee for reporting it. The Town never took any action against Mr. Pender for attacking Firefighter's Alston decision to report him and, remarkably, never seemed to grasp that Mr. Pender was engaging in retaliatory behavior against Firefighter Alston.

Only two (2) days after Firefighter Alston's return to work, fellow firefighter Joseph Canney posted a derogatory message on the Union's blog referring to Firefighter Alston as a "FACELESS COWARD". While the posting does not explicitly identify Firefighter Alston, it is painfully clear who he is referring to. Again, the Town took no action to investigate whether Firefighter Canney's posting constituted retaliation against Firefighter Alston. Commonsense dictates that this posting caused further stress on Firefighter Alston, as it raised real questions regarding whether he was being ostracized by members of the Department.

Only months after making the racist comment, Mr. Pender, in February 2011, again verbally attacked Firefighter Alston for reporting it, telling Firefighter Alston, " … you destroyed my life and ruined my career …". Mr. Pender told Firefighter Alston that he had "begged" him [Alston] "not to do what he [Alston] did." Rather than recognizing that his comments could be construed as retaliatory, Mr. Pender actually documented the conversation in a transcript-like summary and hand-delivered the summary to the Town's Human Resources Director. Again, the Town took no action against Mr. Pender for his verbal attack on Firefighter Alston. Had the Town taken the reasonable step of requiring a last chance agreement months earlier, and had the Town recognized Mr. Pender's comments for what they were (retaliation), there would have been no justification for continuing Mr. Pender's employment with the Town at this point.

Further, just prior to a training session in October 2013, presumably in which Firefighter Alston was required to receive training from the person who had left a racist comment on his voicemail, Mr. Pender once again verbally attacked Firefighter Alston, this time for filing a lawsuit that, according to Mr. Pender, "was full of lies." Mr. Pender discounted his use of the racist comment years earlier, chalking it up to "road rage" and "a side effect of PTSD." To me, it is noteworthy that Firefighter Alston felt the need that same day to reach out to his treating psychiatrist. It reinforces the correlation between the actions of Town officials and the adverse psychological impact on Firefighter Alston.

On December 19, 2013, Firefighter Alston found the word "Leave" written on the door to his seat on the fire engine. While the Town appeared to take appropriate steps to investigate this serious matter, the suggestion by the Town that the word could have been written by members of an MIT fraternity seemed to defy commonsense and understandably cause Firefighter Alston to again question whether the Town was seeking to find an acceptable, alternative explanation to what appears to be a clear message that Firefighter Alston was not welcome in the Brookline Fire Department.

In March 2015, the union voted to remove Firefighter Alston from the union for not paying dues, even after, according to Ms. DeBow, he had come back on the payroll and was, in fact a dues-paying member. While the Town has no role in actions taken by the union, this event is yet another example of how Firefighter Alston could

reasonably conclude that he was being ostracized by fellow firefighters for reasons related to his reporting Mr. Pender's use of the racial comment heard on his voice mail.

Finally, in December 2015, fellow Firefighter Joseph Canney penned a letter to Ms. DeBow stating in part that: "Despite the fact that Mr. Alston threatened to shoot his co-workers, he continued to be payed (sic) for longer than most can even remember." This is yet another example that supports Firefighter Alston's reasonable fear that, upon his return, he may not have the support of his fellow firefighters.

After being promoted, Mr. Pender used his position as Captain of Training to tell his "side of the story" regarding the incident to *all new recruits*, telling them that what they read in the local paper about this matter was "a bunch of lies". In a remarkable statement during his deposition in the federal lawsuit, Mr. Pender recounted talking to five new recruits from Fall River, "who were all minorities". Presumably after telling them "his side of the story", Mr. Pender stated that " … they were pretty shocked that it had turned into, you know … that something so benign is going on seven and a half years later …". This was not a momentary misstatement by Mr. Pender. Rather, both at the time, and years later, he would repeatedly make comments suggesting that his racist comment was overblown and, in turn, that Firefighter Alston had overreacted to the racist comment. Most troubling is that, over a period of years, Mr. Pender would reinforce that message to every new recruit of the Brookline Fire Department. Put another way, Mr. Pender was telling *every new recruit,* that if and when a supervisor is heard making a racist comment, it should be considered benign; it should not be reported; and it should be settled in-house with a handshake. Equally as troubling, by labeling reports of the incident as "a bunch of lies", Mr. Pender was arguably leaving the impression with every new recruit that Firefighter Alston was a liar who could not be trusted. This could help explain the shunning by fellow firefighters that Firefighter Alston referenced in his December 2013 court filing in Norfolk Superior Court. In that filing, Firefighter Alston talks about being ostracized by fellow firefighters when he was assigned to other stations, including firefighters excluding him from dinner or leaving the room when he entered to eat breakfast. He also lamented that he was no longer invited to sing the national anthem at firefighter-sponsored events, something Firefighter Alston said he was "proud and privileged" to do for many years prior to reporting the racist comment to Town officials.

C. Attacking Firefighter Alston's credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.

Numerous other actions and inactions by the Town called into question whether they were acting in good faith regarding their stated goal of returning Firefighter Alston to the Town's workforce.

In February 2014, "Fire Department leadership" and the Town's HR Director met with Dr. Brown. Based on what he heard from those Town officials about Firefighter Alston, Dr. Brown opined that "high levels of paranoia exist". To me, this was part of a subtle, ongoing narrative that Town officials had settled on by February 2014 in which the Town was suggesting Firefighter Alston's concerns regarding being shunned and ostracized were a figment of his imagination. As referenced previously, some of Firefighter Alston's fears were well-founded, including Mr. Pender's ongoing discussion of his side of the story to all new recruits that may work side-by-side with Firefighter Alston. The evidence does not support the suggestion that Firefighter Alston was suffering from paranoia.

In October 2014, only sixteen (16) days after learning from Firefighter Alston's psychiatrist that Firefighter Alston "had a decline … did not refill medication …" and was " … in desperate financial straits … living out of his car …" the Town notified Firefighter Alston that he was effectively being removed from the Town's payroll as he had exhausted all of his available leave.

In December 2014, the Town's then-Chair of the Select Board penned a letter to Firefighter Alston stating in part that: " … We are also informed that the supervisor who uttered those words to you and was formally disciplined for the incident offered his apology to you, *and has since repeatedly expressed remorse and regret for his conduct*." Again, this narrative, which is not consistent with what actually occurred, was now enshrined as the Town's official version of events. As discussed previously, rather than "repeatedly expressing remorse and regret", Mr. Pender had repeatedly subjected Firefighter Alston to verbal attacks for reporting the matter to Town officials and "ruining his career" over making "benign" comments that, according to Mr. Pender, were likely attributable to PTSD and should have been settled with a handshake. To me, this repeated misrepresentation of events by Town officials was another action that constituted a "stressor" upon Firefighter Alston.

These collective actions and inactions by the Town, many of which Dr. Price was unaware of, prevented Firefighter Alston from returning to a workplace where he would be isolated, even if he satisfied the conditions outlined by Dr. Price in her report.

In sum, the Town chose not to impose meaningful discipline on Mr. Pender for use of the racist comment (which the evidence demonstrated was clearly insufficient to remediate his behavior), chose to overlook the initial and ongoing retaliation against Firefighter Alston by Mr. Pender and others, and actively promoted a false narrative that painted Firefighter Alston as a paranoid employee who simply couldn't "move on" from racist comments made by a purportedly remorseful supervisor years earlier. By these errors and omissions, the Town acted in bad faith and in a manner prohibited by basic merit principles which requires, in relevant part, "*fair treatment* of . . . 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 . . .basic rights outlined in this [civil service] chapter and constitutional rights as citizens* …" When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here,

the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.

CONCLUSION

For all of the above reasons, the Town of Brookline has failed to show just cause for terminating Gerald Alston from 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)

As stated in part by the Superior Court in *Alston* v. *Civ. Serv. Comm'n & Town of Brookline*, Suff. Sup. Crt. No. 2017-1489 (2018):

> " … The question of remedy is … not up to the Commission, because the statute itself prescribes the remedy: 'the person concerned shall be returned to his position without loss of compensation or other rights.' G.L. c. 31, § 43. If the Legislature wanted the Commission to withhold decision upon 'just cause' whenever the agency was concerned about remedy, it would certainly have chosen different language …
>
> In any event, a mandatory reinstatement remedy creates, at most, a cost or an inconvenience in this case, but no real inconsistency with the law. If the Commission [finds] a lack of just cause and order[s] reinstatement to Alston's position, with pay, that would not necessarily require a return to duty in Brookline … The status of firefighter on leave with pay [is] not unfair to a Town that violates the 'just cause' and 'basic merit principles' requirements. Such a status arguably … treat[s] fairly an employee who is a victim of racial bias in violation of the civil service laws …"

Accordingly, as the Town has failed to show just cause for terminating Firefighter Alston, the Commission hereby ***allows*** Firefighter Alston's appeal under Docket No. D1-16-170, reverses the action of the Town of Brookline and orders that Firefighter Alston be returned to his position without loss of compensation or other rights.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 14, 2019.

Notice to:

Brooks A. Ames, Esq.
1309 Beacon Street, 3rd Floor
Brookline, MA 02446

Douglas I. Louison, Esq.
Joseph A. Padolsky, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Patricia Correa, Esq.
Office of Town Counsel
333 Washington Street
Brookline, MA 02445

* * * * * *

DAVID MONTROND

v.

CITY OF BROCKTON and the MASSACHUSETTS HUMAN RESOURCES DIVISION

G1-18-184

February 14, 2019
Paul M. Stein, Commissioner

Examination Appeal-Promotional Exam-Police Sergeant-Time in Service—In a decision by Commissioner Paul M. Stein, the appeal from a Brockton police officer challenging his disqualification from taking the sergeant's exam was dismissed because the Appellant had failed to meet the requirement that he have three years of service in the force. An unsuccessful argument was made that the time the Appellant spent in service as a school police officer for the Brockton Public Schools should be counted and that he had been wrongfully denied an earlier appointment.

DECISION ON PENDING DISPOSITIVE MOTIONS

The Appellant, David Montrond, a Police Officer with the Brockton Police Department (BPD)), acting pursuant to G.L. c.31, §2(b),[1] filed this appeal with the Civil Service Commission (Commission) against the City of Brockton (Brockton), following a determination of the Massachusetts Human Resources Division (HRD that he was not eligible to take the 2018 promotional examination for Police Sergeant. A pre-hearing conference was held at the Commission's Boston office on October 12, 2018, attended by the Appellant and Brockton. At the conference, Brockton filed a Pre-Hearing Conference Memorandum, which the Commission deemed a Motion to Dismiss and HRD made an informational submission.[2] At the Commission's request, Brockton and HRD provided additional documentation evidencing Brockton's hiring process for Police Officers from 2008 through 2018 as well as additional information regarding Officer Montrond's civil service status during that period. (*See CSC E-mails dated 10/12/2018 &11/14/2018; Brockton*

1. [See next page.]

2. [See next page.]

E-Mails dated 10/12/2018 & 10/15/2018; CSC Procedural Order dated 11/2/2018; HRD Emails dated 10/11/2018 & 11/15/2018).;

On January 2, 2019, the Commission received the "Respondent HRD's Motion for Summary Decision". Neither Brockton nor HRD requested oral argument. Officer Montrond opposed Brockton's Motion to Dismiss and requested an "official hearing" of his appeal, which I deem a request for oral argument. He submitted no written rebuttal to the substance of the Respondents' motions. (*See Procedural Order dated 11/2/2018, para.H; Appellant's E-mail dated 12/7/2018)*.

After reviewing Brockton's "Motion to Dismiss", the "Respondent HRD's Motion for Summary Disposition" and all the other submissions of the parties, I conclude that the undisputed facts in the record and well-established law demonstrate: (1) HRD correctly decided: that Officer Montrond was not eligible to take the 2018 BPD Police Sergeant's Promotional Examination because he had not "actually served" as a BPD officer for three years, which is a statutory requirement, prescribed by G.L. c.31, §59, to take such a promotional examination and (2) the Commission lacks jurisdiction, both as a matter of timeliness and on the merits, to grant Officer Montrond relief. (i.e., the right to take a make-up examination prior to completing three years of actual service with the BPD). As the parties' written submissions are sufficient and oral argument requested by Officer Montrond would not further inform the Commission on the relevant facts and the law; per Procedural Order, para. H, oral argument is not necessary.

FINDINGS OF FACT

I find the following facts are not in dispute:

1. The Appellant, David Montrond is a tenured civil service employee who was appointed to the position of permanent, full-time Police Officer with the BPD, effective August 1, 2016.

2. Officer Montrond's appointment was one of nine appointments made from civil service certification #3255, issued to Brockton by HRD on January 12, 2016, with names taken from the eligible list of candidates who took and passed the 2015 Municipal Police Officer examination.

3. Officer Montrond is a non-veteran who claims fluency in Spanish, Cape Verdean and Portuguese.

4. From August 2006 through April 2015, Officer Montrond was employed by the Brockton Public Schools as a school police officer/school resource officer.

5. The Brockton Public Schools is a separate department within the City of Brockton and is not part of the BPD. The position of School Police Officer is not a classified civil service job title.

6. Brockton is a city with a population of more than 50,000.

7. At all relevant times, the BPD was subject to the so-called "Beecher Consent Decree", providing for special treatment of minority black and Hispanic candidates ("C" candidates) over non-minority candidates ("D" candidates) for original appointment to the BPD.[3]

8. Prior to March 13, 2013, Officer Montrond had self-identified as a Black African American. On that date, he updated his civil service profile on file with HRD and, among other things, changes his ethnic status from "Black or African American" to "Choose not to identify."

9. Prior to the hiring cycle in which Officer Montrond was appointed from Certification #3255, Brockton made original appointments to the position of permanent, full-time police officers from six other certifications, copies of which were provided by Brockton, including two on which Officer Montrond's name appeared, as follows:

- Certification #280016 - 01/10/2008 - Eight Permanent Full-Time Police Officers. 2n+1 = 17, which reached the fourth "C: candidate tie group (overall positions 17-38 on list) and the sixth "D" candidate tie group (overall positions 10-18 on the list). The "C" candidates hired from Certification #280016 were the second, thirteenth and nineteenth (overall positions 2, 17 & 25 on the list, in the third "C" tie group) candidates who signed willing to accept. Mr. Montrand is listed as a minority candidate and his name appears in the fifth "C" tie group (overall position 206 on the list).

- Certification #90756 - 10/02/2009 (additional names added 10/27/2009) - Five Permanent Full-Time Police Officers. 2n+1 = 11. Original certification was Re-employment List (non-residents). Additional names were 97 "C" and "D" Brockton residents, all Veterans. Only "C" candidate hired was Veteran on Reemployment List.

- Requisition #281 - 10/04/2012 - Eleven Permanent Full-Time Officers. 2n+1 = 23. 15 "C" and 36 "D" candidates signed willing to accept appointment. Mr. Montrod's name did not appear on this Certification. The one Non-Veteran minority candidate hired from

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.31 and/or Commission rules, taking precedence.

2. Officer Montrond filed his appeal as a "bypass" appeal, naming Brockton as the Respondent. Based on the facts that emerged at the pre-hearing conference, HRD was added by the Commission as an additional Respondent. (*See Claim of Appeal; CSC Procedural Order dated November 2, 2018*)

3. The "Beecher Consent Decree" is a federal court order originally entered in 1975 in the case of *Castro* v. *Beecher*, (D. Mass.) that required certain Massachusetts cities and towns to remediate past discriminatory hiring of police and fire officers by replacing the system of hiring according to rank ordering of candidates' test score with a system of "seeding" minority candidates on eligible lists, to guarantee that, in communities such as Brockton, at least one out of every four candidates considered for appointment would be a minority. Over time, as communities reached a satisfactory level of minority hiring, the federal court released them from the obligations of the decree, but Brockton remains subject to the decree. It should also be noted that, from time to time, the decree was modified by the federal court to make adjustments designed to correct for situations that had arisen which tended to disadvantage, rather than promote, minority hiring as well as to rectify unintended consequences that unduly suppressed opportunities for non-minority candidates. For the reasons explained below, it is not necessary to this Decision to address the specific details of the original decree or the modifications made to it.

this list, who was the 6th ranked "C" candidate (out of 15) who signed willing to accept.

- Requisition #2062 - 9/06/2014 - Five Permanent Full-Time Police Officers. 2n+1 = 11. All 4 "C" candidates and all8 "D" candidates who were willing to accept were disabled veterans or veterans (including one "C" candidate and one "D" candidate deployed overseas). Non-veteran candidates were not reached.

- Requisition #2063 - 9/09/2014 - Special Certification for 2 Permanent Full-time Bilingual Police Officers proficient in Haitain Creole.

- Requisition #2064 - 9/10/2014 - Special Certification for 2 Permanent Full Time Bilingual Police Officers proficient in Cape Verdean Creole. 2n+1 = 5. Mr. Montrond was one of five candidates in the fourth tie group (overall positions 9-13 on the list) who signed willing to accept. The two candidates hired were ranked above that tie group (in 4th and 6th overall position on the list, respectively).

10. On or about July 31, 2018, Officer Montrond submitted an application to HRD to sit for the promotional examination for the title of Police Sergeant to be administered by HRD on September 15, 2018.

11. Based on the Employment Verification Form submitted by Officer Montrond, HRD determined that he would not have been employed with the BPD for three years at the date of the examination. HRD also verified with Brockton that Officer Montrond's name did not appear as one of the officers certified by the BPD Chief of Police as eligible to take the Sergeant's Examination. HRD concluded that Officer Montrond was not eligible to sit for the examination and refunded his examination fee.

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 CMR 1.01(7)(g) and 801 CMR1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail 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

Promotional examinations in the municipal police service are governed by G.L. c.31, §59, which was added to the civil service law by St.1978, c.393, and amended by St.1989, c.174. G.L. c.31, §59,¶2, provides:

> "*An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force*, except that if the number of such employees, or the number of applicants eligible for the examination is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until either four such eligible employees have applied for examination or until the examination is open to all permanent employees in lower titles in such force; *provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifty thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification. (emphasis added)*

The Massachusetts appellate courts and this Commission have construed G.L. c.31, §59,¶2 to establish a "two-prong" test for eligibility to sit for a public safety promotional examination: (1) the candidate is serving in the "next lower title" on the date of the promotional examination; and (2) the candidate has been "employed in the force" [meaning in the same police or fire department, but not necessarily in the "next lower title"] for one year prior to the date of the examination (or three years in communities over 50,000 population) after the candidate's name was first "certified" for appointment in the "next lower title." *See Weinburgh* v. *Civil Service Comm'n*, 72 Mass. App. Ct. 535, *rev.den.*, 452 Mass. 1110 (2008); *City of Lawrence* v. *Civil Service Comm'n*, 66 Mass. App. Ct. 309 (2006); *Nicholas* v. *Human Resources Div.*, 29 MCSR 358 (2016); *O'Donoghue* v. *Human Resources Div.*, 27 MCSR 485 (2014); *McNamara* v. *Human Resources Div.*, 27 MCSR 402 (2014); *Daniels* v. *Human Resources Div.*, 26 MCSR 9 (2013); *Bettencourt* v. *Massachusetts Human Resources Div.*, 24 MCSR 522 (2011); *Dickinson* v. *Human Resources Div.*, 24 MCSR 200 (2011); *Minor* v. *City of Chicopee*, 9 MCSR 1 (1966)

ANALYSIS

Officer Montrond met the first prong of the eligibility requirement for taking a promotional examination - he was serving as a BPD Police Officer in the "next lowest title" on September 15, 2018, the date of the BPD Police Sergeant's Examination. Officer Montrond did not meet the second prong - he became "employed" as a BPD Police Officer on the date he was appointed, August 1, 2016, nearly eleven months short of the three years of service on the date of the examination as required by statute (Brockton's population exceeds 50,000) to sit for that examination. Thus, HRD's decision to deny Officer Montrond's application to take the September 15, 2018 Sergeant's Examination was mandated by civil service law.

Officer Montrond makes two arguments in support of his contention that he was entitled to take the 2018 Sergeant's examination: (1) HRD should have counted his prior service as a school police officer for the Brockton Public Schools toward the three-year statutory requirement; and (2) because of the Beecher Consent Decree, he had been wrongfully denied appointment to the BPD in hiring(s) made prior to 2016 and, had he not been wrongfully denied such earlier appointment, he would have surpassed the three-year threshold by the time of the 2018 examination. Neither argument prevails.

As to the first argument, the relevant facts are beyond dispute and G.L. c.31, §59 is unambiguous - a candidate must have accrued at least three years of actual service "in the force" for which he seeks promotion. The statute, along with the appellate court precedent that have construed the statute, make clear that Officer Montrond's prior service as a Brockton School Police Officer - a non-civil service position with a different appointing authority - is

not service "in the force" within the meaning of the law. HRD is bound to apply the civil service law as written. Officer Montrond's claim to count his employment with the Brockton Public Schools was properly rejected by HRD.

As to the second argument, Chapter 310 of the Acts of 1993 does authorize the Commission to exercise limited discretion to grant equitable relief when it concludes that a person's "civil service rights" have been violated through "no fault" of his or her own. That authority, however, does not authorize the Commission to grant the relief Officer Montrond requests here.

First, the Commission's authority does not extend to overriding judicial decisions, such as the Beecher Consent Decree. If Officer Montrond believes that the Beecher Consent Decree has been applied unfairly and inequitably to prejudice his consideration for appointment under the decree, that is not a matter of civil service law, but an issue for the court that entered the decree to address. Neither HRD nor the Commission may intrude on the authority of the federal courts or order a municipality to take action that would be inconsistent with the obligations established by the federal courts as they were in effect from time to time.[4] Thus, insofar as Officer Montrond complains that he has been adversely impacted by the way the Beecher Consent Decree has been applied or enforced, the Commission is not the proper forum to address that complaint.

Second, insofar as Officer Montrond contends that he was wrongfully denied an appointment to the BPD in some earlier hiring cycle, HRD correctly asserts that such a claim is, in effect, a belated attempt to assert a "bypass" appeal years after the alleged bypass occurred. Such a belated appeal is barred by civil service law and rules, which prescribe a 60-day period within which a candidate must appeal to the Commission after notice of an "action or inaction" that resulted in an unlawful bypass, a jurisdictional matter that the Commission has strictly enforced. *See, e.g,. Lane* v. *Newburyport Police Dep't*, 28 MCSR 587 (2015), *citing Pugsley* v. *City of Boston*, 24 MCSR 544 (2011); *Gagnon* v. *Boston Fire Dep't*, 28 MCSR 179 (2015); *Costa* v. *City of Brockton*, 28 MCSR 87 (2015)

Third, the undisputed facts disprove Officer Montrond's hypothesis that he would have been hired by the BPD in an earlier hiring cycle. In fact, he was never in a position to be hired prior to his 2016 appointment, no matter how he was treated, or might have been treated, under the Beecher Consent Decree.

In the 2008 hiring (#280016), Officer Montrond was nearly 200 places below the "2n+1" range, in no position, wither as a "C" candidate (as he then was listed) or a "D" candidate. In the 2009 hiring (#90756) and 2014 regular hiring (#2062), only "C" and "D" candidates with veteran's preference were considered. As a non-veteran, Mr. Montrond would not have been reached for consideration. The same principle applies to the 2012 hiring (#281), where the lowest ranked minority candidate reached and hired was close to the top of the list, while Mr. Montrond's name did not make it on that list (of 50 names) at all. As to the two 2014 "Special" Certifications (#2063 and #2064), Mr. Montrond did not claim proficiency in Haitian Creole and was not eligible for consideration under that certification. Under the certification for proficient Cape Verdean speakers, while he was eligible and his name did appear on the list, the two selected candidates ranked ahead of him. These same facts also refute Officer Montrond's belated claim that he may have been unlawfully "bypassed" in any prior hiring cycle by a lower ranked selected candidate, which he was not.

In sum, Officer Montrond's claim to sit for a Sergeant's promotional exam without having actually served as a BPD Police Officer for at least three years is without merit. The law and facts of the case undisputedly show that he is not entitled to relief from this Commission.

CONCLUSION

Accordingly, for the reasons stated, Brockton's Motion to Dismiss and HRD's Motion for Summary Disposition are ***allowed.*** The appeal of the Appellant, David Montrond, under Docket No. B2-14-266 is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 14, 2019.

Notice to:

David Montrond
[Address redacted]

Karen A. Fischer, Esq.
City Hall - 45 School Street
Brockton, MA 02301

Melissa A. Thomson, Esq.
Labor Counsel - Human Resources Division
100 Cambridge Street - Suite 600
Boston, MA 02114

* * * * * *

4. The federal court may find that Officer Montrond's Beecher Consent Decree standing is further complicated by the fact that he changed his ethnic status in 2013.

THOMAS PILLING

v.

CITY OF TAUNTON

G1-17-152

February 14, 2019
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as Taunton Firefighter-Driving Record-Recent Arrest and c.209A Order-Bias—Although the appointment process was not flawless and lacked certain procedural safeguards such as documentation of interviews, this candidate was not unlawfully bypassed for original appointment to the Taunton Fire Department in light of his repeated driving infractions and a recent arrest with an attendant Chapter 209A order. Commissioner Paul M. Stein rejected the Appellant's claim that the Department was biased against him because his ex father-in-law was a Taunton Deputy Fire Chief.

DECISION

The Appellant, Thomas Pilling, appealed to the Civil Service Commission (Commission), pursuant to G.L. c.31, §2(b)[1], to contest his bypass by the City of Taunton (Taunton) for appointment as a Firefighter with the Taunton Fire Department (TFD). A pre-hearing conference was held on August 4, 2017 at the UMass School of Law in Dartmouth. A full hearing, which was digitally recorded[2], was held at the Temporary Taunton City Hall on November 3, 2017. Ten exhibits (Exh.1 through Exh. 10) were received in evidence at the hearing. The Commission received a Proposed Decision from the City of Taunton on January 12, 2018. The Appellant did not submit a proposed Decision.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- Thomas Pilling, Appellant
- TFD Fire Chief Timothy Bradshaw
- TFD Fire Lieutenant Michael Krockta
- TFD Fire Lieutenant Gregory Galligan
- Westfield Police Officer William Cavanaugh

Called by the Appellant:

- Thomas Pilling, 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, Thomas Pilling, is a life-long resident of Taunton, MA, graduating from Taunton High School in 2003.[3] He then trained as a golf pro, worked at New Hampshire and Florida country clubs, returned to Taunton in 2008 where he worked in his family's construction business until November 2009, when he enlisted in the U.S. Army. (*Exhs. 2 & 6; Testimony of Appellant*)

2. Mr. Pilling served on active duty with the U.S. Army for 5 years, which included two overseas deployments. He was honorably discharged at the rank of Sergeant. He has continued his military service with a unit of U.S. Army Reserve in Brockton, MA with which he currently serves. He has operated heavy motorized equipment as part of both his active duty and reserve assignment. (*Exh. 2; Testimony of Appellant*)

3. Mr. Pilling currently works part-time in his family construction business. He is studying for a Criminal Justice Associate's Degree at Quincy College. (*Testimony of Appellant*)

4. On or about January 23, 2017, Taunton received Certification #04340 issued by the Massachusetts Human Resources Division (HRD), authorizing Taunton to appoint seven (7) Permanent Full Time Firefighters from the eligible list for Firefighter established by HRD on November 4, 2016. (*Undisputed Facts [HRD Letter to the Commission dated August 15, 2017]*)

5. Mr. Pilling's name appeared on Certification #04340 tied in 11th place with another candidate. (*Undisputed Facts [HRD Letter to the Commission dated August 15, 2017]*)

6. On or about January 31, 2017, Mr. Pilling completed and returned the Candidate Information Questionnaire to the TFD along with certain other requested information. (*Exh. 2*)

7. Upon receipt of the applications, the TFD commenced a background investigation into each candidate's employment and personal history, and commissioned the Taunton Police Department to query each candidate's criminal history and driving records. While this investigation was on-going, the candidates, including Mr. Pilling, were interviewed by a five-member TFD panel, headed by Chief Bradshaw. (*Testimony of Chief Bradshaw & Lt. Gilligan*)

8. The TFD interviews were semi-structured, with substantially the same questions asked of each candidate, but the interview performances were not scored or recorded. Following all of the inter-

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 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 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.

3. Mr. Pilling struggled academically in high school and, eventually, took make-up courses to earn the credits needed to graduate, a situation he attributed to caretaking for a then ailing parent. (*Exh. 6; Testimony of Appellant*)

views, the panel discussed the candidates and arrived at a consensus as to which candidates would be referred to the nine-member Taunton Municipal Council (Council), the TFD's Appointing Authority. Ten of the fifteen candidates interviewed, including Mr. Pilling, were referred for further consideration. (*Exhs. 1, 8 & 10; Testimony of Chief Bradshaw*)

9. The Council's three-member Committee on Fires and Wires interviewed the ten candidates over two different dates in March 2017 and, subject to any "additional references to be completed", voted unanimously to forward the names of six candidates to the full Council and to bypass three candidates. An initial motion to bypass Mr. Pilling failed to receive a second, and a motion to forward his name then passed by a vote of 2-1. (*Exhs. 8 &10*)

10. After all "the references were finished up", Chief Bradshaw recommended six candidates for appointment, two ranked above Mr. Pilling and four ranked below him on Certification #04340. On April 4, 2017, the Council voted 8-0 to offer conditional offers of employment to the six candidates. (*Exh. 10; Testimony of Chief Bradshaw*)

11. By letter dated June 12, 2017, Mr. Pilling was informed that he had not been selected "due to the superior application and superior qualifications" of other candidates "as well as the deficiencies in your background and application" including a "subpar performance on the initial employment interview" and "your repeated motor vehicle infractions". (*Exh. 1*)

12. In particular, the bypass letter sent to Mr. Pilling cited (a) six motor vehicle infractions over the period from 2002 through 2016, including an OUI and multiple suspensions for driving with a suspended license and/or without insurance; (b) deficiencies in the application, including failure to timely submit his high school diploma and providing references that did not check out positively; (c) a 2015 arrest for domestic violence; and (d) a 911 call made to his Taunton residence in April 2016 where his then girlfriend had just overdosed on heroin. (*Exh. 1; Testimony of Chief Bradshaw*)

13. Mr. Pilling's criminal record and driving infractions noted in Taunton's bypass letter involved the following specific incidents:

- 2002 - Cited for operating an unregistered, uninsured vehicle with a suspended license. Defaulted for not appearing in response to criminal summons. Mr. Pilling said it was his mother's car. Eventually, charges were dismissed at the request of the Commonwealth.
- 2002 - Surchargeable accident
- 2004 - Arrested for DWI in California. Disposition of criminal case was not provided but license was suspended and, later, revoked.
- 2007 - Arrested for operating while license was suspended. Admitted he told arresting officer he only had a Massachusetts ID card and, then, that he left his license at home. Case dismissed at request of the Commonwealth.
- 2008 - License reinstated.

[Military Service - 2009 to 2015]

- April 2015 - Arrested for domestic assault and battery. Physical altercation in parking lot and while driving with girlfriend (Ms. S.) resulting in minor injuries to both, his windshield smashed by Ms. S, her side-view mirror ripped off by him. Admitted to putting his hand over her mouth at one point to prevent her from screaming. She eventually exited vehicle and walked away. She was later located by responding police, who were called by neighbors. Case dismissed when Ms. S. pleaded the Fifth and would not testify. Mr. Pilling said he played down Ms. S.'s violent behavior because he thought she was the one that was going to be arrested and wanted to "protect her" from going to jail."[4]
- July 2015 - Ms. S. obtains ten-day Chapter 209A Abuse Prevention Order claiming fear of him from April altercation and possibility that he had "access to weapons/was recently in military". Summons served on Mr. Pilling by Taunton Police (return in evidence) but he denied ever knowing about the Order. Did not appear at return date, case dismissed at Ms. S.'s request.[5]
- 2016 - Cited for failure to yield right-of-way and operating unregistered and uninsured motor vehicle. Mr. Pilling claimed he had accelerated through intersection ahead of speeding (he said 110 MPH) police cruiser who was in pursuit of another vehicle but broke off pursuit and cited him. Warrant issued for default in criminal case and license suspended. Mr. Pilling stated he was unaware of suspension until he was informed by TFD in application. License reinstated after hearing in February 2017.

(*Exhs.2, 3 & 9: Testimony of Appellant & Officer Cavanaugh*)

14. On April 16, 2016, the TFD responded to a 911 call placed by Mr. Pilling (from a residence where Mr. Pilling stated on his TFD application he had then lived). He had returned from a military drill to find the woman he was then dating unconscious from a drug overdose. While waiting for the ambulance, Mr. Pilling performed CPR and resuscitated the woman. She was conscious when the ambulance arrived and required no medical aid but was taken to the hospital. Mr. Pilling was aware that the woman was "in recovery" but denied any knowledge that she continued to abuse drugs. He ended the dating relationship immediately after she admitted to using heroin. (*Exh. 5; Testimony of Appellant*)

15. The problematic issues with Mr. Pilling's references included a personal reference whom he claimed was a veteran Boston Police Detective, but who turned out to be a rookie Quincy Police Officer, and the inability to find anyone at the Army Reserve Unit who could confirm that he worked there. Mr. Pilling explained that the police officer belonged to his Army Reserve Unit and he must have been misinformed as to where the officer worked. As to the lack of confirmation about his Army Reserve Duty, Mr.

4. On his TFD application, Mr. Pilling described the disposition as follows: "Found innocent after story was heard." (*Exh. 2)*

5. Taunton subpoenaed Ms. S. to the Commission hearing but she did not appear. I infer that the Massachusetts address at which the subpoena was left was not her current residence and that, more than likely, she lived in Connecticut, where the evidence indicated her vehicle was registered. (*Exhs. 3 & 7; Testimony of Appellant*). I draw no adverse inference against either party for her failure to testify at the Commission hearing.

Pilling explained that more than one Reserve Unit was stationed at the Armory and the TFD investigator evidently talked to soldiers in the wrong unit. (*Exhs. 1 & 2; Testimony of Appellant, Lieutenants Galligan & Krockta*)

16. Chief Bradshaw did not consider the delay in providing a high school transcript, alone, a disqualifier. He also could have overlooked the 2002 driving history and, even, the 2004 OUI, if they had been the only infractions on his record. Given the totality of that record, however, including an infraction as recent as 2016 (and, apparently, driving without a license from May 2016 to February 2017), Chief Bradshaw believed that, given the duties required of a TFD firefighter, it was not in the best interest of the TFD or the citizens of Taunton to hire a candidate with a pattern of operating unregistered, insured vehicles and multiple license suspensions. He could not, in good conscience, recommend such a candidate over other well-qualified candidates who had no such blemishes on their records. The four candidates who bypassed Mr. Pillings had "impeccable" records and three worked as EMTs. (*Exh. 1; Testimony of Chief Bradshaw*)[6]

17. Mr. Pilling alluded to what he believed was bias against him, which he attributed to the fact that, in 2009, he married the daughter of one of the TFD's Deputy Fire Chiefs, against the father's consent, a marriage that ended in divorce in 2015. He also heard from "anonymous" sources that he was going to be hired but something derailed him. (*Testimony of Appellant*)

18. The TFD vigorously denied any bias against Mr. Pilling due to his prior marriage. The former father-in-law took no part in the hiring process. I heard no evidence to suggest, let alone credibly prove, that animosity toward Mr. Pilling by the former father-in-law contributed to Chief Bradshaw's hiring and bypass recommendations or entered to the Council's decision not to appoint Mr. Pilling. (*Testimony of Appellant, Chief Bradshaw & Lt. Galligan*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c.31, §1.

The mechanism to ensure adherence to basic merit principles in hiring and promotion is the provision 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, which lists are then used by appointing authorities to make civil service appointments based on a "certification" of candidates from the applicable eligible list. G.L. c. 31, §§6 through 11, 16 through 27.

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)

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, by a preponderance of evidence, the appointing authority made an "impartial and reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and that the was "reasonable justification" for the bypass. *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), *citing Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). *See also Mayor of Revere* v. *Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons must be "more probably than not sound and sufficient") The Commission's primary concern is to ensure that the action comports with "[b]asic merit principles." G.L. c. 31, §1. *See Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 188 (2010); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997); *MacHenry* v. *Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den.*, 423 Mass.1106 (1996).

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 neutral-*

6. Chief Bradshaw has never hired any candidate with the pattern of driving infractions on Mr. Pillings record. (*Testimony of Chief Brandshaw*)

ly applied public policy, then the occasion is appropriate for intervention by the commission." *See 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*.

ANALYSIS

Applying the applicable principles of law to the facts of this appeal, the preponderance of the evidence established that Taunton was reasonably justified to bypass Mr. Pilling for appointment to the position of a TFD Firefighter. Although some of the reasons stated for bypassing him were not based on the required reasonably thorough review and are not sufficient reasons under basic merit principles to disqualify him, the core reasons that Chief Bradshaw recommended against hiring Mr. Pilling, and the Council's decision that he should not be appointed, meet the standards of reasonable justification for that decision.

First, TFD's interview process did not meet the standards of basic merit principles. 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). *See also Strano* v. *Town of Mansfield*, 30 MCSR 419 (2017) and cases cited (appeal pending); *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); Absent documented evidence that the interview process was reasonably fair and objective and that the conclusions about candidates not overly subjective or arbitrary, the TFD's preference for one candidate over another could not justify this bypass on the basis of interview performance.

Second, certain other reasons stated in Taunton's bypass letter were not supported with evidence that demonstrated they had been made after a reasonably thorough review. Although some of Mr. Pilling's early employment as a golf pro were unverifiable, Taunton was less than diligent in its efforts to inquire about his five years of military service, which formed an important part of his more recent employment history. Similarly, although the confusion about Mr. Pilling's Army Reserve Unit is understandable, TFD could have resolved the mix-up with simple follow-up with Mr. Pilling. Further inquiry would also have been able to confirm Mr. Pilling's experience with operating heavy-duty motor vehicle equipment, a factor that was used to distinguish him from other candidates that had such experience.

Third, despite the above deficiencies in the process, the remaining factors that Taunton cited as reasons for the bypass do justify the City's decision. Mr. Pilling's driving infractions in 2002, including his one and only surchargeable accident, nearly 15 years before his TFD application, would not have been held against him, but his continued behavior evidences a pattern of disregard for the public safety in operating unregistered and uninsured motor vehicles, as well as driving while his license to operate was suspended. Mr. Pilling's evasive explanation to one officer about why his license was not in his possession, and the history of long periods of driving without a license (whether by negligence or knowingly failing to address his multiple default suspensions), reinforces this disregard.[7] Similarly, Mr. Pilling's recent brushes with the law, in particular, his 2015 arrest, the related c.209A order, and his operating for months without a valid driver's license as recently as February 2017 (during the application process), provides Taunton with reasonable justification to believe that he posed an unacceptable present risk to serve as a TFD Firefighter. Mr. Pilling pointed to mitigating circumstances involved in all of these incidents. The issue for the Commission, however, is not whether Mr. Pilling was guilty of specific misconduct; Taunton has reasonable discretion to decide whether to take the risk of hiring him so long as that decision is based on a reasonably thorough and impartial investigation of the relevant facts. *See, e.g*., *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010) I am satisfied that the police records and the credible testimony of Officer Cavanaugh, who responded to the 2014 assault and battery scene, meet that required standard for reasonable justification.

Fourth, I have considered Mr. Pilling's belief that the animosity between him and his former father-in-law, a TFD Deputy Chief, was a factor in the Council's decision to appoint six, rather than the initially expected seven candidates, and to reject him, the seventh potential hire. Mr. Pilling offered no specific evidence, however, other than from "anonymous" sources, to establish that such animus, if any, played a role in the ultimate decision to bypass him. I find no basis in the record to support the inference of any undue influence or bias in the hiring process.

In sum, Mr. Pilling's interview performance, delay in providing his high school diploma and the snafu regarding his employment and personal references, do not provide reasonable justification to bypass him; Taunton's reasonable perception of his pattern of other irresponsible and unlawful behavior presented reasonable doubt as to his present fitness to serve as a TFD Firefighter, however, and does provide such justification. To be sure, Mr. Pilling's military record and other positive attributes are clear and, perhaps,

7. I do not credit Mr. Pilling's plea that his failure to rectify his defaults was due to his dire financial circumstances at the time and, therefore should mitigate his behavior, when it persisted for as extended a period of time as the facts here showed.

over time, he will be able to overcome the negative perception that prevented his current appointment.

CONCLUSION

In sum, for the reasons stated, this appeal of the Appellant, Thomas Pilling, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 14, 2019.

Notice to:

Thomas Pilling
[Address redacted]

Mark S. Gould, Esq.
Office of the City Solicitor
Temporary Taunton City Hall
141 Oak Street
Taunton, MA 02780

Melissa A. Thomson, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

* * * * * *

THOMAS V. RALPH

v.

HUMAN RESOURCES DIVISION

B2-17-072 (Dracut Police Chief Exam)
B2-17-073 (Oxford Police Chief Exam)
B2-17-238 (Webster Police Lieutenant Exam)
B2-18-220 (Webster Police Chief Exam)

February 14, 2019
Paul M. Stein, Commissioner

Examination Appeal-Police Promotional Exams-Time in Service for Preference Under Section 59-Campus Police Officer-Auxiliary Police Officer-Special Police Officer-E&E Credit-Acting Auxiliary Lieutenant—In a consolidated appeal by four police officers from three different municipalities but presenting the same issues of law, Commissioner Paul M. Stein ruled that time spent as auxiliary and special police officers could not count toward the two-point experience credit on promotional exams for 25 years of service because such "employment" was not in the regular police force. Following statutory changes in 2014, time spent as a campus police officer at a public university may qualify for the credit but this did not help one of the Appellants here because he worked as such in 1993 when the duties of campus officers were not as clearly described as including all the duties of a regular police officer.

DECISION ON RESPONDENT'S MOTIONS TO DISMISS

The Appellant, Thomas V. Ralph, currently a Police Sergeant with the Webster Police Department (WPD), appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §24, from the denial by the Massachusetts Human Resources Division (HRD) of his request for two additional training and experience points (for 25 years of service pursuant to G.L. c. 31, §59) when scoring four civil service promotional examinations, specifically, the February 2017 examination for Dracut Police Chief (CSC No. B2-17-72); the February/March 2017 examination for Oxford Police Chief (CSC No.B2-17-073); the September 2017 examination for Webster Police Lieutenant (CSC No.B2-17-238); and the September 2018 examination for Webster Police Chief (CSC No. B2-18-220). All four appeals present the same issues of law.[1] They were consolidated for decision on Motions to Dismiss filed by HRD in each appeal, which the Appellant opposed. Some appeals may now be moot, but, the issue is clearly a continuing one that warrants a decision on the merits. For the reasons set forth below, the Commission concludes that the Appellant's claim to a Section 59 statutory preference is not well-founded and, as properly calculated, the Appellant's total years of service do not qualify for the Section 59 preference. Accordingly, HRD's Motions to Dismiss are allowed.

1. The Appellant raised one additional issue in the Webster Lieutenant Appeal (B2-17-238)l, claiming that HRD also erroneously denied "E&E" credit for his time as "Acting Lieutenant" with the Dedham Auxiliary Police Department.

FINDINGS OF FACT

Giving appropriate weight to the evidence and argument of counsel submitted and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Thomas V. Ralph, is a tenured police officer with the Webster Police Department (WPD), who currently holds the rank of permanent Police Sergeant. He began employment with the WPD in 1995 as a permanent intermittent police officer and became a regular, full-time police officer in 1996. He was promoted to Sergeant in 1999.

2. Sgt. Ralph's employment history prior to service with the WPD includes, in relevant part:

- March 1988 through June 1996 - Part-time Auxiliary Police Officer (16-20 hours/week) employed by the Town of Dedham Auxiliary Police Department
- July 1990 through July 1996 - Part-time Auxiliary (8 hours/week) and Special Police Officer (unspecified hours) employed by the Medfield Police Department
- May 1989 through February 1992 - Part-time Police Officer (16 or more hours/week) employed by the Suffolk University Police Department
- March 1992 through March 1993 - Full-time Campus Police Officer employed by the University of Massachusetts (Lowell)
- September 1994 through March 1996 - Full-time Police Officer (40 hours or more hours/week) employed by the Suffolk University Police Department

3. Sgt. Ralph has taken and passed these four civil service promotional examinations:

- March 10 & 11, 2017 - Dracut Police Chief Assessment Center
- February 28 & March 1, 2017 - Oxford Police Chief Assessment Center
- September 13, 2017 - Webster Police Lieutenant Promotional Examination
- September 21, 2018 - Webster Police Chief Assessment Center

4. For each examination, Sgt. Ralph duly completed an HRD Employment Verification Form listing his work experience, and claiming the experience credits he thought should be added to his test score, pursuant to civil service law and rules. Among these credits, Sgt. Ralph claimed a "25-Year Promotional Preference", based on his contention that he had accrued the 25 years of service that would entitle him to that preference, pursuant to Mass. G.L. c. 31, §59.

5. G.L. c. 31, §59, ¶5, added by St.1978, c. 393, §11, provides, in relevant part:

> ". . . 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 equal to that provided to veterans . . . ." (*emphasis added*)

6. The HRD Employment Verification Form states, in relevant part:

> **Applicants who are claiming the 25-Year Promotional Preference**: This form will serve as the primary source of verification and computation of an applicant's eligibility for this preference, and the [exam date] will be the computation cut-off date. Time worked as a Permanent Reserve/Intermittent Police Officer or as a Temporary Police Officer after certification may be applied toward one's eligibility for this preference."

7. Sgt. Ralph's claim to the statutory 25-Year Promotional Preference acknowledged that his service with the WPD, dating from his employment on December 12, 1995 as a Permanent Intermittent Police Officer on December 12, 1995, alone, fell short of the twenty-five year mark. He asserted, however, that the following additional employment put him over that threshold: (1) nine years (1988-1996) of part-time service with the Dedham Auxiliary Police Department; plus (2) six years (1990-1996) of part-time employment as an Auxiliary and Special Police Officer with the Medfield Police Department; plus (3) thirteen months (1992-1993) of full time employment as a Campus Police Officer with the University of Massachusetts Lowell Campus.

8. Sgt. Ralph supported his claim with documentation that included:

- Verification by the Town Administrator of employment with the WPD.
- A letter signed from an Administrative Assistant in the Human Resources Department, University of Lowell [sic], attesting to thirteen months' employment as a "full time Campus Police Officer" at UMass Lowell.
- A letter from the Chief of Police of the Town of Medfield attesting to appointment "as an Auxiliary Police Officer and a Special Police Officer".
- A letter dated February 1, 2017 from the Director of the Dedham Auxiliary Police Department attesting to six years as a "member of the Dedham Auxiliary Police . . . assisting the Regular Police Officers with traffic and crowd control at town events . . . traffic duties at church gatherings . . . weekend patrol duties of town buildings and property, when requested by the Regular Police" and attending "regular weekly meetings of the unit".

9. HRD denied Sgt. Ralph's claims for a Section 59 preference on the grounds that his employment at UMass Lowell, Dedham and Medfield, did not qualify as creditable years of service within the meaning of Section 59. These appeals duly ensued.

10. In response to HRD's Motions to Dismiss, Sgt. Ralph submitted additional documentation which included:

- A February 5, 2004 letter from the Chief of Police of the Town of Dedham attesting that Sgt. Ralph "served as a member of the Dedham Auxiliary Police Department" from November 1988 to June 1996.
- An excerpt from the proposed FY 2017 Budget for the Dedham Police Department, which indicates that, among the "significant changes requested for FY17" was "to add two new Auxiliary Officers, Current Auxiliary has four officers." The budget requests also contains a chart that indicates the number of FTE's (Full Time Equivalent Employees) would remain at 63, with a reduction of one FTE "Patrol Officer", no

changes in the other sworn officer ranks, and an increase of one FTE "Civilian" employee.

- A 1992 Dedham Auxiliary Police ID Card, signed by the Dedham Police Chief.
- A September 28, 2012 letter from the Director of the Dedham Auxiliary Police Department attesting that he was "appointed as a Patrolman of the Dedham Auxiliary in November 1988 . . . a Sergeant in August 1992, and Acting Lieutenant in January 1994 . . . [and] in July 1995 . . . returned to his rank of Sergeant."
- A 10/11/2015 Notice from HRD stating, among other things, that, in connection with the May 2005 promotional examination for WPD Police Chief, he had been awarded E&E credit for 150 hours of service in the Dedham Auxiliary Police Department and 300 hours as a Special Police Officer at Medfield Police Department, which, in the aggregate, was pro-rated to 2 months of full-time equivalent service in "Category 8".
- A November 2, 2012 letter from HRD on appeal of his E&E score, stating that his claim submitted for "Police Lieutenant time in Dedham" had been miscalculated and was corrected "resulting in two months of credit being added to your score."

11. The Town of Dedham and the Town of Medfield are "civil service communities" whose appointments to positions as sworn full-time, permanent, intermittent, reserve, temporary and provisional officers in those town's Police Departments are made pursuant to civil service law. (*Administrative Notice [https://www.mass.gov/service-details/civil-service-police-departments]*)

12. The positions of Auxiliary Police Officer and Special Police Officer are not classified as civil service job titles classified within the Massachusetts MuniClass Manual promulgated by HRD or other classification plans approved by HRD for the Towns of Dedham and Medfield. (*Administrative Notice [MuniClass Manual, pp.117 through 125]*)

ANALYSIS

HRD is vested with broad discretionary authority to prescribe the rules for enhancement of the overall test scores of candidates who take and pass a civil service examination to account for a candidate's particular level of education, experience and training (so-called "E&E" credit), including the type and weight given as credit for such training and experience. G.L. c. 31, §3, §5 & §22. *See, e.g., Nicholas* v. *Human Resources Div.*, 29 MCSR 358 (2016); *Mangino* v. *Human Resources Div.*, 27 MCSR 34 (2014). Pursuant to this authority, HRD has prescribed:

> "[T]he administrator [HRD] shall add two points to the general average mark obtained by any veteran. . . . A veteran who has also obtained twenty-five years of service shall not receive an additional two points . . . ." Personal Administration Rules, PAR.14(2).

The two point preference established by PAR.14(2) is incorporated by reference into G.L. c. 31, §59, ¶5, but entitlement to the preference is a matter of law. The statute must be construed to effect the legislature's intent, as disclosed by its ordinary and plain meaning and with substantial deference to HRD (and this Commission) to resolve ambiguities. *E.g., ENGIE Gas & LNG LLC* v. *Dep't of Public Utilities*, 475 Mass. 191,197-98 (2016); *Goldberg* v. *Board of Health*, 444 Mass. 627, 632-35 (2005); *Commercial Wharf East Condo. Ass'n,* v. *Dep't of Environmental. Protection*, 93 Mass. App. Ct. 425, 433, *rev. den*. 480 Mass. 1104 (2018).

HRD denied Sgt. Ralph the two-point 25-Year Promotional Preference based on the language in Section 59 that allows "a member of a regular police force . . . who has served as such for twenty-five years" to claim the preference, which HRD interprets to mean that the legislature intended the preference to apply only to "regular" police officers who "served *as* such" for twenty five years, i.e. who served *as* a regular police officer for at least twenty-five years. Sgt. Ralph reads the statute to mean that service as any "member" *of* a "regular police force" is covered and HRD cannot limit credit to "members" employed as "regular police officers".

No Massachusetts appellate decisions have construed the statutory 25-Year Promotional Preference. The Commission has decided that Section 59 creditable service must be with a police or fire force in the Commonwealth. Although service outside Massachusetts could qualify for certain discretionary E&E credits established by HRD (G.L. c. 31, §22), the legislative intent of the Section 59 statutory preference was meant to reward public safety officers for longevity in public service to citizens within Commonwealth. *See Golner* v. *Human Resources Div.*, 28 MCSR 388 (2015); *Cataldo* v. *Human Resources Div.*, 23 MCSR 617 (2010).

The Commission also has decided that creditable service in a "regular police force" is not limited to the "regular police force" in which the promotional candidate then "served as such".[2] Thus, prior service with another regular police force, time served in any civil service position (i.e., reserve, intermittent or temporary police officer appointments to a regular police force), as well time served in an equivalent non-civil service position in the regular police force of a municipality that had opted out of the civil service system may also be included. *See DeFrancesco* v. *Human Resources Div.*, 21 MCSR 662 (2008), *aff'd sub nom*, *DeFrancesco* v. *Civil Service Comm'n,* C.A. 2009-00392 (Middlesex Sup. 2009); *Neville* v. *Town of Wilmington,* 18 MCSR 188 (2005); *Lopes* v. *Human Resources Division,* 13 MCSR 49 (2000).[3]

2. The language in Section 59 - "a member of a regular police or fire force who has served as such for twenty-five years . . . ." - could have been construed to limit the preference to candidates who accrued their 25 years as a regular police officer entirely for "such force" with which they then served and sought promotion, but the Commission's decisions eschewed that literal and narrow reading because it would be inconsistent with the perceived, logical legislative intent to reward the character and extraordinary experience of police officers who chose to embark on a full-time career of police service within the Commonwealth and dedicated themselves to such public service for twenty-five years, and was not necessarily focused on longevity with any particular Massachusetts community.

3. The Commission ruled in *Neville* v. *Town of Wilmington*, 18 MCSR 188 (2005), that a regular police officer could count time toward the Section 59 preference for prior full-time appointments as a temporary and permanent intermittent officer. The procedures for appointing reserve and intermittent police officers, many of whom work part time, are civil service appointments made pursuant to G.L. c. 31, §58, a statute that consistently distinguishes the "reserve or intermittent force" from the "regular force". Thus, this Commissioner questions whether service as a reserve or intermittent officer is truly equivalent service to time as a regular, full-time officer for purposes of the Section 59 preference but it is not necessary to this Decision to revisit *Neville* here.

Finally, the Commission concluded that a police force staffed by "special state police officers" appointed by the Colonel of the Massachusetts State Police (e.g., police forces of most private colleges, universities and hospitals) are not "regular police forces" within the meaning of Section 59. *See DeFrancesco* v. *Human Resources Div.*, 21 MCSR 662 (2008), *aff'd sub nom, DeFrancesco* v. *Civil Service Comm'n*, C.A. 2009-00392 (Middlesex Sup. 2009)[4]

The questions of statutory interpretation now posed to the Commission are: (1) does service as a Massachusetts "Auxiliary" Police Officer or (2) "Special" Police Officer, count as service with a municipality's "regular police force" within the meaning of Section 59; and (3) does Sgt. Ralph's employment as a UMass campus police officer in 1993-1994 count as service with a "regular police force" within the meaning of Section 59?

General Considerations

HRD's premise - the 25-Year Promotional Preference applies to "regular" officers who have accrued 25 years of service as "regular" officers - comports more logically to the legislative intent in enacting G.L. c. 31, §59 than does Sgt. Ralph's alternative interpretation - time served by anyone considered a "member" of a "regular police force" counts toward the 25 years of service.

First, the 25-Year Promotional Preference must be read in context with all of Section 59, as well as in harmony with Civil Service Law as a whole. The preference is triggered only when a current full-time "member" serving as a "regular" officer in a civil service police force seeks a full-time promotion pursuant to Section 59 to a superior officer's position in that force. Section 59 presumes that only "full-time members of the regular force in the next lower title" will take such a promotional examination. G.L. c. 31, §59,¶2 through ¶5[5] Thus, the legislature's chosen phrase "served as such" logically means to refer back to a candidate's time spent "as" a full-time, sworn member of a "regular police force" in which the member served and would serve if promoted pursuant to Section 59.

Second, Sgt. Ralph's construction would read the statutory language "served as such" to mean served as "members", not just the regular, full-time members of force. This interpretation would mean including not just auxiliary and "special" officers at issue here, but also other department "members" such as police cadets, civilian dispatchers and clerical staff, an illogical result that the legislature obviously cannot have intended when it enacted Section 59. *See generally*, *Commonwealth* v. *Wade*, 475 Mass. 54, 60 (2016), *citing Sullivan* v. *Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001).

Third, Sgt. Ralph's approach creates another anomaly, namely, during calendar years 1988 to 1996, inclusive, he purportedly accrued more than eight years of creditable time toward the 25-Year Promotional Preference for his work for the Dedham Auxiliary Police (16-20 hours per week) and the Medfield Auxiliary Police (8 hours per week), plus six years of creditable time for his unspecified number of hours as a Medfield Special Police Officer during this same period, plus thirteen months of credible time for his full-time employment during a portion of that period as a UMass Lowell Campus Police Officer.[6] The legislature cannot have intended to enable a scheme that permitted simultaneous accrual of over 15 years of credible 25-Year Promotional Preference service within a period of just eight chronological calendar years. Moreover, such double and triple counting of overlapping experience is problematic as a factual matter, especially without any documented support for the unusually large number of overlapping hours purportedly worked at various points during the period in question.

In sum, construing the phrase "served as such" as relating back to the service of the candidate as a sworn full-time member of a regular police force gives the practicable and logical meaning to the phrase that the legislature intended, providing a preference to those seasoned regular career officers who seek advancement to a higher rank in the civil service police and fire service.

Auxiliary Police

The term "Auxiliary Police" stems from the Civil Defense Act of 1950, St. 1950, c. 639, which established the Massachusetts Civil Defense Agency (CDA) to coordinate local civil defense activities with the newly created Federal Civil Defense Administration enacted by the Federal Civil Defense Act, P.L.920, 81st Cong., 2d Sess. (1950). The law was meant to expire after two years, evidently conceived to address a temporary, passing situation (the Soviet Union recently had tested its first atomic bomb in late 1949), but that sunset was extended, eventually the law became permanent and its administration now resides at the local level with the Office of Emergency Preparedness of the Massachusetts Emergency Management Agency (MEMA) and with the Federal Emergency Management Agency (FEMA) at the federal level. *See Director of CDA* v. *Civil Service Comm'n*, 373 Mass. 401 (1977) (discussing history of CDA and application of civil service law to it). *See also*, Civil Defense and Homeland Security: A Short History of Nat'l Preparedness Efforts (Dep't Homeland Security,

4. As noted, exclusion of service as "special state police officer" or as a police or fire officer outside of Massachusetts for purposes of statutory construction of Section 59 does not preclude HRD from allowing "E&E" credits for such service under its broad discretionary authority under G.L. c. 31, §5 & §22 over civil service examination design and scoring. *See, e.g., Verderico* v. *Human Resources Div.*, 28 MCSR 229 (2015) (discussing the distinction between Section 59 and HRD's Section 22 authority over examinations)

5. In the unlikely event that less than 4 regular officers in the next lower title sign up, the department may offer the exam to "regular" members in any lower title, and, if there are still less than four interested officers, may elect to open the exam to "reserve, intermittent or call force" officers, who must produce payroll records that prove their part-time service is equivalent to the required full time experience (1 to 3 years) needed to be eligible for promotion. G.L. c. 31, §59, ¶3

6. Sgt. Ralph also worked during this same time for Suffolk University part-time from 1989 to 1992 (16 or more hours/week) and full time from 1994 to 1996 (40 or more hours per week) but, pursuant to the Commission's *DeFranciso* decision, he correctly did not claim creditable time for that employment.

2006), https://training.fema.gov/hiedu/docs/dhs%20civil%20defense-hs%20-%20short %20 history.pdf

Section 11 of the Civil Defense Act, not codified in the General Laws, provides, in part:

> **§ 11. Auxiliary Firemen and Police.**
>
> (a) *The mayor and city council in cities and the selectmen in towns, or such other persons or bodies as are authorized by law . . . may appoint, train and equip volunteer, unpaid auxiliary firemen and auxiliary police* and may establish and equip such other volunteer, unpaid public protection units as may be approved by [MEMA] . . . . Coats . . . worn . . . by auxiliary firemen shall bear on the back the letters C.D. five inches in height and helmet . . . shall be in yellow. Every such fireman, unless wearing a coat . . . and helmet issued as aforesaid, shall, while on duty as such, wear an arm band bearing the letters C.D. *Chapters thirty-one, thirty-two and one hundred fifty-two of the General Laws shall not apply to persons appointed hereunder. Coats, shirts and other garments to be worn as outer clothing by auxiliary police officers shall bear a shoulder patch with the words "Auxiliary Police" in letters not less than one inch in height.*
>
> (b) Cities and towns may by ordinance or by-law, or by vote . . . authorize their respective police departments to go to aid another city of town at the request of said city or town in the suppression of riots or other forms of violence therein, and, while . . . extending such aid, the members of such departments shall have the same powers, duties, immunities and privileges as if performing the same within their respective cities or towns. . . .
>
> (c) The head of the fire or police department of any city, town or district of the Commonwealth shall, *after the issuing of any proclamation provided for in this act*, order such portion of his department . . . for service in any part of the commonwealth where the governor may deem such service necessary for the protection of life and property. When on such service, police officers and firemen shall have the same powers, duties, immunities and privileges as if they were performing their duties within their respective cities, towns or districts. . . . *Persons appointed to an auxiliary police force in a city of town shall exercise or perform such of the powers or duties of police officers as may be prescribed by the appointing authority including but not limited to replacing and performing the duties of regular personnel who may be actually engaged in the direct control or suppression of riots or other civil disturbance, and no civil defense personnel shall be so utilized in any such direct riot control activities; provided, that said powers or duties shall not be exercised or performed by them except. . . to meet a situation which . . . cannot be adequately handled by the regular police force and by the reserve police force . . . Auxiliary police in towns, but not in cities, may . . . exercise powers conferred by section ten*[7] *of this act upon members of regular, special or reserve police forces of said towns except as provided above.*
>
> (d) *Auxiliary police shall not be sent to another city or town pursuant to the provisions of paragraphs (b) or (c) of this section or any other provisions of law, except upon order of the head of the police force* of the city or town in which such auxiliary police were appointed; provided, that *auxiliary police shall not be so dispatched . . . unless they are authorized by the appointing authority to exercise or perform to the full powers or duties of police officers . . . except that auxiliary police appointed in a town shall not while performing their duties in a city, exercise the powers conferred by section ten in this act upon members of regular, special or reserve police forces of said town. When on such service, auxiliary police shall have the same powers, duties, immunities and privileges, except as provided above, as if they were performing their duties within their respective cities and towns.*

St. 1950, c. 679, as amended, as printed at https://www.mass.gov/lists/emergency-preparedness-laws-and-regulations (*emphasis added*)

The general laws do not mention the appointment or describe the duties of Auxiliary Police. *See* G.L. c. 41, §96 through §99.[8] Regular police officers appointed under G.L. c. 31, §59 and reserve and intermittent police officers appointed under G.L. c. 31, §58 are both positions governed by the civil service law and rules. No equivalent position to an Auxiliary Police Officer exists under civil service law. *See* HRD MuniClass Manual, pp.117-125 (Civil Defense, Fire Alarm & Police Signal Management and Police Series). I found no source that identifies how many municipalities continue to support an Auxiliary Police force. For most of those that still exist, the duties vary across municipalities; some have migrated from the statutory mandate to be used only in declared civil defense emergencies; they all, however, remain volunteer forces. *See,e.g.*, https://www.cambridgema.gov/cpd/policeunits/officeofthecommissioner/auxiliarypolice (traffic and crowd control at Cambridge city events, weekend patrols as needed); https://www.city.waltham.ma.us/police-department/pages/auxiliary-police (non-sworn, unarmed, volunteers who mainly patrol Waltham school grounds and parks); https://www.framinghamma.gov/790/Auxiliary-Police (volunteers provide unpaid "community service"); https://www.lawpd.com/ 410/Auxiliary-Police (volunteers "assist and augment" Lawrence sworn force, monitor municipal buildings, church and local events, bike, foot and cruiser patrols); https://wpd.org/divisions/ auxiliary-police (academy and firearms trained volunteers assist Wilmington police in emergencies, local events and evening school patrol); https://www.natickma.gov/196/Auxiliary-Police (traffic control at local Natick events, bike patrol, weekend school property monitoring, emergency disaster shelter security); https://www.newtonauxpolice.com ("observe, support and assist" full-time Newton police with disasters, event traffic and crowd control [e.g., Boston Marathon]); http://www.belmontauxpd.org/ (reserve/academy trained volunteers assist Belmont police with patrol, events and disasters)

I could not locate any published information about the specific duties of Dedham Auxiliary Police or the Medfield Auxiliary Police and the parties provided none. I examined the documents submitted by Sgt. Ralph concerning the Dedham Police Auxiliary which

7. Section 10 authorizes "regular, special and reserve members of the police and fire forces of the commonwealth or of its political subdivisions, and members of the state guard and the armed forces of the United States, while in uniform" to "enter upon private property for the purpose of enforcing blackout or air-raid precaution rules . . ."

8. The only mention in the General Laws of duties of Auxiliary Police is a statute prohibiting them from being called upon "in any industrial or labor dispute or to regulate picketing in connection with a strike." G.L. c. 149, §23B.

he argues demonstrate that the Auxiliary force is an integral part of the Dedham Police Department's regular police force. The documents, however, prove otherwise. The Police Department's 2017 recommended budget actually shows that, while the department proposed adding four new Auxiliary Police officers, the payroll and FTE schedule shows a net reduction of one sworn regular officer and an increase of one "civilian" FTE. This information confirms that Dedham Auxiliary Police are civilian, non-sworn volunteers, and are not members of the "regular police force".

In sum, given a dearth of authority to show that appointment as a Auxiliary Police Officer brings with it well-defined specific, uniformly assigned "regular" police duties (other than those prescribed for responding sporadically to a declared emergency under the Civil Defense Act), the time served as a volunteer Auxiliary Police Officer is not cognizable as the type of full-time, sworn officer "regular police" work that qualifies for consideration in computing entitlement to the 25-Year Promotional Preference. For the same reasons that the Commission found that HRD was not required to parse all of the variations in the duties of "special state police officers" who staff campus police and other public and private institutions, HRD should not be burdened with investigating whether a particular Auxiliary Police force, if any, actually performs as a "regular police force." Indeed, the possibility that any such force exists seems more remote that with "special state police" forces. The record, here, certainly did not show that the Dedham Auxiliary Police Department or the Medfield Auxiliary Police are, or were, such a qualifying police force.

Special Police Officer

Sgt. Ralph's claim to 25-Year Promotional Preference creditable time for his service as a Medfield Special Police Officer is more simply resolved.

First, no documentation submitted by Sgt. Ralph, confirms the time, if any, that Sgt. Ralph actually performed the duties of such a position on any weekly, monthly or annual basis, or that he was paid for any of that service. As noted above, the eight hours Sgt. Ralph reported as working in Medfield may be double-counting Special Police and Auxiliary Police assignments (and some of this time also overlaps with other reported full time employment). HRD was fully justified to conclude that an undocumented, but apparently, a sporadic weekend job, is not the type of work the legislature intended to be counted as a year of creditable service.

Second, nothing in this record establishes what duties a Medfield Special Police Officer is authorized to perform, let alone whether those duties are equivalent to the type of work performed by Medfield's "regular police force." No equivalent civil service position of Special Police Officer exists. *See* HRD MuniClass Manual, *supra*. The only statutory duty expressly conveyed on special police officers is one that allows them to arrest "tramps" and vagrants", which has been declared problematic under the Massachusetts and U.S. Constitutions and is hardly the stuff of "regular police" work. *See* G.L. c. 279, §63 *et seq.*; *Alegata* v. *Commonwealth*, 353 Mass. 287 (1967) (vagrancy laws "void for vagueness"). *See also Scione* v. *Commonwealth*, 481 Mass. 225 (2019) (part of G.Lc.279, §58A(1) unconstitutionally vague)[9]

Third, Sgt. Ralph points out that special police officers are covered by laws providing injured on duty (IOD), disability and other benefits due to injury and death "in the line of duty" afforded to regular police officers. To claim, however, that entitlement to such benefits means that special police officers must belong to the town's regular police force when on duty, succumbs to a logical fallacy that applies two valid premises to reach an invalid conclusion - i.e. "Special Police Officers injured on duty are entitled to benefits (True); Regular Police officers injured on duty are entitled to benefits (True); therefore, Special Police Officers are Regular Police Officers when on duty (NOT TRUE). Such an inference - i.e., non-tenured special police officers can, in effect, temporarily step into the shoes of "regular" civil service officers without appointment as such, collides with the entire civil service system for filling such civil service positions, including provisional and temporary ones, solely through qualifying examinations and selection based on rank ordering of eligible lists. *See generally*, G.L. c. 31, §8 through §27 and §58 through §65.

In sum, HRD appropriately denied Sgt. Ralph's claim to creditable service toward the 25-Year Promotional Preference for a vaguely stated and largely undocumented claim for the time he served as a Medfield Special Police Officer.

UMass Lowell Campus Police

Sgt. Ralph's claim to 25-Year Promotional Preference creditable time for full-time employment as a UMass Lowell Campus Police Officer is a closer call. Sgt. Ralph correctly points out that his appointment was made by the UMass Lowell trustees, acting pursuant to their specific statutory authority to appoint "police officers" under the UMass enabling statute, G.L. c. 75, §32A. Thus, decisions that the 25-Year Promotional Preference cannot be claimed by campus police appointed as "special state police officers" under the Massachusetts State Police statute, G.L. c. 22C, §63 are informative, but they are not automatically dispositive here. *See, e.g.*, *DeFrancesco* v. *Human Resources Div.* 21 MCSR 662 (2008), *aff'd sub nom*, *DeFrancesco* v. *Civil Service Comm'n,* C.A. 2009-00392 (Middlesex Sup. 2009). *See also, Commonwealth* v. *Mullen*, 40 Mass. App. Ct. 404, *rev.den*. 423 Mass. 1105 (1966) (state college campus police "special state police officer" did not have powers of a regular police officer and lacked authority to stop a motorist for a civil traffic violation). *But see Arkelian* v. *Human Resources Div.*, 30 MCSR 253 (2017) (suggesting, but not deciding, that HRD consider whether state university campus police service should receive E&E examination points in some cases).

9. G.L. c. 41, §99 and related case law does not inform the question here. That statute authorizes appointment of sworn, regular police officer in one community as a "special police officer" a neighboring community, intended to resolve the jurisdictional issues that arise when that regular officer acts in "hot pursuit" or on request for mutual aid outside his appointed jurisdiction. *See, e.g., Commonwealth* v. *Callahan*, 428 Mass. 335 (1998); *Commonwealth* v. *Kerr*, 469 Mass. 284 (1991); *Commonwealth* v. *Andrews*, 34 Mass. App. Ct. 324, *rev.den*., 415 Mass. 1104 (1993)

Although University of Massachusetts campus police forces appointed under G.L. c. 75, §32A are clearly appointed under a different statute than police forces staffed by "special state police officers", the question still remains whether UMass campus police are equivalent to a "regular" municipal police force. After parsing the applicable statutes and legislative history, I conclude that the law now prescribes that police at all five UMass campuses in the "UMass segment" have sufficient, clearly identifiable and uniformly applied characteristics that may well entitle them, currently, to be treated as equivalent to a municipal "regular" police officers. I also conclude, however, that Sgt. Ralph served at UMass Lowell when the law was somewhat different and the characteristics now in place were not so clearly established. Thus, I cannot reasonably conclude that the campus police force at UMass Lowell, as it existed at the time Sgt. Ralph served there nearly 25 years ago, then had the requisite characteristics that enable his duty to be considered the equivalent of service with a "regular" police force for the purposes of the 25-Year Promotional Preference.

The dozens of public universities included within the Commonwealth's higher education system are now divided into three "segments". *See* G.L. c. 15A, §5. Chapter 75, §1A, §32A & §32B, dating from St. 1962, c.648, govern the appointment of police officers at the University of Massachusetts segment (the UMass campuses at Amherst, Boston, Dartmouth, Lowell and Worcester); Chapter 15A, §22 and Chapter 73, §18 govern appointments at the remaining 25 institutions in the "state university" and the "community college" segments.

In addition, when G.L. c. 90C was enacted to establish standard procedures for issuance of civil citations for violations of the motor vehicle laws, it defined "police chief" and "police officer" to cover the UMass police force. These definitions, as further amended to conform to the changing structure of Massachusetts higher education, now authorize campus police officers in all three segments of the system to issue civil citations for on-campus motor vehicle infractions. *See* G.L. c. 90C, §1 & 2A , added by St. 1982, c. 586, as amended.[10]

In 2014, Chapter 75, §32A was amended to add the following paragraph:

> *Police officers appointed by the trustees of the University of Massachusetts, in connection with the operation of any part of the university within the limits of the campuses, may perform police duties under the direction of the commanding officer or the person in charge of such campus. While performing such duties within those limits, the police officers shall have the same authority, immunities and privileges as duly appointed and qualified police officers acting elsewhere in the commonwealth. Every officer* who receives an appointment to a position on a full-time basis in which that person may exercise police powers for any of the campuses of the University of Massachusetts, shall, *prior to exercising those police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee or the department of the state police*.

St. 2014, c.172, §2. (*emphasis added*)

The 2014 amendment also added Section 34B:

> *Notwithstanding any general or special law to the contrary, any campus of the University of Massachusetts*[11] *may enter into an agreement with any . . . federal or state government, town, city or other towns and cities . . . in states contiguous to the commonwealth, to provide mutual aid programs for police departments* to increase the capability of such departments to protect the lives, safety and property of the people in the area . . . when the resources normally available to the University or any municipality . . . are not sufficient to cope with a situation which requires police action. *When providing such mutual aid, police officers shall have all the immunities and powers granted to them by the University or the municipalities that employ them including, but not limited to, the same duties, authority, immunities and privileges as duly appointed and qualified police officers acting as such in the municipality.*

Id. (emphasis added)[12] *See also* St. 2004, c. 348, §2 (mutual aid authority for UMass Amherst)

The evolution of this statutory authority expressed the legislature's intent that, by revising the laws to vest UMass campus police officers with broader authority now may well justify treating full-time public service with a UMass campus police force, currently, as equivalent to full-time service with a "regular police force". UMass campus police must be MPTC or State Police academy trained; they are now expressly vested by law, on-campus, with all of "the same authority, immunities and privileges as duly appointed and qualified police officers acting elsewhere in the commonwealth"; and they are deemed competent to be assigned to perform police duties off-campus for any other federal, state or municipal police department "to cope with a situation which requires police action" and "[w]hen providing such mutual aide, police officers shall have all the immunities and powers granted to them by the University or the municipalities that employ them, including, but not limited to, the same duties, authority, immunities and privileges as duly appointed and qualified police officers acting as such in the municipality."

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10. St. 2006, c.134, §3A added a mandate to G.L. c. 90C, that requires state university and community college campus police chiefs (i.e., c.15A, §22/c.73, §18 departments) to certify that officers who issue civil motor vehicle citations have completed a MPTC or State Police academy, annual in-service training, and (if authorized to carry) MPTC firearm certification, and require adoption of policies and procedures covering use of force, search and seizure, racial profiling and agreements with local municipal police departments for arrest and detention of prisoners (if institution does not have a lock-up).

11. A prior mutual aid law limited to UMass Amherst had been in place since 2004. That law also deemed UMass Amherst a "town" for purposes of invoking the right of "town" elders to use force to quell a riot. St. 2004, c. 348.

12. St. 2014, c. 172, §1, repealed a portion of G.L. c. 22C, §50, added by St.1991, c. 412, §22, which read: "Guards . . . of the University of Massachusetts . . . within the limits of any reservation [of the United States of America] may perform police duties under the direction of the commanding officer or the person in charge of such reservation, and while performing such duties within such limits shall have the same authority, immunities and privileges as duly appointed and qualified police officers acting as such elsewhere within the commonwealth." (*emphasis added*)

The question remains whether the 2014 legislative intent that UMass police forces should be considered "regular" police forces can be related back to 1993, when Sgt. Ralph served as a UMass Lowell police officer. The law then in effect focused mainly on authority to exercise "police powers" to enforce "traffic and parking rules and regulations" and to issue civil citations for motor vehicle offenses on school premises. G.L. c. 15A, §22, added by St. 1991, c. 142, §7; G.L. c. 90C, §1, added by St. 1982, c. 586; G.L. c. 75, §1A, added by St. 1991, c.142, §17. These 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. *See, e.g*., G.L. c. 22C, §56 *et seq*. *See also Commonwealth* v. *Mullen,* 40 Mass. App. Ct. 404, *rev.den*. 423 Mass. 1105 (1966) (cataloguing statutes providing limited grants of police powers). Thus, when Sgt. Ralph served as a UMass Lowell police officer in 1993–94, UMass campus police forces were not as clearly described to have all of the duties of a regular police force. Therefore, HRD was justified to conclude that his employment at UMass Lowell did not qualify for creditable time toward the 25-Year Promotional Preference.[13]

E&E Credit for Acting Auxiliary Lieutenant Time

Sgt. Ralph's claim to "E&E" credit on his Webster Police Lieutenant's exam for time spent as an "acting Lieutenant" with the Dedham Auxiliary Police Department can be addressed summarily. As noted earlier, in establishing the parameters for "E&E" credits, HRD is vested with broad authority under civil service law to establish parameters for "E&E" discretionary credits. *See* G.L. c. 31, §3, §5 & §22. *See, e.g*., *Nicholas* v. *Human Resources Div*., 29 MCSR 358 (2016); *Magino* v. *Human Resources Div.*, 27 MCSR 34 (2014). HRD was fully justified to disqualify volunteer, part-time "acting" service with an Auxiliary Police Department, supervising civilians who were being directly supervised by the Regular Police Officers whom they were "assisting . . . with traffic and crowd control at town events . . . traffic duties at church gatherings . . . weekend patrol duties of town buildings and property, when requested by the Regular Police" and attending "regular weekly meetings of the unit". I found nothing in the 2016 Police Lieutenant's E&E Claim Form that allows E&E credit for such service.

The fact that HRD allowed E&E credit for volunteer service as an Auxiliary Police officer on the 2005 and 2012 exams does not stop HRD from exercising discretion to change for good reason and, especially to correct errors in, the requirements for E&E points in a future exam, a decision the Commission is not inclined to second-guess. Similarly, Sgt. Ralph's citation to *Baston* v. *Human Resources Div.*, 29 MCSR 62 (2016) is not persuasive. That appeal turned on specific facts, namely, service by a Boston Police Deputy Superintendent, who the Commission found objectively, and undisputedly, met the specified requirement for E&E points, as set forth in the E&E Claim Form, for "acting" in the title of "Police Captain or higher". .Finally, no evidence was produced to infer that adding the E&E points involved would make any difference to Sgt. Ralph's final, rounded exam score or his place on the eligible list.

CONCLUSION

For the reasons stated, the appeals of Sgt. Thomas V. Ralph in CSC Nos. B2-17-072, B2-17-073, B2-17-238 and B2-18-220, are ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 14, 2019.

Notice to:

Sergeant Thomas V. Ralph
[Address redacted]

Michael Downey, Esq.
Labor Counsel, Human Resource Division
100 Cambridge Street, Suite 600
Boston, MA 021114

* * * * * *

13. The Commission reserves to a future decision whether the 25-years of service preference applies to post-2014 UMass campus police forces or other college and university police forces.

ALAN M. WYNN

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

C-16-158

February 14, 2019
Cynthia A. Ittleman, Commissioner

Reclassification Appeal-Department of Health and Human Services-EDP Systems Analyst III to IV-Scope of Responsibilities— Hearing Commissioner Cynthia A. Ittleman rejected the reclassification appeal from an EDP Systems Analyst III with the Department of Health and Human Services seeking an upgrade to Analyst IV. The Appellant was found not to perform a key function of the sought after classification, that of building servers from scratch. His chief reason for seeking reclassification was the quantity of work he was being assigned due to the increased number of agencies he now serves.

DECISION

On September 15, 2016, the Appellant, Alan M. Wynn (Mr. Wynn or Appellant), pursuant to G.L. c. 30, § 49, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the state's Executive Office of Health and Human Services (EOHHS) to deny his request for reclassification from the position of EDP Systems Analyst III to the position of EDP Systems Analyst IV. A pre-hearing was held on October 11, 2016 at the offices of the Commission. A full hearing was held at the same location on November 15, 2016 and December 6, 2016.[1] Witnesses, except the Appellant, were sequestered. The hearing was digitally recorded and both parties were provided with a CD of the hearing[2] . The parties opted not to submit post-hearing briefs. The appeal is denied because the Appellant has not proved that he performs the tasks of an EDP IV a majority of the time.

FINDINGS OF FACT

Twenty-nine (29) exhibits were entered into evidence at the hearing: Joint Exhibits (Jt.Exs.) 1 - 4; Appellant's Exhibits (A.Exs.) 1 - 13; and Respondent's Exhibits (R.Exs.) 1 - 12. The parties also produced documents ordered at the first day of hearing marked as Appellant's Email (A.Email), November 28, 2016; and Respondent's Email (R.Email), December 1, 2016. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Susan Robak, Deputy Director Field Operations, Secretariat IT Operations, Executive

Office of Health and Human Services (EOHHS)

- Mike Fitzpatrick, Regional Operations Manager, Northeast Region (EOHHS)
- Amy Lynch, Director of Recruitment Staffing and Policy (EOHHS) (formerly Manager, Employment and Staffing Unit, Children, Youth and Families (EOHHS)

Called by the Appellant:

- Alan M. Wynn, Appellant

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

Background

1. The Appellant has worked for the state as an EDP Systems Analyst for more than two (2) decades. In 2012, the Appellant and a number of other EDP IIs at EOHHS were reclassified to EDP IIIs with the functional title of Information Technology Site Manager (ITSM) in view of the increased consolidation of IT agencies. The Appellant works in the EOHHS Northeast Region (NE Region). (Testimony of Appellant and Robak)

EOHHS IT Organization

2. Susan Robak is the IT Deputy Director for Field Operations at EOHHS, overseeing six (6) regional managers, including the regional manager for the NE Region. Ms. Robak worked with the Appellant directly and indirectly many years prior to his EDP IV reclassification request but has had very limited direct contact with the Appellant in recent years. When, as here, Ms. Robak is informed by EOHHS HR that an IT employee has requested reclassification, she reviews the employee's Interview Guide, contacts the employee's regional manager to verify the work the employee is performing and she then completes an audit decision form with her comments and sends it to EOHHS HR. (R.Ex. 6; Testimony of Robak)

3. Michael Fitzpatrick is the NE Regional Manager; he has worked directly with the Appellant and is in contact with him two (2) or three (3) times per week. Mr. Fitzpatrick supervises two (2) people directly: Mark Grant, a supervisor and Technical Pay Law (TPL) employee; and Mr. Fitts, a "backfill Supervisor"[3] . (Testimony of Fitzpatrick) A significant difference between and EDP III and EDP IV is that an EDP IV builds a server, loads software, and defines the role of the server, although they may only build and maintain servers less than half of their time. The Appellant's name was

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. 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 organizational chart for this region indicates that the position is officially vacant. (R.Ex. 6)

not on a group email to server builders. (Testimony of Fitzpatrick and Robak) To become an EDP IV requires continuing education. EOHHS IT offered related training but the Appellant was out of work several months due to a work injury when the training was offered. However, since a server can be a personal computer, people can learn at home; they can also volunteer with a more experienced person at work. Mr. Fitzpatrick observed Mr. A and Mr. B pursuing such skill sets but not the Appellant. (R.Ex. 6; Testimony of Fitzpatrick)

4. Mr. Grant supervises the Appellant and several other EDP IIIs and one (1) TPL staff person. Similarly, Mr. Fitts supervises six (6) people, two (2) of whom (Mr. A and Mr. B) were reclassified to the position of EDP IV in 2015, at or about the time that the Appellant requested reclassification.[4] At the time that the Appellant requested reclassification to EDP IV, Mr. Grant was assisted by Mr. Fitzpatrick in supervising the Appellant and other employees. Each of these managers has had many years of experience. (Testimony of Robak, Fitzpatrick)[5]

Processing of Appellant's Reclassification Request

5. The Appellant requested reclassification on or about May 20, 2015. (Jt.Exs. 1 and 3)

6. On May 22, 2015, Ms. Joan Bishop Fallon, then Employment and Staffing Manager, EOHHS Children, Youth and Families Office of Human Resources, sent an email message to Ms. Robak, with a copy to the Appellant, Mr. Fitzpatrick and others. In the email, Ms. Bishop Fallon asked Ms. Robak to give the Appellant an Interview Guide to complete, to review the Appellant's completed Interview Guide, to sign a Classification Audit Decision form and return the Interview Guide and Audit Decision to her. In addition, Ms. Bishop Fallon asked Ms. Robak to ask the Appellant for a current EPRS, a Form 30, and an updated organization chart. (A.Email, November 28, 2016; R.Exs. 1, 3, 4, 5, 6, 7, 9; Jt.Exs. 1 - 4)

7. Shortly thereafter, the Appellant completed the Interview Guide.[6] (Jt.Ex. 1)

8. Ms. Robak subsequently contacted Mr. Fitzpatrick to confirm with him what functions the Appellant was performing. Mr. Fitzpatrick confirmed that the Appellant was performing limited server work but that the Appellant did not build servers or migrate data for servers as EDP IVS do. (Testimony of Fitzpatrick, Robak and Lynch)

9. On June 4, 2015, Ms. Robak filled out the Classification Audit form for the Appellant's reclassification request. In it, Ms. Robak wrote, "[t]here have been no changes to [Appellant's] level of responsibilities since his last reclass. He is preforming (sic) the tasks of an EDP System Analyst III." (R.Ex. 1)

10. After following the Respondent's process for considering reclassification requests and reviewing the Appellant's Interview Guide, his Form 30, and EPRS, and considering the comments of Ms. Robak and Mr. Fitzpatrick, Ms. Amy Lynch, then the Employment and Staffing Unit Manager, sent a memo to the Appellant on September 29, 2015 preliminarily denying his reclassification on September 29, 2015. (Jt.Ex. 2)

11. The Appellant submitted a rebuttal to the Respondent in response to the Respondent's preliminary denial of his reclassification request on October 5, 2015. In the rebuttal, the Appellant asserted, *inter alia*, that he handles fourteen (14) offices in the NE Region and that he manages every such site's specific projects, providing network infrastructure and server support. (A.Email), November 28, 2016)

12. By letter dated November 12, 2015, Ms. Lynch informed the Appellant that his request was denied. (Jt.Ex. 3)

13. The Appellant appealed the Respondent's decision to the state's Human Resources Division (HRD) on December 14, 2015. (Jt.Ex. 4)

14. HRD denied the Appellant's appeal on August 25, 2016. (Jt. Ex. 4)

15. The Appellant filed the instant appeal. (Administrative Notice)

Appellant's Interview Guide

16. The Appellant completed the Interview Guide at or around May 22, 2015. (Jt.Ex. 1)

17. The Interview Guide asks, if there have been any "significant job changes since your appointment? If so, indicate the dates the changes took place and briefly describe the nature of the changes." (Jt.Ex. 1) The Appellant responded,

> There have been very significant changes since my appointment. Server access and management responsibility have gone up dramatically I (sic) have gone from managing one agency to six agencies in the past seven years. With the merger of the six agencies, it has introduce (sic) multiple different operating systems, applications, mail servers, (such as Lotus Notes, MS Outlook) and networks (DCL, comcast (sic) routers, VPN) requiring additional training, rapid self learning in order to effectively support the new customer base. Open new offices without any assistance requiring me to bring up connect (sic) to data communications network; connect personal computers, peripheral devices and other network equipment.

(*Id.*)(emphasis added)

18. Under "Specific Duties" in the Interview Guide, the Appellant was asked to describe what duties he performs ("listing most im-

4. At least one (1) other EDP III in the NE Region similarly requested reclassification but his request was denied and he appealed to the Commission. *Mesquita v EOHHS*, 30 MCSR 385 (2017). The appeal was denied.

5. There is no date on the organization chart containing this information (R.Ex. 6) produced by the Respondent. However, it appears to be undisputed that Mr. Grant supervises the Appellant, Mr. Fitzpatrick supervises Mr. Grant, and Ms. Robak supervises Mr. Fitzpatrick, as indicated in the chart.

6. The Appellant signed but did not date the completed Interview Guide.

portant first") and indicating what percent of his time is spent on each duty. The Appellant answered,

> Manage Email support/accounts/troubleshoot 15%
>
> Troubleshoot errors with application 15%
>
> Manage re-image, joint to EHS domain 15%
>
> Manage client viruses remediation at sites I manage 10%
>
> Manage/Add/Editing/Deletions of users on the servers, and manage the transfer of users from one office server to new office Server. 10 %
>
> Manage Active Directory/Rights editing or adding 8%
>
> Manage new hardware and software based on TR Requests 6%
>
> Install printer's new devices, deal with outside Vendors 5%
>
> Manager VOIP [Voice Over Internet Protocol] configuration, troubleshooting 5%
>
> Manage deployment of new equipment throughout my offices 5%
>
> Manage physical inventory for 8 sites and super center 5%
>
> User support Teaching, or just helping in general 5%
>
> Move PC's (sic), VOIP phones, desktops printers (sic) 4%
>
> VPN into Servers after hours, to bring server down after updates have been done, re-boot server back online for next business day. 2%[7]

(Jt.Ex. 1)(sic)(emphasis added)

19. On the Interview Guide, the Appellant indicated that he does not supervise anyone. (Jt.Ex. 1)

20. According to his responses in the Interview Guide, the Appellant operates or repairs, the following equipment:

> Manage local and remote Servers, Non-Magnet sites
>
> Manage VOIP Phones not excluding Analog, Droids, and IPhone
>
> Manage Desktop, workstations, laptops, printers
>
> Manage Backup power units
>
> Manage Printer, Faxes, and Multifunction Units
>
> Manage Patch[8] Panels, Switches, Routers, Modems
>
> Manage handheld devices such as DDS portable email devices
>
> Manage Cabling projects and repairs
>
> Responsible for the knowledge of our standard OS [operating system] plus a variety of software used by all agencies, and Citrix installs Cabling
>
> Knowledge of a variety of software used by all agencies
>
> Manage EBT Machine and processes

(Jt.Ex. 1)(emphasis added)

21. Asked who assigns, reviews and approves his work, the Appellant wrote,

> Tickets are assigned on call and office covering basis via the helpdesk. Pulled by me from the queue, or immediate supervisor and Regional Manager assign tickets based on the above not excluding coverage to backup unavailable workers. Large percentage of the work also coming from workers that I come in contact daily throughout the agencies by email and not excluding direct calls, based on need.

(Jt.Ex. 1)

22. Asked if his job requires a certificate, license, graduate degree or other special requirement, the Appellant wrote,

> Certificate, Novell, two to four years of full time professional experience in electronic data processing of which at least two years have been in work in which major duties included computer systems analysis.

(Jt.Ex. 1)

23. At the Commission hearing, the Appellant added, *inter alia*, the following examples of his server assignments[9]:

> wiped servers clean so that they can be disposed of (A.Ex. 7);
>
> checked for power to servers and other equipment (A.Ex. 7);
>
> "patched" and reboots servers (*id.*);
>
> transferred certain PC drives back to a server (*id.*)
>
> cooled off a server room when the air conditioning was not working (*id.*);
>
> replaced power supplies on a server that was shutting down frequently (A.Ex. 9);
>
> determined if there was enough space in the server room and power for an additional server if someone else was to build it (*id.*);
>
> backed up servers (A.Ex. 4); and
>
> worked overtime when approved (A.Ex. 11).

---

7. The Appellant's percentages of time add up to 110% when the total should be 100%.

8. A computer patch is defined as, "a minor correction or modification in a computer program". https://www.merriam-webster.com/dictionary/patch (January 22, 2019). I note that on December 21, 2015, Mr. Fitzpatrick emailed the Appellant and another EDP III stating that they had not patched and rebooted certain servers for the end of FY2015 and certain months thereafter even though there were new patches monthly. (R.Ex. 3)

9. These are some of the examples provided by the Appellant in A.Exs. 6 through 11 relating to events that occurred in or about FY15, when he requested reclassification. The Appellant included in those exhibits documents pertaining to the late summer and early fall of 2016, which are beyond FY15. In addition, certain pages of A.Exs. 6 through 11 appear to be incomplete email messages. For these reasons, the untimely documents and incomplete documents in A.Exs. 6 through 11 are given no weight.

Appellant's EPRS

24. The Appellant's Employee Performance Review Form (EPRS) for fiscal year 2015[10] lists the Appellant's four (4) duties as follows:

Duty 1: Customer Satisfaction and Support:

- Respond and resolve tickets and incidents in accordance with EOHHS IT policies and procedures as they relate to customer support.
- Responsible for customer/User satisfaction as it relates to IT services.
- Performs all duties in a respectful and professional manner.
- Support of personnel as it relates to the use of equipment/software in the EOHHS enterprise environment as needed.

(A.Ex. 13)

For this duty, the Appellant's rating was "Meets" and Michael Grant, the Appellant's supervisor, added, "Alan works hard to meet all customer needs across the multiple agencies he supports. I consistently hear positive feedback from all that Alan comes in contact with." (*Id.*)

Duty 2: Technical and Team responsibilities:

- Assess, debug and resolve technical problems associated with desktops and system peripherals.
- Assists with troubleshooting and resolving network issues as required.
- Assist with the monitoring and maintaining the health and integrity of the network.
- Assist with local backup and restore process as required.
- Manage the upgrade of hardware & software when necessary to insure that all services are provided in a secure and timely fashion.
- Assist Telecom with movement of IP phones as required.
- Implementation of EOHHS IT enterprise images for PCs (Desktop/Laptop) according to EOHHS procedures and policy to insure a consistent environment.
- Install and move assets as required according to EOHHS policies and procedures.
- Assist with site specific projects as related to network infrastructure & server support.
- Support, trouble shoot and configure remote access to assist network users with connectivity to EOHHS network from non-magnet connections.

(*Id.*)(emphasis added)

For this duty, the Appellant's rating was "Meets" and Mr. Grant added, "Alan is a strong desktop support staff member and is consistent with addressing all that is needed by those he supports in a timely manner." (*Id.*)

Duty 3: Project roles and Coordination:

- Participate in meetings, special projects and other requests as required to maximize the efficient use of IT resources.
- Coordinate site visits with service providers.
- Work collaboratively with internal and external groups in a team environment to improve overall customer service and support.
- Utilize any and all resources available through EOHHS and other sources for assistance with problem resolution.
- Assist with site specific projects as related to network infrastructure and server support.

(*Id.*)(emphasis added)

For this duty, the Appellant's rating was "Exceeds" and Mr. Grant added, "Alan coordinates all IT related activities at his assigned sites and has been successful in seeing project through completion." (*Id.*)(emphasis added)

Duty 4: Leadership Responsibilities:

- Manage site specific projects.

(*Id.*)

For this duty, the Appellant's rating was "Meets" and Mr. Grant wrote, "Alan attends has (sic) done a good job coordinating projects which have at times have (sic) involved internal staff and vendors." (*Id.*)

Duty 5: Administrative Tasks:

- Performs all business administrative duties in a timely and accurate fashion.
- Maintain inventories of all EOHHS IT assets using the EOHHS inventory collection process to secure Commonwealth assets.
- Clearly communicate and/or escalate to their supervisor any IT operations issues or disruptions (planned or unplanned) to minimize user impact.
- Perform all duties as required and directed.

(*Id.*)

For this duty, the Appellant's rating was "Meets" and Mr. Grant wrote, "Alan meets all administrative duties in a timely manner." (*Id.*)

EDP Specification

25. The EDP Specification (Spec) approved by the state's Human Resources Division (HRD) is dated July 1, 1987 and is technologically out of date in many regards. (R.Ex. 5; Testimony of Robak) However, the Spec indicates that in addition to performing the

10. In making its preliminary decision regarding the Appellant's reclassification request, the Respondent incorrectly relied upon the Appellant's 2012 EPRS. (Testimony of Lynch) In connection with his rebuttal to the preliminary denial, the Appellant submitted his 2015 EPRS to the Respondent. (A.Ex. 13; A.Email, November 28, 2016)

work of an EDP III, EDP IVs would also be responsible for overseeing a number of activities:

> 1. Prepare EDP unit budget requests and supporting documentation for agency approval and inclusion in final budget.
>
> 2. Schedule duty rosters and ensure that all duty stations are properly staffed.
>
> 3. Act as consultant to data processing personnel of other agencies or departments, determine suitability of agency programs or systems to meet specific needs and give general advice and direction to agency staff.
>
> 4. Act as consultant to users on such matters as computer-augmented or business-oriented instructions, validity of programs, assessing user needs, etc.
>
> 5. Approve program/systems for computer programming
>
> 6. Conduct workshops and/or classroom training sessions for users and agency personnel and students.
>
> 7. Determine staff needs and proper allocation of staff to work functions.
>
> 8. Interview, evaluate and recommend applicants for employment.
>
> 9. Approve rescheduling of interrupted or delayed production runs.
>
> 10. Act as liaison between users, operations management, computer center and agency personnel to establish or adjust production priorities.
>
> 11. Schedule daily production runs based on program priorities, input/output requirements, sequence of related jobs, etc.

(R.Ex. 5)

26. The Spec provides that EDP IIIs supervise 1 to 5 employees and EDP IVs supervise 1 to 10 employees plus, EDP IVs indirectly supervise others. Both EDP IIIs and EDP IVs receive supervision from employees of higher grade regarding policy, they assign work and review performance through conferences and reports. (R.Ex. 5)

27. The minimum entrance requirements (MERs) for an EDP III are four (4) years of fulltime or equivalent part time, professional experience in electronic data processing of which at least two (2) years must have been in computer systems analysis or equivalent combination of the required experience and the listed permissible substitutions. MERS for an EDP IV are five (5) years of fulltime or equivalent part time professional experience of which at least three (3) years have been in computer systems analysis or equivalent combination of the required experience and permissible substitutions. (R.Ex. 5)

28. Because the Spec is outdated, in or about 2010 the Respondent developed more current Form 30s (job descriptions), *inter alia*, for EDP IIIs, EDP IVs and TPLs.[11] (Testimony of Robak, Fitzpatrick and Lynch; A.Ex. 5)

Appellant's EDP III Form 30

29. In preparing his request for reclassification in 2015, the Appellant requested his EDP III Form 30 from the Respondent but he received different responses to his requests. On one hand, he was informed that there is a specific Form 30 for his position but the Respondent did not or could not produce it; instead, the Respondent produced for the Appellant an EDP III Form 30 which apparently applies to a number of EDP IIIs. The Appellant had also requested the Form 30 for an EDP IV but he did not receive one until after he had submitted his reclassification request. (Testimony of Appellant; R.Ex. 4; R.Email, December 1, 2016)

30. The Form 30 for EDP IIIs that the Appellant received lists the following duties and responsibilities, in part[12]:

> 1. Responsible for customer/User satisfaction as it relates to IT services and support.
>
> 2. Acts as support technician for sites assigned.
>
> 3. Performs tasks associated with managing, prioritizing, and resolving Help Desk tickets.
>
> 4. Maintains the IT inventory database.
>
> 5. Provides support of personnel as it relates to the use of equipment and software[.]
>
> 6. Assess, debug and resolve technical problems associated with desktops and system peripherals. …
>
> 7. Assists with troubleshooting and resolving Network issues as required.
>
> 8. Assist with the Monitoring and Maintaining the health and integrity of the network[.]
>
> 9. Assist with local backup and restore process as required[.]
>
> 10. After hours support as authorized and required …
>
> 11. Manage the upgrade of hardware & software … This includes but is not limited to new Anti-Virus, Operating System patches, or other mandated software upgrade as directed …
>
> 12. Work collaboratively with internal and external groups in a team environment …
>
> 13. Install and move assets as required …
>
> 14. Complete all activities within EOHHS security policies and practices.
>
> 15. Act as the contact person for office wiring/cable installations …
>
> 16. Required to travel to various sites …
>
> 17. Manage site specific projects as related to desktops.
>
> 18. Assist with site specific projects as related to network infrastructure & server support[.] …
>
> 19. Support, trouble shoot and configure remote access to assist network users with connectivity to EOHHS network from non-magnet connections. …

11. Ms. Robak indicated that the Spec is so dated, for example, that it references mainframe computers. (Testimony of Robak)

12. The tasks are not numbered in the Form 30 but they are numbered here for ease of reference.

(R.Ex. 4)(emphasis added)

According to this Form 30, EDP IIIs are supervised by Mr. Grant. EDP IIIs do not supervise others. (*Id.*)

The minimum entrance requirements (MERs) for EDP IIIs are: at least 2 years of full-time or equivalent part time professional experience in the IT field or any equivalent combination of the required education/experience listed permissible substitutions, even though the Spec requires four (4) years of such experience for an EDP III. (*Id.*)

EDP IV Form 30

31. The Form 30 for EDP IVs lists the following duties and responsibilities, in part:

> 1. Responsible for Customer/User satisfaction as it relates to IT services and support.
>
> 2. Acts as lead Support technician for site/sites as assigned
>
> 3. Performs tasks associated with managing, prioritizing, and resolving Help Desk tickets.
>
> 4. Maintains the IT inventory database as applicable
>
> 5. Performs training and mentoring of IT staff and support of users as it relates to the use of equipment/software/applications in the EOHHS enterprise environment as needed
>
> 6. Assess, debug and resolve technical problems associated with desktops/servers and system peripherals. ….
>
> 7. Performs all business administrative duties in a timely and accurate fashion.
>
> 8. Perform Project support as coordinator and lead as needed
>
> 9. Coordinate site visits with service providers.
>
> 10. Performs troubleshooting and resolves in Network and Infrastructure issues as required.
>
> 11. Performs backup and restore process as required
>
> 12. Monitors and Maintains the health and integrity of the network
>
> 13. Provide mentoring and subject matter expertise within the IT department to insure professional growth within the department and IT community
>
> 14. Maintain documentation for server rooms/infrastructure & disaster recovery
>
> 15. Ensure compliance with system security and network policies
>
> 16. After hours support as authorized and required
>
> 17. Maintain an organized and safe work environment
>
> 18. Participate in meetings as required. …
>
> 19. Manage the upgrade of hardware & software when necessary to insure that all services are provided in a secure and timely fashion. This includes but is not limited to new Anti-Virus, Operating System patches, or other mandated software upgrades as directed by EOHHS Standards and practices.
>
> 20. Clearly communicate and/or escalate to their supervisor any IT operations issues or disruptions (planned or unplanned) to minimize user impact. …
>
> 21. Work collaboratively with internal and external groups … to improve overall customer service …
>
> 22. Implementation of EOHHHS IT enterprise images for Desktops/Laptops … to insure a consistent environment.
>
> 23. Responsible for timely response and support during scheduled and authorized non-business hours to insure continuity of services …
>
> 24. Install and move assets …
>
> 25. Assist/lead with meetings special projects (sic) and other requests …
>
> 26. Complete all activities within EOHHS security policies and practices to insure the safety and privacy of data, its clients and its resources.
>
> 27. Acts as the contact person for office wiring/cable installations and performs related duties …
>
> 28. Required to travel to various sites as needed …
>
> 29. Manage site specific projects as related to network infrastructure & server support
>
> 30. Install, configure and support state issued mobile devices
>
> 31. Troubleshooting and resolving Network issues …
>
> 32. Configure and maintain backup and restore process …
>
> 33. Support, trouble shoot and configure remote access to assist network users …
>
> 34. Participate in the development of the documentation of servers, infrastructure and practices by providing written and/or verbal communications to effectively maintain a resource of standard practices.
>
> 35. Provide consultative IT services to IT management and site teams as needed
>
> 36. Mentor other IT professionals to insure their professional growth and skill set improvement …
>
> 37. Build and restore severs (sic) as required
>
> 38. Maintain Disaster recovery package for server rooms …
>
> 39. Review server event logs on a daily basis to ensure optimal performance and identify potential issues ….

(R.Ex. 4)(emphasis added)

There is no indication in the record that the Appellant performs EDP IV tasks number 2, 5, 8 (as to leading), 13, 14, 15, 22, 23, 25 (as to leading), 26, 32, 34, 36, 37, 38 and 39. (Administrative Notice; R.Ex. 10)

- This Form 30 for EDP IVs indicates that EDP IVs are supervised by an IT Manager and that they do not supervise others. (R.Ex. 4)
- The minimum entrance requirements (MERs) for EDP IVs are: at least four (4) years of full-time or equivalent part time professional experience in the IT field or any equivalent combination of the required experience listed permissible substitutions, even though the Spec requires at least five years of such experience for EDP IVs. (*Id.*)

APPLICABLE LAW

Pursuant to G.L. c. 30 § 49, the Civil Service Commission is charged with hearing the appeal of an employee aggrieved by a classification decision of a personnel administrator regarding "any provision of the classification affecting his office or position." *Id*. "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). It is well established that, in order to justify a reclassification, an employee must establish that he or she is performing 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); *Morawski* v. *Department of Revenue*, 14 MCSR 188 (2001); *Madison* v. *Department of Public Health*, 12 MCSR 49 (1999); *Kennedy* v. *Holyoke Community College*, 11 MCSR 302 (1998); and *Mesquita* v. *EOHHS*, 30 MCSR 385 (2017).

ANALYSIS

The Appellant has not established by a preponderance of the evidence that he performs the functions of an EDP IV 51% (or more) of his time. The Appellant has devoted more than two (2) decades to his job as an EDP analyst. In 2012, in recognition of the work he was then doing, he was reclassified from EDP II to EDP III. The Appellant here seeks reclassification to EDP IV. The Appellant's EDP III Form 30, Interview Guide, EPRS and the other evidence in the record here indicate that the work he performs is that of an EDP III.

The Appellant he asserts that he performs certain functions on servers. Exhibits in the record and credible witnesses for the Respondent testified that a key difference between the server work that the Appellant performs as an EDP III and the work of an EDP IV is that the EDP IV builds servers "from scratch" (without a prepared script written by someone else and without assistance) and/or migrates server data and the Appellant does not. The Appellant offered evidence of his work in connection with servers but they do not involve building servers and/or migrating server data. For example, he offered documents indicating that he patches and reboots servers, and he removes information from the server for employees who have left EOHHS and adds information for new employees. This does not constitute building servers or migrating server data. Further, in his Interview Guide the Appellant wrote that he has two (2) to four (4) years of the pertinent full time professional experience but the Spec for EDP IV MERs require a minimum of five (5) years of such experience.

Even if the Appellant was building servers, he has not established by a preponderance of the evidence that he does so 51% of the time, nor has he established that he performs other EDP IV Form 30 tasks 51% of his time, as detailed above. The Appellant submitted a different EDP IV Form 30[13], placing check-marks next to functions that he asserts he performs and that, therefore, he should be reclassified. However, he did not indicate what percent of his time is spent performing those functions. In addition, while there is some overlap in the Form 30s for EDP III and EDP IV, many of the functions for an EDP III indicate that the function is to "assist" therein, whereas the EDP IV functions indicate that the EDP IV is the "lead" for those functions. Therefore, the Appellant's reclassification is unwarranted.

The Appellant asserts that he should be reclassified because Mr. A and Mr. B, whom he asserts performed the same work that he performs were reclassified. To this end, the Appellant offered exhibits showing that, like him, Mr. A and Mr. B were responding to help desk inquiries. While Mr. A and Mr. B appear to have performed at least some of the same functions performed as the Appellant, EOHHS managers indicated that Mr. A and Mr. B were also doing other higher level work and they were doing it without assistance, unlike the Appellant. The Appellant also asserts that it was improper for an indirect supervisor (Ms. Robak) to provide written comments on his reclassification request and recommend against it whereas direct supervisors for other EDP IIIs were asked for written comments and they recommended reclassification. However, Ms. Robak testified credibly that she consulted the Appellant's supervisor to verify the work the Appellant was performing, in addition to reviewing the Appellant's Interview Guide. Therefore, it appears that there was no impropriety in this regard. In addition, I detected no bias on the part of the personnel involved with the Appellant's reclassification request.

In the end, it appears that the Appellant's chief reason for seeking reclassification is the quantity of work to which he has been assigned. As the Appellant indicated in his Interview Guide, the quantity of agencies for which he provides IT services has grown from one (1) agency to six (6), with a concomitant increase in the number of EOHHS employees for whom he provides IT services. His work in these regards is admirable and it is crucial to the everyday functioning of EOHHS. However, an increase in the quantity of tasks assigned to a state employee does not merit reclassification. Rather, it is the changes in the tasks the employee may be performing that are assessed to determine if they constitute the work of the higher title and whether they perform the work of the higher title 51% of the time.

CONCLUSION

Accordingly, for the above stated reasons, Mr. Wynn's appeal, filed under Docket No. C-16-158, is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 14, 2019.

Notice to:

13. It was not established that the EDP IV Form 30 that he produced is the correct Form 30 for that position.

Alan M. Wynn
[Address redacted]

Sheila Anderson
Executive Office of Health and Human Services
600 Washington Street—7th Floor
Boston, MA 02114

John Marra, Esq.
Human Resource Division
100 Cambridge Street
Boston, MA 021114

* * * * * *

ANDREW BENNETT

v.

HUMAN RESOURCES DIVISION

E-18-191

February 28, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Firefighter-Family Preference-Death in the Line of Duty-Plain Meaning—A candidate for original appointment as a firefighter was not entitled to a "402A" family preference since his Cambridge Fire Lieutenant father's eventual death from Hepatitis C was caused by a "needle stick" that did not occur while responding to a fire. The relevant statute plainly and clearly requires the death of the loved one to have originated at the scene of a fire, or when responding to a fire, and in this case the Appellant's father had sustained the injury while cleaning up hospital equipment after responding to a medical emergency.

DECISION

On October 10, 2018, the Appellant, Andrew Bennett (Mr. Bennett), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny his request for so-called "402A" preference on the eligible list for the position of firefighter. On November 20, 2018, I held a pre-hearing conference which was attended by counsel for Mr. Bennett and counsel for HRD. On December 17, 2018, HRD submitted a Motion for Summary Decision and Mr. Bennett filed a reply on February 19, 2018.

The parties agree to the following:

1. Mr. Bennett took and passed a civil service examination for firefighter.

2. Mr. Bennett requested preferential treatment on the eligible list for firefighter pursuant to G.L. c. 31, § 26, as amended by Chapter 402A of the Acts of 1985.

3. In support of his request, Mr. Bennett submitted a copy of his birth certificate, a copy of his father, Lieutenant Barry M. Bennett's, death certificate, a copy of the Cambridge Fire Department documentation regarding the circumstances of his father's death on November 3, 2003, a copy of a report from the Public Safety Officers' Benefit Office Claim Determination, Mr. Bennett's written examination and ELPAAT passing notifications, and a letter from the Public Employee Retirement Administration Commission (PERAC) stating that the Appellant's mother, receives an Accidental Death Benefit in conformity with G.L. c. 32, § 100.

4. The documentation indicated that Lt. Bennett's line of duty injury was a "needle stick" that resulted in the transmission of Hepatitis C. Lt. Bennett sustained this injury while cleaning up ALS IV equipment at the hospital, after he responded to a medical emergency.

5. HRD denied the Appellant's 402A claim, because the aforementioned documentation indicated that his father's death "did not occur as a result of an accident while responding to a fire or while at the scene of a fire."

APPLICABLE STANDARD OF REVIEW

Pursuant to G.L. c. 31 § 2(b), the Commission has the power to hear and decide appeals from those persons aggrieved by the actions or inactions of HRD. A person is only aggrieved when "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 … such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

The Appellant seeks preferential placement on the relevant eligibility list pursuant to G.L. c. 31, §26, which states in relevant part:

> Notwithstanding any other provisions of this chapter or of any law, a son or daughter of a firefighter or a police officer who passes the required written and physical examination for entrance to the...fire service...shall have his or her name placed in the first position on the eligible list… for appointment to such fire or police service if...in the case of a firefighter, such firefighter while in the performance of his duties and as the result of an accident while responding to an alarm **of fire** or while at the scene **of a fire** was killed or sustained injuries which resulted in his death… For the purposes of determining the order of persons on eligible lists pursuant to this section, the presumptions created by section ninety-four, ninety-four A and ninety-four B of chapter thirty-two, shall not be applicable to the death or disablement of any firefighter or police officer whose son or daughter is eligible for appointment.

ANALYSIS

Neither party argues that the accident which caused the death of the Appellant's father occurred while responding to *an alarm of fire* or at the scene *of a fire*. Rather, the nature of the call for service that day was a call for *medical* services and there was no fire at the scene. While the Appellant appears to make strong arguments why the statute should be amended to include such incidents in regard to 402A benefits, the Commission cannot ignore the plain language of the statute which limits such benefits to children of parents who die in the line of duty *while responding to an alarm of fire or at the scene of a fire*.

CONCLUSION

The Appellant's appeal under Docket No. E-18-191 is hereby ***dismissed***.

* * *

By a 4-1 vote of the Civil Service Commission (Bowman, Camuso, Ittleman, Stein, [YES]; Tivnan [NO]; on February 28, 2019).

Notice To:

Joseph G. Donnellan, Esq.
Rogal & Donnellan, P.C.
100 River Ridge Drive, Suite 203
Norwood, MA 02062

Melinda Willis, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * * *

VANESSA BURNS

v.

DEPARTMENT OF CORRECTION

G1-18-171

February 21, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Physical Fitness-Female Candidate for Original Appointment as a Correctional Officer-Running Test—The Commission dismissed the appeal from a female candidate for original appointment as a correctional officer where she had twice failed the running test and there was no allegation made that DOC failed to apply the physical fitness standards in a uniform manner for all candidates. DOC requires candidates to be able to run 1.5 miles in 19 minutes and 56 seconds. The Appellant never came close.

ORDER OF DISMISSAL

On September 6, 2018, the Appellant, Vanessa Burns (Ms. Burns), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to bypass her for appointment for the position of Correctional Program Officer A/B (CPO A/B).

2. On October 16, 2018, I held a pre-hearing conference that was attended by Ms. Burns and DOC representatives.

3. As part of the pre-hearing conference, the parties agreed that:

A. On May 21, 2016, Ms. Burns took and passed the civil service examination for CPO A/B.

B. On January 19, 2018, Ms. Burns's name appeared ranked 13th on Certification No. 05165 for CPO A/B.

C. On February 15, 2018, Ms. Burns was required to participate in a physical fitness test, part of which required her to run 1.5 miles in 19 minutes, 56 seconds.

D. Ms. Burns failed the run portion of the test, finishing the 1.5 miles in 21 minutes, 27 seconds.

E. Ms. Burns was given a second opportunity to pass the run test and failed a second time, finishing the 1.5 miles in 25 minutes, 31 seconds.

4. At the pre-hearing conference, Ms. Burns stated that she failed the test due to a mild asthma and heart condition, the cold weather conditions and insufficient time to prepare for the run.

5. DOC had ten (10) days to file a Motion to Dismiss the Appellant's Appeal and the Appellant had ten (10) days thereafter to file a reply, after which time the Commission would issue a decision.

6. DOC submitted a Motion to Dismiss; the Appellant did not submit a substantive reply.

ANALYSIS

It is undisputed that Ms. Burns failed the PAT. As referenced in its motion, DOC, since 2012 has applied the "Cooper Standards" established by the Cooper Institute to evaluate the physical abilities of candidates. These standards were developed as part of a settlement agreement following United States Department of Justice allegations that the prior standards disproportionately excluded female applicants.

Further, it is uncontested that, prior to the PAT, Ms. Burns was medically cleared to participate in the evaluation.

Finally, there has been no allegation that DOC has failed to apply these standards in a uniform manner for all candidates.

For these reasons, and all of the reasons cited in DOC's Motion to Dismiss, Ms. Burns's appeal under Docket No. G1-18-171 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 21, 2019.

Notice to:

Vanessa Burns
[Address redacted]

Joseph Santoro
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * * *

NATHAN W. GOLDRICK

v.

CITY OF NEW BEDFORD

G1-17-127

February 28, 2019
Paul M. Stein, Commissioner

***Bypass Appeal-Original Appointment as a New Bedford Police Officer-Lying on a Firearms Application About Residency*—**By a 3-2 vote, the Commission reversed the bypass of a candidate for original appointment to the New Bedford Police Department where the City was apparently convinced that he had lied on a previous LTC application about his residency, claiming he was a resident of Fairhaven rather than New Bedford. For many years, New Bedford refused to give unrestricted LTCs whereas neighboring communities did. The majority found that during the period in question, the Appellant could have rightfully claimed the family home in Fairhaven as his residence, in the sense of his permanent domicile, even though he was living with friends in a New Bedford apartment and that it was absurd to expect a 23-year-old to parse the meaning of "residency" in various laws relating to firearms permits. Moreover, the "investigation" conducted by New Bedford that concluded that he was untruthful was sloppy and cursory.

DECISION

The Appellant, Nathan W. Goldrick, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b)[1] , to contest his bypass by the City of New Bedford (New Bedford) for appointment as a Police Officer with the New Bedford Police Department (NBPD) and to remove his name from the eligible list pursuant to Personnel Administration Rule PAR.09. A pre-hearing conference was held on July 14, 2017 and a full hearing, which was digitally recorded,[2] was held on June 13, 2017, both at the UMass School of Law in Dartmouth. Eighteen Exhibits (Exh.1 through Exh.18) were received in evidence and one additional exhibit (PHExh.19) was submitted by the Appellant at the Commission's request. The Commission received Proposed Decisions from the parties on November 27, 2017.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Lieutenant Ricard Rezendes
- NBPD Detective David Conceicao

Called by the Appellant:

- Nathan W. Goldrick, 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, Nathan W. Goldrick, was raised in Fairhaven, MA. He is a graduate of Fairhaven High School and received a Bachelor's Degree in Physical Education from Bridgewater State College in 2006, earning honors for his academic and athletic achievements (track and cross-country) in both high school and college. He has been a professional trainer since 2006, currently working for Boston Sports Clubs as lead trainer. (*Exhs. 1 & 2: Testimony of Appellant*)

2. Mr. Goldrick was taught firearms safety by his father, a Massachusetts corrections officer, and has used firearms since he was a teenager. He received a Firearms Identification Card (FID) from Fairhaven in 1998 and a Class A Firearms License to Carry (LTC) for "all lawful purposes" from Fairhaven in November, 2006. Since 2012, he has held an "unrestricted" LTC (formerly Class A "for all lawful purposes" licenses) issued by the NBPD. He belongs to several gun clubs and states that he would "often carry concealed in public." (*Exhs.1,2,3&19; Testimony of Appellant & Det. Conceicao*)

3. After college, Mr. Goldrick moved back to his family home in Fairhaven. In the fall of 2006, he began to "hang out" with childhood friends who had purchased a duplex on Central Ave, New Bedford, making a "hand-shake" agreement to rent a room in the basement on a month-to-month basis, and began spending most (7 out of 10) nights there. He still considered his family home in Fairhaven as his "official" permanent residence (domicile), where he left his bed, his computer, his firearms and most of his other personal belongings and furniture (taking only a spare bed to New Bedford). He registered his car in Fairhaven, filed taxes using his Fairhaven family residence as his "Home Address", was registered to vote (and, did vote) in Fairhaven in the November 2006 presidential election, and continued to give his Fairhaven home address to employers and health care providers. (*Exhs. 10 through 17; Testimony of Appellant*)

4. In April 2008, Mr. Goldrick relocated to Carver, living with a co-worker from the Middleborough YMCA where he was then employed, lived again in a new New Bedford apartment from July 2009 to September 2010, and then moved to Taunton where he lived until June 2012. (*Exhs.1,2,5&10; Testimony of Appellant*)

5. Mr. Goldrick became a <u>permanent</u> resident of New Bedford in June 2012, when he moved from Taunton to an apartment on Seabury Street. He currently resides with his wife, who owns the home on Harwich Street in which they have lived together since September 2014. (*Exhs.1,2,5,10&18; Testimony of 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. 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 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.

6. On April 25, 2016, Mr. Goldrick took and passed the civil service examination for Police Officer administered by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list created on October 2, 2015, which expired October 31, 2017. (*Stipulated Facts; HRD Submission dated 7/12/2017*)

7. On December 9, 2016, as amended on February 7, 2017, HRD issued Certification #04224 to New Bedford for appointment of fourteen (14) Permanent Full-time NBPD Police Officers. Mr. Goldrick's name appeared in 14th place on the list, tied with five other candidates. (*Stipulated Facts; HRD Submission dated 7/12/2017*)

8. On December 18, 2016, Mr. Goldrick submitted an Employment Application form to the NBPD in support of his application for appointment. Among other things, the application asked:

> "In reverse chronological order, please state every place you have resided within the past ten years. Include addresses while attending school, if away from home, and all military addresses."

In response, Mr. Goldrick listed the following:

> 09/2014 to Present - [#] Harwich St, New Bedford, MA
>
> 06/2012 to 09/2014 - [#] Seabury St, Apt. 2, New Bedford, MA
>
> 09/2010 to 06/2012 - [#] Bay St, Apt. 10, Taunton, MA
>
> 07/2009 to 09/2010 - [#] Abbott St, Apt. 2, New Bedford, MA
>
> Spring/2008 to 07/2009 - [#] Pleasant St, Carver, MA
>
> Fall/2006 to Spring 2008 - [#] Central Ave, Apt. 1, New Bedford, MA

(*Exh. 2*)

9. On January 30, 2017, an NBPD police officer was assigned to conduct a background investigation into Mr. Goldrick's application. (*Exh. 5; Testimony of Lt. Rezendes*)

10. The background investigator reviewed Mr. Goldrick's application, which he found to be complete. He pulled a previous NBPD Employment Application that Mr. Goldrick had filed in January 2016 in connection with an earlier hiring cycle, for which he had not been processed (being too far down on the list to be considered at that point). He also checked his criminal and driver's records which had no issues, save for a 2002 speeding ticket and a 2009 seat-belt citation. No attempt was made to contact his current employer and attempts to reach prior employers resulted in little information due to company policy to provide only basic information or no longer having any records of his employment. Neighbors had no issues with him and called him a "good neighbor". (*Exhs.1,2&5)*

11. In the course of his investigation, the background investigator obtained Mr. Goldrick's November 2006 Fairhaven LTC application, in which he listed his family home as his "Residential Address". This concerned the investigator because Mr. Goldrick had stated on his December 2016 NBPD application that he "resided" at the Central Ave, New Bedford address from "Fall 2006" to "Spring 2008" and stated on his January 2016 application that he "resided" at that address from "SEP 2006" to "APR 2008". (*Exhs.1,2&5; Testimony of Lt. Rezendes*)

12. On February 23, 2017, Mr. Goldrick was called to NBPD headquarters for a tape-recorded interview with the background investigator. After some preliminary questions about his residential history, the investigator stated he had discovered that Mr. Goldrick applied to Fairhaven in 2006 for an LTC during the time he claimed on his Employment Application he "resided" in New Bedford. The investigator told Mr. Goldrick that he had "committed a crime" in doing so because he only could have obtained an LTC from the community (New Bedford) in which now stated he had "resided" at the time. The investigator said this was a "big deal" for the NBPD and they "caught" a lot of people going to other towns for an LTC because, until recently, New Bedford only issued "target practice" and "sporting" LTC's and did not issue "unrestricted" or "all lawful purpose" LTCs. He told Mr. Goldrick he could be prosecuted for making a false statement on his firearms application. He said NBPD had disqualified another police candidate for the "same thing" a year ago. (*Exh. 10; Testimony of Det. Conceicao & Lt. Rezendes*)

13. Mr. Goldrick explained to the investigator that he filed for his LTC in Fairhaven because that was who had issued his FID and he still considered his Fairhaven home to be his "official" t residence. He possessed no documents such as a lease, utility bills or a voter registration that showed he was a New Bedford resident. He had no idea at the time that he applied that he was doing anything wrong or had broken any laws by his actions. (*Exh. 10; Testimony of Appellant*)

14. Mr. Goldrick indicated that he had applied for other law enforcement jobs and had an interview with the Massachusetts State Police in a few days. The background investigator told Mr. Goldrick that the State Police would be his "better option" and the NBPD would not "jam him up", meaning that, if Mr. Goldrick chose not to mention that NBPD was rejecting him, the NBPD would not tell them why unless specifically asked, and the State Police might not ever learn about it on their own. Mr. Goldrick was quick to say that he knew it would be wrong to hide information from the State Police and he would disclose the information himself, now that he had been told that the NBPD was rejecting him for doing something that was illegal (knowing that it probably would hurt his chances for another job. (*Exh. 10; Testimony of Appellant*)[3]

15. Following the interview, the background investigator submitted his report to Lt. Rezendes, recommending that Mr. Goldrick not be hired, based on his "admission" to criminal misconduct in fraudulently obtaining a firearms license in 2006. (*Exh. 10)*

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3. I draw no inference that the investigator's comments were an invitation to lie, as opposed to a test of Mr. Goldrick's proclivity for deceit, a test he clearly passed. I infer that he is pressing this appeal because was not hired by the State Police. (*Testimony of Appellant*)

16. By letter dated March 9, 2017, drafted by Lt. Rezendes, New Bedford Mayor Jonathan Mitchell, the Appointing Authority for the NBPD, wrote to HRD, asserting that Mr. Goldrick was bypassed due to an admission to falsifying the 2006 Fairhaven firearms application and his untruthfulness calls into question his credibility to testify as a witness should he be hired as a police officer. Mayor Mitchell's letter requested that HRD remove Mr. Goldrick's name from the current eligible list pursuant to Personnel Administration Rules, PAR.09. (*Exh.8*)

17. By letter dated April 28, 2017, HRD informed Mr. Goldrick that New Bedford had bypassed him and that he was being removed from the eligible list pursuant to PAR.09. (*Exh. 8*)

18. New Bedford hired three candidates from Certification #04224 who were ranked below Mr. Goldrick. This appeal duly ensued. (*Stipulated Facts; Claim of Appeal*)

19. At the Commission hearing, New Bedford called NBPD Detective David Conceicao, who serves as the NBPD Firearms Officer. Det. Conceicao explained that the NBPD currently does issue "unrestricted" LTCs but until several years ago, NBPD only issued restricted LTCs for specific limited purposes, such as "target practice" or "sporting". He also explained what type of identification was required of an applicant to obtain an LTC, namely, proof of citizenship (or a "green card") and documentary proof of residency. He agreed that the types of documents that New Bedford accepted to show residency included utility bills, credit cards and voter registration records. He acknowledged on cross-examination that an applicant who was registered to vote in Fairhaven could not obtain an LTC in New Bedford. (*Testimony of Det. Conceicao*)[4]

20. NBPD Police Lt. Rezendes testified at the Commission hearing that the "only red flag" he saw in Mr. Goldrick's application, and the basis for his recommendation to Mayor Mitchell to bypass and PAR.09 removal, was his concern that Mr. Goldrick had made a false statement under the penalty of perjury on his 2006 FTC application. The sole basis for his conclusion that Mr. Goldrick "perjured himself" on the 2006 application was Lt. Rezendes' "comparison" of three documents, i.e., the background investigation report, the statement on the 2016 NBPD application, stating that he "resided" at an address in New Bedford, and the 2006 LTC application using the "Residential Address" in Fairhaven. (*Testimony of Lt. Rezendes*)[5]

21. Prior to making his recommendation to Mayor Mitchell, Lt. Rezendes had not reviewed the tape recorded interview with Mr. Goldrick. The background investigator did not testify at the Commission hearing. (*Exh. 10; Testimony of Lt. Rezendes*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1.

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 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, by a preponderance of evidence, the appointing authority had "reasonable justification" to bypass the candidate after making an "impartial and reasonably thorough review" of the background and qualifications of the candidate that was sufficient to form a "credible basis" to believe allegations of misconduct or other facts that presented "legitimate doubts" about the candidate's present fitness to perform the duties of the position, in this case, the sensitive job of a police officer. *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), *citing Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). *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 suf-

4. Mr. Goldrick testified that he changed his voting registration from Fairhaven to New Bedford after he last voted in Fairhaven "several years ago", but did not have a specific recollection of the year in which he did that. At New Bedford's request, I left the record open for the City to provide copies of any relevant voting records, but none were received. (*Testimony of Appellant; Colloquy with Counsel*)

5. New Bedford did not claim that Mr. Goldrick had made any false statements about his residency on his applications to the NBPD. I note that the application called for "every place you have resided" in the past ten years, including "while attending school", living "way from home", and "all military addresses". In compliance with that requirement, on his first application, Mr. Goldrick listed the on-campus student apartment at Bridgewater State College where he resided from September 2005 to May 2006. Lt. Rezendes "concurred" that, at least in that instance, for purposes of the question on the Employment Application, Mr. Goldrick lawfully "resided" in two places, his on-campus residence in Bridgewater and his home in Fairhaven (*Exh. 2; Testimony of Appellant & Lt. Rezendes*)

ficient") The Commission has primary concern to ensure that the action comports with "[b]asic merit principles." G.L. c. 31, §1. *See Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *Beverly* v. *Civil Service Comm'n*., 78 Mass. App. Ct. 182, 188 (2010); *City of Cambridge* v. *Civil Service Comm'n*., 43 Mass. App. Ct. 300, 303-305, *rev. den*., 428 Mass. 1102 (1997); *MacHenry* v. *Civil Serv. Comm'n.*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass.1106 (1996).

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."

See 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 does recognize 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, 371, 494 N.E.2d 27, 32 *rev.den.* 398 Mass. 1103, 497 N.E.2d 1096 (1986). An appointing authority is justified to refuse 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

The preponderance of the evidence presented to the Commission establishes that the NBPD's decision to bypass Mr. Goldrick solely for "perjuring himself" on a 2006 LTC application was not reasonably justified because it was not based on a reasonably thorough review of the facts and was premised on a misunderstanding of applicable law. Mr. Goldrick was lawfully entitled to apply to Fairhaven for an LTC in November 2006 as he had not abandoned his residency there although, a few months earlier, he began living with friends at a second residence in New Bedford. Neither Mr. Goldricks's 2006 LTC application nor his two NBPD applications contain any false statements or untruthfulness. The NBPD has established no rational basis to call into question his reputation as a witness for truth and veracity or otherwise raise legitimate concern about his suitability to serve as an NBPD police officer.

First, this appeal does <u>not</u> raise the issues of untruthfulness that are more commonly presented to the Commission and upon which New Bedford cites in support of its bypass decision. Those appeals typically involve the case of an applicant who makes knowingly false statements at the time he submitted an employment application, such as omitting or misrepresenting information on the application, or being less than truthful during the investigation into the application. Here, NBPD found Mr. Goldrick's application "complete" and free of errors or omissions. Moreover, when the NBPD background investigator gave Mr. Goldrick an opening to be less than truthful to the Massachusetts State Police, Mr. Goldrick promptly rejected that suggestion and strongly professed that he knew how important it was to be forthright and honest when seeking appointment as a police officer. His actions throughout the application process and his testimony before the Commission show that his intention to be truthful was genuine. The preponderance of the evidence proved that Mr. Goldrick is not a person who would be inclined to "fudge the truth" for personal gain.

Second, the <u>residency</u> issue here is also distinct from what is more typically involved in bypass appeals, in which an appellant has been rejected based on an appointing authority's investigation that showed that an applicant falsely claimed <u>permanent</u> residency status (also known as domicile) in the municipality where he was applying (also known as domicile). i.e., claiming to have been a <u>permanent</u> resident of a municipality for at least a year prior to taking the civil service examination for the position, which is a statutory requirement to qualify for preference in hiring over any non-residents. Here, it is not disputed that Mr. Goldrick <u>was</u> a <u>permanent</u> resident of New Bedford for at least a year prior to the qualifying examination. Similarly, every statement on his both of his NBPD applications, including, in particular, his meticulous disclosure of all of the places he resided in the past ten years, which, as the instructions required, must include both all permanent residences (domicile) <u>and</u> other temporary residences, was completely truthful. The only issue, here, involves his residency status ten years earlier under non-civil service law.

Third, Mr. Goldrick argues that the NBPD wrongfully equated the term "residing" in the LTC and FID laws with permanent residence or "domicile", when they are legally distinguishable and, in the LTC and FID statutes, the term was not meant to be limited to permanent residency or domicile but allowed for an applicant to have, and lawfully use, more than one "Residential Address" on an LTC application. His argument makes a fair point.

> "Domicile is "the place of one's actual residence 'with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode.'" *Hershkoff* v. *Registrars of Voters of Worcester,* 366 Mass. 570, 578, 321 N.E.2d 656 (1974), quoting from *Opinion of the Justices,* 365 Mass. 661, 663, 312 N.E.2d 208 (1974). "[*A] person may have a residence in one place and a ... domicile ... in another*." *Horvitz* v. *Commissioner of Rev.,* 51 Mass. App. Ct. 386, 393, 747 N.E.2d 177 (2001).

Commonwealth v. *Becker*, 71 Mass. App. Ct. 81, 92-93, *rev.den*., 451 Mass. 1106, *cert.den*., 555 U.S. 933 (2008) (*emphasis added*)

Confusion about the meaning of the terms "residing" and "residence" in any particular statutory context is understandable, as the courts have acknowledged that the terms are ambiguous.

> "The words of the statute imply that there may be a distinction between 'residence' and 'address' of the applicant for registration, and that both are required in the application. [Citation] '*Residence' is not a word of inflexible meaning but may be used in different senses. It is not synonymous with domicil[e]. . . .[I]n the laws relating to taxation, voting, and settlement, it means the same as 'domicile.' Usually it means the same in the law of divorce. . . . [but f]or the purpose of giving notice to an indorser, his place of residence implies less permanency of abode*.' [Citations] *Although a person can have but one domicil[e] . . . [i]t is matter of common knowledge that a person may have two places of residence within the commonwealth*. [Citations omitted] A statement of the residence and address of the applicant affords information sufficient in the ordinary case to satisfy one main purpose of the statute as to the easy identification of the registrant. . . . The desire of the plaintiff to secure a lower rate of automobile insurance, if warranted . . . was not bad faith in the circumstances disclosed."

Doyle v. *Goldberg*, 294 Mass. 105, 107-109 (1936) (*emphasis added*)

Thus, on the one hand, for example, the NBPD's own Employment Application treats the term "resided" to include both permanent and non-permanent residences. Lt. Rezendes concurred that, within the meaning of the NBPD Employment Application, an applicant could have "resided" in more than one place at the same time, e.g., residing at college or on military base, and still have another permanent residence. On the other hand, for purposes of "residency preference" in civil service examinations, the ambiguity in the term has uniformly been construed in the tax law and divorce law sense not to mean any residence but only one's permanent residence or domicile.

I have not been made aware of any case law on point that definitively resolves the ambiguity in the term "residing" as it appears in the LTC and FID statutes, which provide that any person may obtain an FID and/or LTC from a licensing authority in any jurisdiction where he or she is then "residing or having a place of business", including "residing in an area of exclusive federal jurisdiction located within a city or town". G.L. c.140, §129B (FIDs); G.L. c.140, §131 (LTCs). It does seem reasonable to me that the term "residing" in those laws and the term "Residential Address" on the application form itself, more closely fits the usage described by the SJC to the motor vehicle registration statute involved in *Doyle* v. *Goldberg*, *supra*, i.e., it was meant primarily to identify a verifiable nexus or contact point with a gun owner within the licensing authority's jurisdiction, and need not be limited to a single jurisdiction. Indeed, the laws, on their face, give a gun owner the option to obtain an FID or LTC from more than one jurisdiction, i.e. where they personally reside or anywhere they have a place of business (which may or may not necessarily be where the gun owner has a "residence" and/or is permanently "domiciled"), as well as the jurisdiction encompassing an area owned by the federal government, i.e. a military base (a town that most military personnel would not consider themselves permanently residing or domiciled).

What is important here, however, is not how the ambiguity in the LTC statute should be construed. More significant to this bypass appeal is the fact that it is inconceivable to believe that a 23-year old Mr. Goldrick could possibly parse the statutorily ambiguous meaning of the term "residing" in these laws, an ambiguity that appellate courts have explicitly recognized, so that he could be found to have "perjured himself" by listing his "Residential Address" on the 2006 LTC application form as his family home in Fairhaven, which he then still considered his permanent residence (i.e., domicile) and where all his firearms were kept. Moreover, even if the law is construed to mean that an LTC can be issued only by a jurisdiction in which the applicant was permanently "domiciled", Mr. Goldrick produced compelling evidence that, in the few short months that he had been staying with his friends in New Bedford as of November 2006, he, indeed, had done nothing to evidence that he was changing his "legal" permanent residence from his Fairhaven home and had continued many actions that demonstrated his continuing intent to continue using his family home as what he called his "official" (i.e., permanent) residence.. Also, Fairhaven approved his application, which provides, at a minimum, a presumption that Fairhaven concluded that it had the authority to issue Mr. Goldrick's LTC. On the other hand, based on the testimony of the NBPD witnesses at the Commission hearing, at the time (November 2006), Mr. Goldrick had none of the documentation that he would have been required to produce to obtain an LTC from New Bedford.

In sum, based on the evidence presented at the Commission hearing, I am persuaded that, at the time of his LTC application, Mr. Goldrick honestly (and, probably, correctly) believed that he remained a Fairhaven "resident" (whether permanent or not) and that he was lawfully entitled to use his Fairhaven family home "Residential Address" on an LTC application for firearms which he kept at that address. Even if Mr. Goldrick's (and my) understanding of the residency requirement in LTC statute is incorrect, he is responsible for no more than an honest mistake, not a disqualifying falsehood. *See generally*, *Boyd* v. *City of New Bedford*, 29 MCSR 471 (2016); *Morely* v. *Boston Police Dep't.*, 29 MCSR 456 (2016); *Lucas* v. *Boston Police Dep't.*, 25 MCSR 520 (2012).

Fourth, I dismiss as speculation the NBPD's impression that Mr. Goldrick acted with the same ulterior motive as other people encountered by the NBPD, who intentionally avoided making application to New Bedford because they knew that the NBPD was not

then issuing "all lawful purposes" licenses. Lt. Rezendes conclusion was based entirely on his "comparison" of the LTC application with Mr. Goldrick's own (truthful) disclosures on his NBPD applications, as noted above, that indicated he "resided" in New Bedford when he filed his 2006 LTC application in Fairhaven. Lt. Rezendes had not listened to what Mr. Goldrick has to say about his actions during the tape-recorded interview, and New Bedford took no other steps to investigate and did not consider whether there might well be a rational and consistent explanation, rather than an ulterior motive, for the statements in those applications more than ten years apart. I note that Lt. Rezendes "concurred" at the Commission hearing that "residing" at one address (such as his Bridgewater school apartment) did not mean Mr. Goldrick was claiming that was his only residence, but, for purposes of truthfully completing the Employment Application, he could lawfully be "residing" in two places simultaneously.

Fifth, the Commission appreciates the so-called *Brady/Ellison* obligation that police departments and prosecutors carry to disclose "exculpatory evidence" to defense counsel about the truthfulness of witnesses expected to be called to testify in a criminal prosecution, but that only reinforces how critical it is that NBPD conduct a thorough and deliberate investigation before permanently tainting an applicant for appointment as untruthful, especially, for something that occurred ten years before the person even became a sworn police officer. Moreover, I doubt that type of "exculpatory evidence" would come within the sweep of the "automatic disclosure" requirements, but, rather, would be subject to stricter limits upon disclosure imposed on internal affairs investigation and personnel files. *See, e.g., Worcester Telegram & Gazette Corp.* v. *Chief of Police*, 58 Mass. App. Ct. 1, *rev.den.* 440 Mass. 1103 (2003) (employment applications); *Commonwealth* v. *Wanis*, 426 Mass. 639, 643-44 (1998) (internal affairs files)

In sum, when bypassing a candidate for untruthfulness, which is, in effect, a career-ending decision for most applicants, an appointing authority must do more than what New Bedford did here. In order to satisfy civil service requirements, disqualification must come only after a "reasonably thorough" review of an applicant's suitability that is "based on credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law". Given the facts and the legal ambiguity that came out during this appeal, Mr. Goldrick was entitled to more than a paper review of his situation. Unfortunately, here, there was a rush to judgment on the paper record, instead of the required deliberate and reasoned assessment of all of the facts and the applicable law that should have been more thoroughly considered, given the serious nature and severe consequences of disqualifying a candidate for untruthfulness, especially for something that did not occur during the application process but based on what some might view as a potentially stale incident that occurred more than a decade earlier. At a minimum, Mr. Goldrick should have been allowed to move forward in the hiring process to the next level of review—typically the Captains Board, which vets all candidates before decisions are made as to who should be appointed—where he would have the opportunity to present all of the relevant facts that the NBPD investigator missed and persuade the NBPD panel of the merits of his claim that his LTC application complied with lawful requirements and/or, at most, he made an honest, youthful mistake concerning an ambiguous statute, and, in either case, that should not disqualify him.

Accordingly, Mr. Goldrick is entitled to be given at least one further opportunity to have the thorough consideration for appointment to the NBPD that he deserves.[6]

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Nathan, is ***allowed.*** Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of New Bedford in its delegated capacity take the following action:

- Place the name of Nathan W. Goldrick at the top of any current or future Certification for the position of NBPD Permanent Full-Time Police Officer until he is appointed or bypassed after consideration consistent with this Decision.

- If Mr. Goldrick is appointed as a NBPD Permanent Full-Time Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. Goldrick who was appointed from Certification No. 04224. This retroactive civil service seniority date is not intended to provide Mr. Goldrick with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [NO]; Camuso [AYE] Ittleman [NO], Stein [AYE] and Tivnan [AYE], Commissioners) on February 28, 2019.

Notice to:

Michael McGlone, Esq.
128 Union Street
New Bedford, MA 02740

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02740

Michael Downey, Esq.
Human Resources Division
100 Cambridge Street
Boston, MA 02114

* * * * * *

6. As Certification #04224 has expired, the issue of Mr. Goldrick's PAR.09 removal is moot and need not be addressed by this Decision.

KEVIN M. KELLEY

v.

CITY OF BOSTON

D1-18-247

February 28, 2019
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Unauthorized Absence of a Boston Heavy Equipment Operator—The Commission lacked jurisdiction to hear the appeal of Boston's decision to terminate a heavy equipment operator due to his absence without leave where such an appeal under Section 39 of c. 31 lies exclusively within the purview of HRD.

ORDER OF DISMISSAL

On December 20, 2018, the Appellant, Kevin M. Kelley (Mr. Kelley), filed an appeal with the Civil Service Commission (Commission), contesting the City of Boston (City)'s decision to terminate his employment as a Heavy Equipment Operator.

On January 2, 2019, the City filed a Motion to Dismiss Mr. Kelley's appeal, arguing that the Commission had no jurisdiction over this matter, which, according to the City, falls under G.L. c. 31, § 38, as Mr. Kelley was separated due to his absence without leave.

On January 15, 2019, I held a pre-hearing conference which was attended by Mr. Kelley, counsel for the City and a representative from the City.

At the pre-hearing, Mr. Kelley acknowledged that he was absent without leave, but he argued that he did contact the City by telephone at some point, although his primary focus was seeking medical attention for addiction-related issues.

Mr. Kelley was given ten (10) days to file a reply to the City's Motion to Dismiss, but he failed to do so.

G.L. c.31, § 38, concerning unauthorized absences, provides, in relevant part:

> "Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight, an appointing authority shall send by registered mail a statement to the person named in the report, informing him that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.
>
> The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.
>
> If an appointing authority fails to grant such a person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.
>
> No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.
>
> For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven."

Section 38 has been interpreted consistently to mean that jurisdiction to review a decision by an appointing authority to separate an employee for "unauthorized absence" lies exclusively with the Personnel Administrator [HRD]. *See, e.g.*, *Police Comm'r*. v. *Civil Service Comm'n*., 29 Mass. App. Ct. 470 (1990), rev.den., 409 Mass. 1102 (1991), appeal after remand sub nom, *Police Comm'r*. v. *Personnel Adm'r*, 39 Mass. App. Ct. 360 (1995), *aff'd*., 423 Mass. 1017 (1996). See also *Canney* v. *Municipal Ct.*, 368 Mass. 648 (1975); *Sisca* v. *City of Fall River*, 65 Mass. App. Ct. 266 (2005), *rev.den*., 446 Mass. 1104 (2006); *Town of Barnstable* v. *Personnel Adm'r*, 56 Mass. App. Ct. 1106 (2002) (Rule 1:28 opinion); *DeSimone* v. *Civil Service Comm'n*., 27 Mass. App. Ct. 1177 (1989). The Commission's decisions have been uniformly to the same effect. *Alves* v. *Fall River School Dep't*., 22 MCSR 4 (2009); *Donnelly* v. *Cambridge Public Schools*, 21 MCSR 665 (2008); *O'Hare* v. *Brockton*, 20 MCSR 9 (2007); *McBride* v. *Fall River*, 19 MCSR 325 (2006); *Fontanez* v. *Boston Police Dep't*., 19 MCSR 159 (2006); *Pimental* v. *Department of Correction*, 16 MCSR 54 (2003), *aff'd sub nom*, *Pimental* v. *Civil Service Comm'n*., Suffolk Superior Civ. No. SUCV2003-5908 (June 6, 2005); *McDonald* v. *Boston Public Works*, 14 MCSR 60 (2001); *Sheehan* v. *Worcester*, 11 MCSR 100 (1998); *Brindle* v. *Taunton*, 7 MCSR 112 (1994); *Tomasian* v. *Boston Police Dep't.*, 6 MCSR 221 (1993).

1. Mass.G.L. c. 31, §68 states, in part: "Each appointing authority shall report in writing forthwith to the administrator of any . . . absence for more than a month because of illness or injury, unauthorized absence [and]. . . leave of absence for more than a month. . . ." See also PAR.13 (governing prior notice for leaves of absence longer than three months)

Accordingly, since this termination was made under Section 38, the Commission is obliged to dismiss the appeal for lack of jurisdiction. Nothing in this decision, however, is meant to decide whether Mr. Kelley has a right of appeal to HRD, even as of this date, or whether Mr. Kelley has a right of appeal in another forum.

Finally, nothing in this decision prevents the City, based on the facts presented by Mr. Kelley, from unilaterally deciding that Mr. Kelley, consistent with the City's stated objectives of being "a City of second chances, a City of heart and hope" deserves one of the those second chances as he successfully works through his recovery.

CONCLUSION

For all of the above reasons, Mr. Kelley's under Docket No. D1-18-247 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 28, 2019.

Notice to:

Kevin M. Kelley
[Address redacted]

Robert J. Boyle, Jr., Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

* * * * * *

STEPHENS P. LIMA

v.

CITY OF NEW BEDFORD

G1-17-093

February 28, 2019
Paul M. Stein, Commissioner

Bypass Appeal-Domestic Violence-Unauthorized Consultation of CJIS Network and MNI Index for Personal Reasons—The City of New Bedford was fully justified in bypassing the Appellant for his unauthorized consultation of the CJIS Network and MNI Index for personal reasons while serving as a police cadet and also for credible claims of violence from his ex-wife that led to the issuance of a restraining order.

DECISION

The Appellant, Stephens P. Lima, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b)[1], to contest his bypass by the City of New Bedford (New Bedford) for appointment as a Police Officer with the New Bedford Police Department (NBPD) and to remove his name from the eligible list pursuant to Personnel Administration Rule PAR.09. A pre-hearing conference was held on June 9, 2017 and a full hearing, which was digitally recorded[2], was held on August 18, 2017, both at the UMass School of Law in Dartmouth. Twenty-one exhibits (Exh.1 through Exh.21) were received in evidence. The Commission received Proposed Decisions from the parties on October 6, 2017.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Lieutenant Ricard Rezendes
- NBPD Police Officer Nelson Goncalves
- NBPD Police Detective Dominique Sherburne

Called by the Appellant:

- Stephens P. Lima, 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. 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 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.

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, Stephens P. Lima, is a long-time New Bedford resident who was born and raised in New Bedford. He is a 2010 graduate of New Bedford High School and holds an Associate's Degree in Criminal Justice from Bristol Community College. He got married in October 2014. (*Exhs. 2, 3 & 19; Testimony of Appellant*)

2. In September 2013, Mr. Lima became a New Bedford Police Cadet, where he was assigned to answering 911 calls and assisting civilian dispatchers. He resigned his position in July 2016 for reasons that are explained below. (*Exhs. 2, 3 & 19; Testimony of Appellant*)

3. Mr. Lima holds the rank of Sergeant in U.S. Army Reserves in a unit that operates heavy military construction equipment. He was deployed overseas on active duty from January 2015 through December 2015. (*Exhs 2 & 19; Testimony of Appellant*)

4. In February 2016, Mr. Lima and his wife filed a joint petition for a "1A" no-fault decree which became final in July 2016. (*Exh. 3;Testimony of Appellant*)

5. In March, 2016, Mr. Lima took and passed a military make-up examination for Police Officer and his name was added to the then current eligible list, which since has expired. (*Exh.1*)

6. On or about April 4, 2016, Mr. Lima completed and submitted his Employment Application to the NBPD in connection with the department's on-going hiring (Certification #03724) for the original appointment of permanent, full-time Police Officers with the NBPD. (*Exhs. 2 & 18*)

7. During the NBPD's background investigation, the investigators discovered that (while on duty as an NBPD Police Cadet), Mr. Lima logged on to the department's computer system and made queries of a personal nature in the NBPD's internal Master Names Index (MNI) data base and the CJIS[3] network about his estranged wife and a mutual friend she had started dating. These queries included:

> 03/27/2016 - CJIS motor vehicle query of estranged wife (divorce pending)
>
> 04/14/2016 - CJIS motor vehicle query of ex-wife
>
> 04/25/2016 - Department MNI query of friend after learning of his alleged arrest

Mr. Lima's ex-wife claimed that, at some point, Mr. Lima told her that he "ran her plates" and, also some of her other friends (although no evidence conclusively confirmed this). (*Exhs. 3, 8 through 12; Testimony of Officer Goncalves, Detective Sherburne & Lt. Rezendes*)[4]

8. As part of the background investigation into Mr. Lima's application, on July 13, 2016, two background investigators (one male and one female) interviewed Mr. Lima's ex-wife.[5] The former spouse described her ex-husband as a "hot head" with "anger issues" who physically and emotionally abused her throughout their six-year relationship, at least six times strangling her almost to the point of unconsciousness. She said she was "young and stupid" and never reported the abuse. She reported that after he came home from overseas, Mr. Lima has been texting her, coming to her home and confronting visitors who would no longer visit her. She said she was in fear of Mr. Lima, told him to stop texting and to stay away or she would take "legal action", and blocked his number. (*Exhs.3,13,14&16; Testimony of Officer Goncalves & Detective Sherburne*)

9. The ex-wife described two specific events to the investigators. The first incident occurred three months earlier, around the end of April, when Mr. Lima arrived at her home and she let him in while calling his roommate to come get him. She claimed he was physically abusive, picking her up in a "bear hug" and throwing her to the floor. The second incident was on or about a month prior to the interview (June 17) when he confronted their mutual friend as he left her home. (*Exhs. 3, 13, 14 & 16; Testimony of Officer Goncalves & Detective Sherburne*)[6]

10. The NBPD investigators advised the ex-wife of her right to seek a Chapter 209A abuse prevention order. On July 14, 2016, based on an affidavit which described, among other things, the two specific incidents described above, the ex-wife obtained an ex-parte Abuse Prevention Order which required Mr. Lima to stay away from the former spouse's home and workplace and to surrender all firearms in his possession. On July 21, 2017, after a hearing at which the ex-wife testified and Mr. Lima was represented by counsel but did not testify, the court extended the Abuse

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3. CJIS is a "restricted information system" maintained by the Department of Criminal Justice Information Services which contains a variety of personal information, including motor vehicle and criminal offender records, to which access and disclosure is regulated by statute (G.L. c.6, §167 et seq.) and regulations (803 CMR 7.00). improper access of CJIS for any "non-criminal justice purpose" is prohibited and may be punished by state and federal civil and criminal penalties. (*Exhs. 6 & 7*) In addition, NBPD officers are annually trained on these restrictions and NBPD General Order 2-13 on Computer Usage Policy provides: "The computer, software, and network they connect to are the property of the City of New Bedford and may only be used for legitimate business purposes." (*Exh. 4; Testimony of Officer Goncalves*)

4. The 4/14/2018 CJIS query was made with the log-on ID of another NBPD cadet, but NBPD records confirmed that cadet did not work that day but Mr. Lima did. I infer that Mr. Lima is responsible for this query. There were also queries about the mutual friend made by a different Cadet who admitted that he had also accessed the MNI data base in 2016 out of "curiosity" after Mr. Lima had told him of the friend's alleged arrest. (*Exhs. 9,10 & 15; Testimony of Officer Goncalves*)

5. In an initial telephone conversation with the male NBPD investigators who asked about "domestic issues" she paused and then said she would prefer not to answer the question. She requested a female officer to attend the interview. (*Exh. 3; Testimony of Officer Goncalves & Detective Sherburne*)

6. Detective Sherburne currently works as a detective in the juvenile sex crimes unit. She presented as a well-trained, articulate witness with considerable experience in domestic violence cases. Her judgment that the ex-wife's statements were credible is based on that experience as well as the text messages she viewed and the ex-wife's body language and demeanor in this particular instance. She does not necessarily need to see photographs or other physical evidence of abuse to believe a victim of domestic violence. (*Testimony of Detective Sherburne*)

Prevention Order for one year and expressly reaffirmed the firearms surrender order. (*Exh.14; Testimony of Appellant*)

11. On July 15, 2016, NBPD Lieutenant Rezendes, the superior officer supervising the hiring process, along with the two background investigators conducted a recorded interview of Mr. Lima. The interview began as a "non-criminal" employment interview,[7] but midway through, Mr. Lima was given his "Miranda Rights." Mr. Lima admitted to "running the plates" of his ex-wife (he said, to get information needed for the divorce proceedings) and, after initially being equivocal about it, admitted to making a query of the mutual friend after hearing he had been arrested (apparently by reading about it in the newspaper). He denied any domestic abuse, stating that he only gave "bear hugs" to his ex-wife in the past to restrain her when she got physical and violent. After he returned, he was getting "mixed messages" and said he did see her, drive by or text her occasionally, essentially, just to "check on her." He confirmed the incident on which he said he showed up after having "three beers" and she called his roommate to bring him home. He confirmed the encounter on June 17, 2016, claiming he had only been "driving by" and happened to notice the friend. (*Exhs. 3, 13 & 15; Testimony of Appellant, Lt. Rezendes, Officers Goncalves & Sherburne*)

12. Following his interview, Mr. Lima withdrew his name from consideration for hiring as a NBPD Police Officer. He also resigned his position as an NBPD Police Cadet, effective August 5, 2016. (*Exh. 18*)

13. On December 1, 2016, Mr. Lima called the NBPD to report that, while he was at work, his ex-wife had come to his home, left a box that belonged to him on the porch and starting asking his roommate if Mr. Lima still lived there, as well as "all kinds of questions on how Mr. Lima was doing." The responding NBPD officer spoke with Mr. Lima, who reported that there was an outstanding restraining order against him and he did not know why his ex-wife would be coming to his house. The responding officer confirmed that there was an active restraining order and filed a "No Crime Involved" report. (*Exh. 21; Testimony of Appellant*)

14. In December 2016, as amended in February 2017, a new Certification (#04224) was issued to authorize the NBPD to hire up to 14 additional permanent, full-time Police Officers. Mr. Lima's name appeared on the certification and he reapplied, submitting a new NBPD Employment Application dated December 20, 2016. (*Exhs. 1 & 19*)

15. On or about January 9, 2017, Detective Sherburne was assigned to investigate Mr. Lima's second application. She confirmed that the 209A abuse prevention order and the firearms restriction it imposed remained in effect. She confirmed (with the commanding officer of the NBPD's firearms division) that an open restraining order precluded Mr. Lima from obtaining a license to carry a firearm, essential to become a police officer and, therefore, that Mr. Lima was ineligible to be appointed as an NBPD police officer. This report ended further consideration of his application. (*Exh. 20; Testimony of Detective Sherburne & Lt. Rezendes*)

16. On March 3, 2017, on a motion requesting that the 209A restraining order be vacated, the court entered a finding that "based on plaintiff having gone to defendant's home in December and her failure to appear at show cause hearing . . . she no longer has ongoing fear of defendant" and terminated the prior restraining order. (*Exh.14*)

17. By letter dated March 23, 2017, New Bedford Mayor Jonathan Mitchell, the appointing authority for the NBPD, requested approval from the Massachusetts Human Resources Division (HRD) to bypass Mr. Lima and remove his name from the current eligible list for future consideration for appointment to the NBPD, pursuant to Personnel Administration Rule PAR.09. The reasons stated for this request included "Allegations of Domestic Abuse" and "Abuse of official authority" while serving as a NBPD Police Cadet. (*Exh. 1*)

18. By letter to Mr. Lima dated April 28, 2017, HRD notified Mr. Lima that his bypass and PAR.09 removal were approved. This appeal duly ensued. (*Exh.1; Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, §1.

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 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, by a preponderance of evidence, the ap-

7. Mr. Lima was asked about discrepancies in his application and performance as a Police Cadet which are not part of the reasons for his bypass and need not be further addressed in the Decision.

pointing authority had "reasonable justification" to bypass the candidate after making an "impartial and reasonably thorough review" of the background and qualifications of the candidate that was sufficient to form a "credible basis" to believe allegations of misconduct or other facts that presented "legitimate doubts" about the candidate's present fitness to perform the duties of the position, in this case, the sensitive job of a police officer. *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), *citing Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). *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 has primary concern to ensure that the action comports with "[b]asic merit principles." G.L. c. 31, §1. *See Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259, (2001); *Beverly* v. *Civil Service Comm'n*., 78 Mass. App. Ct. 182,188 (2010); *City of Cambridge* v. *Civil Service Comm'n*., 43 Mass. App. Ct. 300, 303-305, *rev. den*., 426 Mass. 1102 (1997); *MacHenry* v. *Civil Serv. Comm'n.*, 40 Mass. App. Ct. 632, 635 (1995), *rev.den*., 423 Mass. 1106 (1996).

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."

See 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 does recognize 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, 371, 494 N.E.2d 27, 32 *rev.den.* 398 Mass. 1103, 497 N.E.2d 1096 (1986). An appointing authority is justified to refuse 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

New Bedford has proved by a preponderance of the evidence that the decision to bypass Mr. Lima was reasonably justified after they performed a reasonably thorough and impartial review of the facts relevant to his suitability to serve as a NBPD Police Officer.

First, in March and April 2016, while serving as an NBPD Police Cadet, Mr. Lima violated the NBPD rules and Massachusetts regulations prohibiting access to the NBPD's internal MNI data base and the state-wide CJIS data base, by using his position as a Police Cadet to retrieve information from those data bases for personal, and not "criminal justice" or "police" business. On at least one occasion, Mr. Lima accessed the data by logging in with the access code of a co-worker, rather than his own. These recent incidents of misconduct, alone, provide reasonable justification to bypass him.

Second, the 209A restraining order against Mr. Lima also provides independent, reasonable justification for the bypass. Although Mr. Lima denies that he ever physically abused his ex-wife, and accuses her of false claims against him, the NBPD does not have the burden to prove, and the Commission is not required to find, who is telling the truth here. "Reasonable justification" means only that, after an "impartial and reasonably thorough review", there is a "credible basis" to believe allegations of misconduct that present "legitimate doubts" about Mr. Lima's suitability to serve in the sensitive job of an NBPD police officer. *E.g*., *Beverly* v. *Civil Service Comm'n*., 78 Mass. App. Ct. 182 (2010) New Bedford met this standard, based on the testimony of the background investigators who found the ex-wife's claims to be credible, the order entered by a judge after hearing from both the ex-wife and Mr. Lima's counsel, and his own admission to behavior (e.g., a tumultuous relationship that required restraining her with "bear hugs"). New Bedford had reason to infer that there was, indeed, more physical altercation between them than he acknowledged, which, together with the judicially approved restraining order, serves to confirm the NBPD's "legitimate doubt" about his present suitability for appointment.

I have not overlooked the fact that, as of March 23, 2017, the date on which New Bedford sent its request to HRD to bypass and PAR.09 remove Mr. Lima, the restraining order had been vacated. The evidence did not indicate that New Bedford learned of that

fact before it submitted the request to HRD and, more importantly, the decision to bypass Mr. Lima was made in January, while the order was still active and, legally, prevented Mr. Lima from carrying a firearm for at least another six months. New Bedford had no obligation, having completed a "through and impartial review" in January, to further investigate the status of the restraining order before formally submitting the bypass request, even after Mr. Lima had filed a police report concerning his ex-wife's unannounced visit to his home when he was away. Finally, even if the termination of the restraining order was a fact that New Bedford "knew or should have known" at the "time of the bypass", the close proximity of the underlying event remains sufficient to present "legitimate doubt" about Mr. Lima's suitability for appointment.

Third, I find no indication that Mr. Lima was bypassed for any ulterior political reasons, favoritism toward others or unlawful bias. Indeed, Mr. Lima's overall ambition and solid service as a NBPD Police Cadet and his military service were included among the positive attributes in his record that NBPD recognized he possessed. It may be that, in time, he will be able to establish that the blemishes on that record which tripped him up this time are behind him.

Fourth, as the eligible list from which this appointment was made has now expired, and the effectiveness of the PAR.09 removal no longer effective, the PAR.09 removal issue is now moot and the Commission need not separately address it here.

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Stephens P. Lima, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 28, 2019.

Notice to:

Matthew A. Viana, Esq.
Beauregard, Burke & Franco
32 William Street
New Bedford, MA 02740

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
Solicitor New Bedford City Hall
133 William Street
New Bedford, MA 02740

John Marra, Esq.
Human Resources Division
100 Cambridge Street
Boston, MA 02114

* * * * * *

MATTHEW McCARTHY

v.

HUMAN RESOURCES DIVISION

E-18-242

February 28, 2019
Christopher C. Bowman, Chairman

Commission Practice and Procedure-Mootness-Appeal from Candidate for Appointment as an MBTA Police Officer—A candidate for original appointment as an MBTA police officer who claimed never to have received an email notifying him that his name appeared on the certification had his appeal dismissed on the grounds of mootness since the MBTA did not consider for appointment any individuals ranked below him. As such, no bypass occurred.

ORDER OF DISMISSAL

On December 12, 2018, the Appellant, Matthew McCarthy (Mr. McCarthy), filed an appeal with the Civil Service Commission (Commission), asking the Commission to grant him relief under Chapter 310 of the Acts of 1993, arguing that the state's Human Resources Division (HRD) failed to notify him via email that his name appeared on a Certification (05777) issued on November 13, 2018 for MBTA Police Officer. Mr. McCarthy sought an order allowing him to sign the Certification and be considered in the current hiring process, even though the deadline for signing the Certification had passed.

2. On January 8, 2019, I held a pre-hearing conference which was attended by Mr. McCarthy, his father and counsel for HRD. Mr. McCarthy submitted an appearance form for his counsel, Scott Dunlap, who, according to Mr. McCarthy, was unable to attend the pre-hearing conference due to a scheduling conflict.

3. At the pre-hearing conference, it was agreed that: a) Mr. McCarthy, sometime in 2017, took and passed the civil service examination for full-time police officer; and b) his name appeared on Certification No. 05777, issued to the MBTA Police Department on November 13, 2018.

4. Candidates whose name appear on a Certification are notified of such by HRD, via email. In this email, candidates are notified of the deadline date for signing the Certification indicating their willingness to accept appointment. The deadline in this case was November 20, 2018.

5. At the pre-hearing conference, Mr. McCarthy stated that he never received an email notification from HRD. Rather, on November 26, 2018, when he logged into HRD's online system (NEOGOV) to sign up for another civil service examination, he saw a notification indicating that he had been sent an email on November 13th regarding the MBTA Police Officer Certification.

6. According to Mr. McCarthy, he immediately checked his email account, including his SPAM / Junk folder, and confirmed that

he had not received any email from HRD on November 13th, or at any other time, regarding his name appearing on Certification No. 05777. According to McCarthy, he checks this email account throughout the day as it his primary email account.

7. At the pre-hearing, Mr. McCarthy opened the inbox from his email account on his phone to show that he received several emails on November 13th, but no email from HRD.

8. I asked Mr. McCarthy to open the junk / SPAM folder as well, but the folder (at least what appeared on the phone), only went back several weeks (i.e. - through December 2018). Mr. McCarthy offered to check his gmail account on a computer at the offices of the Commission to see if the junk / SPAM folder went back further when accessed on a computer, as opposed to his phone.

9. HRD argued that, according to the online NEOGOV system, an email was sent to Mr. McCarthy on November 13th and, HRD argued, this is sufficient evidence for the Commission to conclude that an email was sent and that McCarthy is not an aggrieved person.

10. Standing alone, I found Mr. McCarthy's statements to be credible. It appears that he does indeed use his gmail account as his primary email account and that he checks that email account throughout the day. Given his strong desire for a position as an MBTA Police Officer, it is not plausible that he would receive and ignore an email regarding his eligibility to sign the Certification related to this hiring process.

11. For these above-referenced reasons, and given the time-sensitive nature of this appeal, I ordered the parties to take the following actions forthwith:

> I. The Appellant would access his junk / SPAM folder on his GMAIL account on a computer to view the content of the entire folder, including the junk emails received on or around November 13, 2018.
>
> II. The Appellant would provide the Commission with a printout of the list of junk emails received on or around November 13th accompanied by an affidavit, signed under the pains and penalties of perjury, that he had not deleted any emails from this folder.
>
> III. HRD, as discussed at the pre-hearing conference, would, solely for the purpose of "testing" the system, take the steps necessary to "re-notify" the Appellant of the Certification in order to determine if this generated an email to the Appellant's email account. HRD was ordered to report its findings to the Commission.
>
> IV. Upon receipt of this information, the Commission would determine whether any additional actions and/or orders by the Commission are required.

12. During the afternoon of January 9, 2019, HRD forwarded information to the Commission which was not responsive to the order in Paragraph 11, Subparagraph III above.

13. On January 11, 2019, Mr. McCarthy forwarded an affidavit to the Commission stating that he had taken the steps ordered by the Commission and found no email from HRD notifying him that his name appeared on Certification No. 05777.

14. On February 18, 2019, I inquired with HRD regarding whether it had taken the steps ordered in Paragraph 11, Subparagraph III.

15. Also on February 18, 2019, I inquired with the MBTA regarding the status of the hiring process related to Certification No. 05777 and whether any candidate tied or ranked below Mr. McCarthy on Certification No. 05777 was being considered for appointment.

16. The MBTA responded by indicating that the hiring process related to Certification No. 05777 had been completed and that no candidate tied or ranked below Mr. McCarthy was considered for appointment.

ANALYSIS

This appeal is moot. Even if Mr. McCarthy had received an email notification from HRD, he would not have been considered for appointment as the MBTA did not consider any individuals tied or ranked below Mr. McCarthy. Thus, McCarthy cannot show that he is an aggrieved person here.

CONCLUSION

For this reason, Mr. McCarthy's appeal under Docket No. E-18-242 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners on February 28, 2019.

Notice to:

Matthew McCarthy[1]
[Address redacted]

Scott Dunlap, Esq.
[No listing]

Patrick Butler, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

Daniel Kazakis, Esq.
MBTA–Labor Relations
10 Park Plaza—7th Floor
Boston, MA 02116

* * * * * *

1. The Appellant indicated that he was being represented by Attorney Scott Dunlap. However, the Commission never received a Notice of Appearance from Attorney Dunlap. All notices and correspondence to and from the Commission, however, have been copied to Attorney Dunlap.

MARC SAVAGE

v.

SPRINGFIELD FIRE DEPARTMENT

E-18-141 and I-19-039

February 28, 2019
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Promotional Bypass Appeal-Selected Candidate Ranked Higher Than Appellant-No Investigation Warranted—The Commission dismissed the appeal from a Springfield Fire Captain claiming he had been wrongfully bypassed for promotion to District Fire Chief since the successful candidate was ranked higher than the Appellant and therefore no bypass had occurred. The Commission also declined to initiate an investigation sought by the Appellant based on his claims of personal and political bias against him because he initiated litigation challenging the City's alleged non-enforcement of local residency requirements for firefighters.

DECISION & RESPONSE TO REQUEST FOR INVESTIGATION

On August 2, 2018, the Appellant, Marc A. Savage (Captain Savage), a Captain in the Springfield Fire Department (SFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission). Attached was a three (3)-page letter outlining the basis of his appeal.

2. On September 12, 2018, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Captain Savage, counsel for the SFD, the SFD Deputy Fire Chief and a human resources representative from the SFD. Counsel for the state's Human Resources Division (HRD) participated via phone.

3. Based on the information presented at the pre-hearing, I determined that: a) Captain Savage was ranked third on an eligible list for District Fire Chief; b) prior to the expiration of that list, the SFD promoted the second ranked candidate to District Fire Chief; c) the newly-promoted District Fire Chief will serve in the functional capacity of Director of Training, a position the new incumbent, until recently, held for many years in an "acting capacity" while he was in the title of Fire Captain.

4. In his appeal, Captain Savage argued that the selected candidate was ineligible to sit for the promotional examination for District Fire Chief because, according to Captain Savage, he was no longer a civil service employee (Fire Captain) when he served as the "Acting Director of Training." Captain Savage is mistaken. I am not aware of any law, rule or prior Commission or judicial decision that supports his argument. Just as, for example, a police officer does not lose his/her civil service status as a police officer (sergeant, etc.) when he/she is designated as a detective, a Fire Captain serving as the Director of Training does not lose his civil service status.

5. The remainder of Captain Savage's appeal centered around his argument that the decision to promote the second-ranked candidate on the eligible list was pre-determined and that the review process was not fair and impartial. Specifically, Captain Savage pointed to the fact that two (2) of the interview panelists were named in litigation that he initiated contesting the City's alleged non-enforcement of local residency requirements.

6. Had Captain Savage been ranked first on the eligible list and subsequent Certification, his non-selection would have constituted a promotional bypass and the above-referenced argument related to fairness, impartiality, etc. would be part of the bypass appeal proceedings. Since Captain Savage was ranked third, the selection of the second-ranked candidate did not constitute a bypass, for which appeals are heard by the Commission under Section 2(b) of Chapter 31.

7. The Commission, does, however, maintain the discretion to initiate investigations under G.L. c. 31, s. 2(a). That discretion is exercised sparingly and is typically exercised in circumstances in which the Petitioner has shown a high likelihood that the Commission would find evidence of personal or political bias in a decision-making process.

8. For all of the above reasons, I ordered the following:

> I. Captain Savage had thirty (30) days to submit a request for investigation with the Commission, detailing the reasons why the Commission should initiate an investigation under Section 2(a).
>
> II. The SFD had thirty (30) days thereafter to file a reply.
>
> III. The SFD had thirty (30) days to submit a motion to dismiss the Appellant's appeal, as initially filed under Section 2(b).
>
> IV. Captain Savage had thirty (30) days thereafter to file a reply.

9. The Commission subsequently received: a request for investigation from Captain Savage; a reply from the SFD; a Motion to Dismiss by the SFD; and a reply from Captain Savage.

ANALYSIS

For decades, the Commission has concluded that a candidate may, pursuant to G.L. c. 31, §2(b), contest his/her non-selection for appointment or promotion to a civil service position *if the appointing authority selects someone ranked below that candidate on the civil service Certification.*

In fact, the Commission has long held that the appointment of a candidate among those with the *same rank* on a Certification is not a bypass that can be appealed under Section 2(b). *See Edson* v. *Reading*, 21 MCSR 453 (2008) (upheld by Superior Court; *Edson* v. *Civil Service Comm'n*., Middlesex Sup. Ct. No. 08-CV3418 (2009); *Bartolomei* v. *Holyoke*, 21 MCSR 94 (2008); *Coughlin* v. *Plymouth*, 19 MCSR 434 (2006); *Kallas* 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); *Massachusetts Ass'n of Minority Law Enforcement Officers* v.

Abban, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates); *Cotter* v. *Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing HRD's guide), *rev'd in part on other grounds*, 323 F.3d 160 (1St Cir. 2003) ("when a civil service exam results in a tie -score, and the appointing authority ... promotes some but not all of the candidates, no actionable ` bypass ' has taken place in the parlance of... civil service").

Here, Captain Savage was not ranked higher nor tied with the selected candidate. Rather, the SFD promoted a candidate who was ranked *above* Captain Savage on the Certification. Thus, no bypass occurred for which Captain Savage can appeal to the Commission.

For these reasons, Captain Savage's appeal filed under G.L. c. 31, § 2(b) is ***dismissed***.

As referenced above, however, the Commission has the option to exercise its discretion to initiate an investigation under G.L. c. 31, § 2(a), even when no bypass occurs. 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).

After careful review and consideration of the entire record in this matter, including the submissions of the Petitioner and the City, the Commission has concluded that an investigation is not warranted at this time and has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 28, 2019.

Notice to:

Talia Gee, Esq.
City of Springfield
36 Court Street, Room 5
Springfield, MA 01103

* * * * * *

TIMOTHY GALVIN

v.

TOWN OF WESTFORD

D-17-032

March 14, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Westford Police Officer-Suspension-Fighting with Colleague-Refusal to Desist—In a decision by Commissioner Cynthia A. Ittleman, a unanimous Commission voted to affirm a five-day suspension of a Westford police officer who got into a fist fight with a fellow officer in the report writing room at the station and refused to desist when ordered to by three superior officers. The two officers in question apparently had "bad blood" between them and the incident arose out of false information spread by the Appellant that the other officer had chosen to take a personal day for Thanksgiving thereby forcing another officer to cover for him on that holiday. The other officer received the same suspension but wisely did not appeal.

DECISION

On February 16, 2017, the Appellant, Timothy Galvin (Mr. Galvin or Appellant), pursuant to G.L. c. 31, s. 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Westford (Town or Respondent) to suspend him for five (5) days. A pre-hearing conference was held on March 13, 2017 at the Mercier Community Center in Lowell. The hearing was held on June 12, 2017 at the Mercier Community Center.[1] Witnesses were sequestered. At the Appellant's written request, the hearing was declared to be a public hearing. The hearing was digitally recorded and both parties were provided with a CD of the hearing.[2] The parties filed post-hearing briefs on July 28, 2017. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Eighteen (18) exhibits were entered into evidence.[3] Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Chief Thomas McEnaney
- Officer M
- Captain Mark Chambers
- Officer H
- Deputy Chief Walter Shea

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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. This includes Respondent's Exhibits (R.Ex.) 1 through 15 and Appellant's Exhibits (A.Ex.) 1 through 3.

Called by the Appellant:

- Officer Timothy Galvin, Appellant

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

1. The Appellant has been employed as a police officer in the Town of Westford Police Department (WPD) for six (6) years when he filed this appeal. Prior to his employment at the WPD, the Appellant served in the Marine Corps for six (6) years. (Testimony of Appellant) The Appellant worked the overnight shift and Officer H worked the day shift. (Testimony of Appellant and Officer H)

2. All members of the WPD, upon hire, receive all Department Rules and Regulations, as well as WPD Policies and Procedures. All officers are trained and tested on said rules and regulations and policies and procedures and they sign an "Acknowledgement and Receipt" form. In addition, as part of the WPD's accreditation process, officers are tested annually on the rules and policies and receive an annual stipend for passing the test. (Testimony of McEnaney; R.Exs. 4,5,6, and 8)

3. WPD Officers are taught the use of force and in escalation and de-escalation of the use of force at the academy and at semi-annual in-serve trainings. (Testimony of Chambers)

4. In the WPD, vacation days are given based on seniority but personal days supersede seniority for vacation days. When an officer uses a personal day, he is guaranteed the day off regardless of seniority. For example, if two (2) officers want to use a vacation day on the same day, the senior officer will be permitted to do so. However, if the junior officer opted to utilize a personal day rather than a vacation day, he would be guaranteed the day off even though he is not the senior officer. (Testimony of McEnaney)

5. Officers are not permitted to use a single vacation day if it will create an overtime shift. However, personal days are allowed to create an overtime shift and, if no one is willing to take the shift, it could result in an officer being ordered in ("order in") to work the shift. (Testimony of Officer M)

6. Prior to November 22, 2016, the Appellant told Officer M that he heard that other officers had a problem with Officer H taking Thanksgiving off. (Testimony of Officer M) Also prior to November 22, 2016, Officer M explained to the Appellant that Officer H had made appropriate arrangements with an officer to cover the Thanksgiving shift in order to avoid inconvenience to other officers. (Testimony of Appellant and Officer M) Officer M made such arrangements months in advance of the holiday. (R.Ex. 9) In addition, Officer H told other officers that if voluntary coverage fell through on Thanksgiving, he would work that day, rather than force another officer to work involuntarily that day. (Testimony of Officer M)

7. On Tuesday, November 22, 2016, prior to the start of Officer H's shift, in the locker room, Officer H spoke to Officer M. Officer M told Officer H that the Appellant said that some officers were upset that Officer H was taking a personal day off on Thanksgiving, alleging that he had done it in such a way as to cause an "order in", requiring another officer to be ordered to work that shift. (Testimony of Officer M and Officer H)

8. At the end of his conversation with Officer M, Officer H seemed "annoyed" that other officers were upset with his personal day off, especially since he had secured voluntary coverage. (Testimony of Officer M)

9. After leaving the locker room, Officer H eventually went out to the WPD parking lot, where he saw the Appellant coming back in to the station since his overnight shift was coming to an end. (Testimony of Officer H; R.Ex. 13)

10. While in the parking lot, Officer H asked the Appellant about taking a personal day on Thanksgiving. Officer H wanted the Appellant to understand that he had done everything to make sure that his request was not going to trigger an "order in". In addition, Officer H repeatedly asked the Appellant which officers were upset with his personal day off on Thanksgiving. (Testimony of Officer H; R.Ex. 15B[4])

11. The Appellant would not give Officer H the names of the officers who were upset that Officer H was taking a personal day on Thanksgiving, despite Officer H's repeated questions. The Appellant did not tell Officer H that, based on his conversation with Officer M, he knew that coverage was pre-arranged with a named Detective and an "order in" would not occur on Thanksgiving. (Testimony of Appellant and Officer M; R.Ex. 9)

12. As indicated in the video of the parking lot, after a brief exchange between Officer H and the Appellant, Officer H unlocked the station door and held it open for the Appellant to enter. (R.Ex. 15B)

13. Once inside the station, the Appellant and Officer H walked a short distance down a hall and both walked into the report writing room, which is diagonally across the hall from the Sergeants' office. (Exs. 10, 11, 12 and 13)

14. At approximately 6:50 a.m., Deputy Chief Shea was talking to Sergeant Agraz when he heard Officer H and the Appellant arguing in the report writing room. Although Dep. Chief Shea could not tell exactly what they were arguing about, he observed the two (2) officers come face to face and he could hear the voices getting louder. (Testimony of Shea; R.Ex. 13)

4. R.Ex. 15 is a thumb drive containing video recordings, from two (2) different angles, of the parking lot behind the WPD station. The recordings were apparently made on November 22, 2016. R.Ex. 15A shows a more distant view of the parking lot; Ex. 15B shows a view of the back entrance to the WPD station from the parking lot. There is no audio accompanying the video recordings. R.Ex. 15B very briefly shows Officer H and the Appellant walking into the back of the WPD station.

15. At that point, Sgt. Gendron entered the Sergeants' room. Sgt. Gendron and Sgt. Agraz could hear the argument between the Appellant and Officer H across the hall in the report writing room. Upon seeing the altercation, Dep. Chief Shea directed both sergeants to enter the report writing room to diffuse the situation. (Testimony of Shea; R.Ex. 13)

16. Neither the Appellant nor Officer H called out for assistance from supervisors that were nearby. (Testimony of Shea; R.Ex. 13)

17. Dep. Chief Shea observed the Appellant and Officer H make chest contact while Officer H's back was facing the hall. (Testimony of Shea; R.Ex. 13)

18. The Appellant and Officer H pushed each other, perhaps to create space between them. Then the two (2) threw punches at each other. (R.Ex. 13)

19. Sgts. Gendron and Agraz and Dep. Chief Shea rushed into the report writing room. Once in the room, they observed Officer H and the Appellant in a physical struggle and the Appellant had Officer H bent backwards on a writing table and throwing punches at Officer H. (Testimony of Shea; R.Ex. 13)

20. Despite repeated commands by the Dep. Chief and two (2) Sergeants to stop fighting, both the Appellant and Officer H continued their altercation.[5] Eventually, after considerable physical effort by the three (3) superior officers, the Appellant and Officer H were separated. (Testimony of Shea and Officer H; R.Ex. 13)

21. Once separated, Dep. Chief Shea saw that the Appellant appeared to be laughing at and taunting Officer H. (R.Ex. 13)

22. Both the Appellant and Officer H suffered minor injuries: scratches and redness on their faces. Both declined medical attention. The Appellant, after his shift, went to his parents' house and took photos of his injury. The photos are consistent with the observations of the Dep. Chief and the two (2) Sergeants. (A.Exs. 1 - 3; R.Ex. 13)

23. Shortly thereafter, Dep. Chief Shea informed Chief McEnaney about the altercation. In response to Chief McEnaney's direction, an investigation into the altercation was initiated. Dep. Chief Shea was in charge of such investigations. However, since he was a witness, Capt. Chambers was assigned to conduct the investigation. Capt. Chambers supervises the patrol division and assists with internal and external investigations. In addition, Capt. Chambers has been the primary defensive tactics and use of force instructor at WPD for sixteen (16) years. (Testimony of McEnaney and Shea; R.Ex. 13)

24. As part of the investigation, Capt. Chambers directed all witnesses and participants in the altercation to draft and submit administrative reports. (R.Ex. 13) In addition, Capt. Chambers reviewed the parking lot video but he did not see anything to suggest an altercation was imminent. (R.Ex. 15B; Testimony of Chambers)

25. The reports of the Appellant and Officer H asserted that the other was the aggressor and threw the first punch. No other member of the WPD observed who threw the first punch. Sgt. Agraz's report noted, in part, that, "[e]ven with the three of us attempting to separate [the Appellant and Officer H] they continued to try to get at each other to continue fighting. While attempting to separate the two I injured my ankle. . . ." (R.Ex. 13) Sgt. Gendron's report states, in part, " … it took a great deal of physical strength from both Sgt Agraz and myself to restrain the Officers …" and that Dep. Chief Shea assisted with the restraining of the officers …." (*Id.*) Sgt. Gendron reported that his left thumb was sore after breaking up the altercation. (*Id.*) None of the participants and/or witnesses sought medical attention at the time. (*Id.*)

26. Capt. Chambers' report indicates, in part, that,

> it was "clear to Sergeant Gendron that both officers were actively engaged in a physical fight" and that it took "a great deal of physical strength from all the supervisors to separate the Officers …" (R.Ex. 13)
>
> prior to writing their administrative reports, the Officers were advised to speak to their union representatives;
>
> the Appellant's report asserted that he acted in self-defense;
>
> Dep. Chief Shea reported that repeated orders to stop fighting "had little effect";
>
> There is "bad blood" between the Appellant and Officer [H];
>
> Sgt. Agraz reported that the Appellant and Officer [H] had been arguing, their voices escalated and the two were swearing at each other;
>
> Officer [H] apologized to Capt. Chambers and informed him that he had been told earlier that morning that the Appellant was complaining that other officers were "mad" at Officer [H] for taking a personal day on Thanksgiving but that he had made arrangements so there would be no "order in"; and
>
> Officer [H] "did not deny throwing a punch, he just does not remember if he actually did". (*Id.*)

Capt. Chambers' report concludes, in part, that,

> "it is undisputed the Officer Galvin and Officer [H] engaged in a physical altercation with each other while armed and in uniform. Several ranking officers … were witness to the assault and battery and had difficulty in separating the parties. After numerous orders from three Supervisors, the Officers were finally separated …The actions of both [officers] are violations of Rules and Regulations 4.01 Conduct Unbecoming an Officer and 8.0 Orders, as well as [G.L. c. 265, s. 13A Assault and Battery. The conduct of both Officers reflects unfavorably upon themselves and the [WPD]. Furthermore, their conduct may have a potential adverse impact on the morale, integrity, reputation or effectiveness of the [WPD]. (*Id.*)[6]

5. The evidence indicates only that the superior officers repeatedly ordered the Appellant and Officer H to stop the quickly escalated altercation; it does not indicate the specific words the superior officers used in this regard.

6. There is no indication in the record that criminal charges were filed against the Appellant.

27. On November 23, 2016, after reviewing Capt. Chambers' report, Chief McEnaney met individually with the Appellant and Officer H and informed them each that they were being suspended for five (5) days. When the Appellant was informed of the suspension, he informed the Chief that he would appeal it. (*Id*.)

28. On November 29, 2016, Chief McEnaney sent a memo to Town Manager Jodi Ross summarizing the events related to the altercation adding, "If this incident happen (sic) out on the street and the officer lost his cool and was ordered to stop by a supervisor and didn't it could have serious consequences for the town." The Chief also summarized the Appellant's lengthy discipline history and added that Officer H "understood the serious (sic) of this incident and chose not to appeal the suspension." (*Id*.)

29. Since 2012, the Appellant has received two (2) "verbal written warnings", eight (8) written warnings and two (2) written reprimands in connection with: the vehicle locating system, mobile data computers, insubordination, maintenance of police vehicles, multiple instances of neglect of duty, repeated instances of incompetence, repeated instances involving department property, storage of weapons, and multiple instances involving reporting for duty. (R.Ex. 3)

30. By a letter dated February 7, 2017, the Respondent informed that Appellant there would be a hearing on February 10, 2017 regarding his suspension, citing information from Capt. Chambers' report. (R.Ex. 1)

31. Town Manager Ross conducted the hearing on February 10, 2017. (R.Ex. 2) On February 13, 2017, Town Manager Ross issued her decision to the Appellant affirming the suspension, referencing details of the Appellant's statements at the hearing and other evidence, concluding, in part, "[f]or a physical altercation to happen between two officers in the police station is completely unacceptable and inexcusable. In the police chief's 30 years with the department and my 20+ years of municipal experience in three towns, neither of us had ever experienced this situation.... You did not present any evidence that this altercation was anything but completely avoidable. Officer Galvin, I am disturbed that you seem to feel you have no responsibility in this altercation. Even if you were provoked, you did participate, and you did not stop even though directly ordered to do so by several officers superior to you …" and "this type of behavior will not be tolerated in the future.…" (R.Ex. 2)

32. On February 16, 2017, the Appellant filed the instant appeal. (Administrative Notice)

33. At the Commission's hearing, when asked why he did not simply inform Officer H that he knew the allegations about Officer H were wrong when it was clear that that was Officer H's concern, the Appellant said "hindsight is 20 20" (Testimony of Appellant - Digital Recording of Commission Hearing, at 3 hours, 30 minutes) Further, the Appellant acknowledged that, at a minimum, he did not deescalate the situation as officers are trained to do. (Testimony of Appellant)

34. Rule 3.0 - in the Introduction, states, in part, "Certainly law enforcement employees, both sworn and non-sworn, must obey the law, exercise their responsibilities within constitutional guidelines, and obey lawful order."(R.Ex. 5)

35. Rule 4.02 states, in part, "[e]mployees, both sworn and non-sworn, shall not commit any specific act or acts of immoral, improper, unlawful, disorderly or intemperate conduct whether on or off duty, which reflects, discredit (sic) or reflects unfavorably upon the employee, upon other employees or upon the police department." (R.Ex. 7)

36. Rule 8.0 states, in part, "[a]n order is defined as a command or instruction, oral or written, given by one member of the department to another member of lesser rank. It is essential to the proper operation of a police agency that employees promptly obey all lawful orders." (R.Ex. 6)

37. Policy 4.02 states, in part, "[t]his directive establishes the structure of the Police Department and provides for the application of certain basic organization principles. It is intended to ensure that each employee understands their role and position within the department, as well as that of all of the other department members, and that the existing chain of command is clearly delineated to all personnel." (R.Ex. 8)

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 actions taken by the appointing authority." *Cambridge* v. *Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304 (1997). *See Watertown* v. *Arria*, 16 Mass. App. Ct. 331 (1983). 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 by correct rules of law." *Commissioners of Civ. Serv.* v. *Mun. Ct. of the City of Boston*, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service." *Murray* v. *Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983).

The appointing authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probably in the sense that actual belief in its truth, derived from the evidence, exists in the mind of minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, if the Commission finds that there was just cause for 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).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' " as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in gov-

ernmental employment decisions.'" *Town of Falmouth* v. *Civil Service Comm'n*., 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" of civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, s. 1.

Under G.L. c. 31, s. 43, "[t]he commission may also modify any penalty imposed by the appointing authority." *Id*. "Here the commission does not act without regard to the previous decision of the town, 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.'" *Town of Falmouth* v. *Civil Service Commission & another*, 447 Mass. 814, 824 (2006)(note and further citation omitted). Further, the Court stated in *Town of Falmouth* v. *Civil Service Comm'n & another* that, "[u]nless 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. *Id*. (*citing Police Comm'r. of Boston* v. *Civil Serv. Comm'n*., 39 Mass. App. Ct. 594, 600 (1996)).

The Commission must also take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. Furthermore, "… police officers voluntarily undertake to adhere to a higher standard of conduct. . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." *Attorney General* v. *McHatton*, 428 Mass. 790, 793-74 (1999) and cases cited. *See also Falmouth* v. *Civil Service Comm'n*., 61 Mass. App. Ct. 796, 801-802 (2004); *Police Commissioner* v. *Civil Service Comm'n*., 39 Mass. App. Ct. 594, 601-602 (1996); *McIsaac* v. *Civil Service Comm'n*., 38 Mass. App. Ct. 473, 475-76 (1995); *Police Commissioner* v. *Civil Service Comm'n*., 22 Mass. App. Ct. 364, 371, *rev.den*. 398 Mass. 1103 (1986); *Spargo* v. *Civil Service Comm'n*., 50 Mass. App. Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. There is no disagreement that the Appellant and Officer H, both uniformed and armed officers, had a physical altercation in the WPD report writing room on November 22, 2016 during the morning shift change, they were ordered to stop the altercation and that it took two (2) Sergeants and the Deputy Police Chief to end it. Although there were no witnesses when the altercation began, the two (2) Sergeants and Deputy Chief were nearby, heard loud voices and entered the report writing room, where they found the Appellant had pinned Officer H to a desktop and they were exchanging blows. After an investigation that included the written reports of all involved, the Appellant and Officer H were each suspended for five (5) days. Officer H did not grieve, nor appeal his suspension whereas the Appellant filed the instant appeal. Regardless of who started the fight, the Appellant's behavior is simply unacceptable. Public knowledge that two (2) of the Town's police officers engaged in a physical fight at work, that they were ordered to stop and did not, and had to be separated by multiple superior officers undermines the public trust on which a police department relies to do its job. The Appellant's conduct was egregious. As such, his conduct clearly violated the cited WPD policies, as well as higher standards to which police officers are held, and it constitutes substantial misconduct by impairing the efficiency of public service.

The Appellant argues that he should not be disciplined because Officer H began and/or instigated the fight in connection with Officer H's holiday time off. Even if Officer H initiated the conflict, the Appellant should have disengaged from the conflict but he did not, as Town Manager Ross' decision after the local hearing noted. Moreover, the Appellant testified at the Commission that Officer M had earlier told him that allegations that Officer H took Thanksgiving holiday time off in a manner that would trigger an "order in", requiring other officers to cover for him, were wrong. When asked at the Commission hearing why he did not simply inform Officer H that he knew the allegations were wrong when it was clear that Officer H was concerned about such allegations, the Appellant said "hindsight is 20 20", taking no responsibility for his own actions. Further, the Appellant acknowledged that, at a minimum, he did not deescalate the situation as officers are trained to do. Having reached conclusions similar to those of the Respondent, having found no bias therein, and in view of the Appellant's prior discipline, I find that modification of the Appellant's five (5)-day suspension is unwarranted.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. Galvin, Docket No. D-17-032, is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 14, 2019.

Notice to:

Joseph P. Kittredge, Esq.
Rafanelli & Kittredge, P.C.
1 Keefe Road
Acton, MA 01720

Nicholas Anastasopoulos, Esq.
Mirick, O'Connell, DeMallie & Lougee, LLP
1800 West Park Drive, Suite 400
Westborough, MA 01581

* * * * * *

MICHAEL GONCALVES

v.

CITY OF NEW BEDFORD

G1-17-140

March 14, 2019
Paul M. Stein, Commissioner

***Bypass Appeal-Original Appointment to the New Bedford Police Department-Poor Interview-Inappropriate Relationship with Prisoner-Fraternization*—**The Commission affirmed the bypass by the New Bedford Police Department of a previously discharged Bristol County Deputy Sheriff fired for engaging in a clandestine personal relationship with an inmate under his care and custody. The Captain's Board also found his interview performance to be lacking.

DECISION

The Appellant, Michael Goncalves, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b)[1], to contest his bypass by the City of New Bedford (New Bedford) for appointment as a Police Officer with the New Bedford Police Department (NBPD). A pre-hearing conference was held on July 28, 2017, and a full hearing, which was digitally recorded[2], was held on October 27, 2017, both at the UMass School of Law in Dartmouth. Twenty exhibits (Exh.1 through Exh.19 & Exh.21) were received in evidence, one document marked for identification (Exh.20ID). The Commission received Proposed Decisions from the parties on December 31, 2017.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Captain Dennis Hebert
- NBPD Captain Adelino Sousa
- NBPD Captain Dennis Ledo
- NBPD Lieutenant Ricard Rezendes

Called by the Appellant:

- Michael Goncalves, 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, Michael Goncalves, is a New Bedford resident and a 1998 graduate of the Greater New Bedford Regional Vocational Technical High School. He received an Associate's Degree in Elementary Education from Bristol Community College in 2001 and later attended two years of study at Bridgewater State College. His brother is currently employed with the NBPD as a sworn police officer. Mr. Goncalves also has a number of other members of the NBPD who consider him a good friend. (*Exhs. 3, 4, 10 & 11; Testimony of Appellant*)

2. Mr. Goncalves was employed as a Deputy Sheriff[3] with the Bristol County Sheriff's Office (BCSO) from June 2013 until October 2014, when he was suspended and discharged two weeks later for reasons that are more fully discussed below. In March 2016, he became employed for a private security firm, and worked as a security guard assigned to the Registry of Motor Vehicles in Taunton, MA at the time of the Commission hearing. (*Exhs. 3, 4, 10 & 11*)

3. On April 25, 2015, Mr. Goncalves took and passed the civil service examination for Police Officer administered by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established in October 2, 2015. (*Exh. 1; Stipulated Facts*)

4. Mr. Goncalves also passed the previous (2013) police officer's examination and his name appeared on a May 2015 Certification #02505 issued to New Bedford for appointment of Police Officers. He submitted an Employment Application to the NBPD on or about May 16, 2015 and the NBPD conducted an extensive background investigation on his application at that time. (*Exhs. 3 through 5 & 8; Testimony of Lt. Rezendes*)

5. The 2015 background investigation into Mr. Goncalves included the typical review of the application itself for completeness, checking residency, education, credit, criminal and driver history, all of which turned up no significant issues. The background investigation into his employment record and, in particular, the circumstances surrounding his termination from his position with the BCSO, however, became a focus of the investigation. Eventually, responsibility for that aspect of the investigation was transferred from the initially assigned background investigator and assumed by his superior officer, Lt. Ricard Rezendes, the commanding 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. 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 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.

3. A BCSO Deputy Sheriff is a non-union position whose duties primarily involve transporting inmates and supervising "pre-release" work crews, which differs from the position of a BCSO Correction Officer, which is a union position working "within the walls" of the institution. Both positions have responsibility for "care and custody" of inmates. (*Testimony of Appellant & Capt. Ledo*)

ficer of the NBPD Planning and Training Unit, who oversees the NBPD hiring process. (*Exhs. 4, 5 & 8; Testimony of Lt. Rezendes*)

6. Mr. Goncalves listed his employment in his Employment Application as a Deputy Sheriff with the BCSO from 6/2013 to 10/2014 and stated the "Reason For Leaving" as "Terminated". He provided the name and phone number for Lt. Williams as his supervisor. He stated in the Employment History Notes: "I'm currently unemployed [a]fter being terminated from Bristol County. I was never told or received anything to inform me why I was terminated." (*Exh. 3*)

7. After assuming responsibility to obtain further details about Mr. Goncalves' employment and termination from his position of BCSO Deputy Sheriff, Lt. Rezendes obtained a copy of a report dated 10/24/2014 prepared by the BCSO Special Investigations Unit (SIU), a copy of the termination letter dated 11/10/2014, and excerpts from the BCSO Code of Ethics and Rules of Conduct (that, among other things restricted social and romantic interaction with inmates), along with a signed acknowledgement by Mr. Goncalves that he was responsible to review and become familiar with these requirements. (*Exhs. 5 through 7, 20ID & 21; Testimony of Lt. Rezendes*)

8. The SIU report disclosed that, as a result of an Incident Report from a Confidential Informant, the SIU initiated an investigation into allegations that Mr. Goncalves was engaged in unprofessional conduct with a female inmate (Inmate A) who was one of members of the all-female work crew whom he had recently been assigned to supervise on road work out of the facility. As a result of the investigation, the SIU investigator identified eight (8) completed telephone calls on the inmate phone system from 10/17/2014 to 10/20/2014 by Inmate A to a telephone number that later matched up with a phone number found in one of a series of letters confiscated from Inmate A's cell exchanged between a person who called himself "Manny" and had told Inmate A to call him at that number. (*Exhs. 6 & 8*)

9. Subsequent interviews with Inmate A, Inmate B (her cellmate) and other inmates confirmed that "Manny" was an alias that Mr. Goncalves used when he communicated with Inmate A and that the telephone number in his letter was associated with a body shop that turned out to be owed by a mutual friend with whom they were both acquainted.[4] Inmate A had previously socialized with Mr. Goncalves when they were teenagers "back in the day". Inmate A recognized Mr. Goncalves soon after he started supervising her work crew. (*Exhs. 6, 9 & 12; Testimony of Appellant*)

10. Inmate A denied any contacts of an intimate or sexual nature with Mr. Goncalves, but claimed they had planned to be together after she was released from jail. The other inmates who were interviewed claimed that all of the contacts between the two were "out in the open" and no one claimed to have observed any contacts of a romantic or sexual nature between the two. (*Exh.6 & 8*)[5]

11. Inmate A was placed in a segregation unit. She wrote to Mr. Goncalves twice thereafter, using the nickname "Mike" or "Mikey" instead of "Manny". She assumed that the authorities were keeping tabs on his home address and the body shop, and wrote "make up an address and a name: I'll definitely know it's you."[6] (*Exh. 6*)

12. On October 21, 2014, the SIU investigator called Mr. Goncalves to a meeting, read him his "Miranda Rights" and asked to speak with him about allegations that he had a dating relationship with inmates on his work crew. Goncalves chose to remain silent and said he wanted to talk to a lawyer. The investigator took Mr. Goncalves badge/ID and informed him he was suspended at that time. (*Exh. 6)*

13. By letter dated November 11, 2014, BCSO Assistant Superintendent Silvia informed Mr. Goncalves that his employment was terminated for "improper conduct",effective 10/22/2014. (*Exh. 7*).[7]

14. As part of his own independent investigation, in addition to reviewing the SIU report, Lt. Rezendes spoke to the SIU supervisor; to Mr. Goncalves' BCSO immediate supervisor, Lt. Jeffery Williams; to Inmate A; and to the owner of the body shop used by Mr. Goncalves to communicate with Inmate A. *(Exh. 8; Testimony of Lt. Rezendes*)

15. The SIU supervisor confirmed Mr. Goncalves' dates of employment (6/11/2013 to 10/22/2014) and called him "a pretty good employee." The supervisor believed that the Assistant Superintendent was "overzealous" by terminating Mr. Goncalves before the SIU investigation had been completed, stating that Mr. Goncalves invoked his Miranda rights and never submitted to an interview and, had he done so, the discipline meted out might have been less than termination. The SIU supervisor also confirmed that there was no evidence that Mr. Goncalves acted inappropriately with any other female inmates or that the consensual relationship with Inmate A ever became intimate. He stated that Mr. Goncalves did not commit any crimes but he did violate policy and, since Mr. Goncalves had not used his own phone or address, and employed an alias for the purpose of communicating with Inmate A, he "knew what he was doing was wrong." (*Exh. 8; Testimony of Lt. Rezendes*)

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4. No record of Mr. Goncalves previous or present employment at this body shop was on file with the Bristol County Sheriff. (*Exh. 6*)

5. Most of the recorded telephone calls and correspondence is set forth at length in the SIU report and is replete with highly flirtatious statements, and sexual innuendo by both Inmate A and Mr. Goncalves, including specific reference to their reconnecting when Inmate A was released from jail and Mr. Goncalves stating that he was in love with her and wanted her to meet his family. (*Exh.6*)

6. I heard no satisfactory explanation for why neither Inmate A nor Mr. Goncalves were so naive as to conduct such extended telephone and mail communications, both of which they knew were subject to monitoring. (*Exhs. 6, 8,9*)

7. At the Commission hearing, Mr. Goncalves claimed he never received the termination letter (sent to the address where he then resided) and did not fully read the Code of Ethics and Rules of Conduct. (*Exh. 9; Testimony of Appellant*)

16. Mr. Goncalves' supervisor, Lt. Williams, called Mr. Goncalves "very professional and squared away" and recommended him to Lt. Rezendes for appointment to the NBPD. Mr. Goncalves voiced concern to Lt. Williams when he was first assigned to supervise female inmates on a work crew. Lt. Williams told him "sometimes you have no choice." Lt. Williams was not involved in the SIU investigation and found out that Mr. Goncalves was terminated after the fact and, possibly, he "got the short end of the stick." (*Exh. 8; Testimony of Lt. Rezendes*)

17. The body shop owner confirmed to Lt. Rezendes that Mr. Goncalves "hung out" at his shop, watched his business and home when he was not around, and made money deposits for him. He confirmed that Mr. Goncalves used the business address and phone to communicate with Inmate A (whom he also knew), but he was not asked about it in advance and it came as a surprise to him when the first letter arrived (which he opened, thinking it was meant for another former employee, but soon connected it to Mr. Goncalves). (*Exh. 8; Testimony of Lt. Rezendes*)

18. Inmate A had been released from jail by the time Lt. Rezendes contacted her and he interviewed her over the phone. She confirmed that she and Mr. Goncalves had "hung out" with mutual friends many years ago and that, after he was assigned to take out her work crew, she remembered who he was. She confirmed, generally, the letter writing and telephone exchanges. (*Exh. 8; Testimony of Lt. Rezendes*)[8]

19. On July 29, 2015, Lt. Rezendes conducted a one-hour recorded interview with Mr. Goncalves at NBPD headquarters. A copy of the recording was introduced into evidence. Mr. Goncalves generally corroborated the mail letter writing and telephone exchanges with Inmate A, and, among other things, made the following statements:

- He admitted that he had put $50.00 on Inmate A's phone card so she could call him.
- He knew that he "did violate policy".
- He admitted that they wrote "stupid stuff" such as "I love you" and wrote about plans for after she was released.
- He then thought it was just something to "pass time" and was a "big joke" between them, but "now I know I should not have wrote back or nothing . . . "
- ". . . I was vulnerable or what . . . I was working a lot and did not have a girlfriend . . . My girlfriend and I were on and off during that time, I don't know it was just a bad time I guess. I F'ed up big time."
- He admitted that he had started "falling for this inmate", he "let his emotions take over" and that his "emotions got the best of him."
- "I promise you this would never happen again. I learned my lesson and if anything like this came up I would . . . let someone know because like I said it was a bad choice I made."

(*Exhs. 8 & 9; Testimony of Lt. Rezendes*)[9]

20. Eventually, New Bedford did not hire the complement of officers it had planned and Mr. Goncalves was never reached for formal consideration during the 2015 hiring process. His application packet was filed without action. (*Exh. 9; Testimony of Lt. Rezendes*)

21. On December 9, 2016, as amended on February 7, 2017, HRD issued a new Certification #04224 from the October 2015 eligible list for New Bedford to appoint fourteen (14) Permanent Full-Time Police Officers. (*Exh. 1; Stipulated Facts*)

22. Mr. Goncalves' name appeared on Certification #04224 in the 32nd position, tied with three other candidates. (*Exh.1; Stipulated Facts*)[10]

23. Mr. Goncalves completed a new Employment Application which he submitted to the NBPD on or about February 13, 2017. (*Exh.10*)

24. A background investigator was assigned to update Mr. Goncalves 2015 investigation report. The investigator confirmed that Mr. Goncalves had obtained new employment with a private security company (he had been unemployed when the 2015 investigation was completed). He spoke with the head manager of the company who called Mr. Goncalves "one of his better employees" who was "always on time" and "received only positive reviews from clients on Goncalves behalf." Except for the change in employment, the investigator reported no other significant changes from the information learned in the prior investigation. (*Exh. 11*)

25. Despite his concerns about Mr. Goncalves from the information developed during the 2015 background investigation, Lt. Rezendes decided to move Mr. Goncalves to the next stage of the process, which is a "Captains Board", a loosely structured record-

8. Some of the statements made by Inmate A to Lt. Rezendes were inconsistent and varied from what the SIU investigators had reported as well as irreconcilable with other credible evidence and I do not credit everything she allegedly said to the SIU or Lt. Rezendes. In particular, I do not credit her assertion that she initiated the communications by getting Mr. Goncalves' address through sources at the jail, then, later stating she looked up the body shop and sent the first letter there and, finally, claiming she didn't actually remember who sent the first letter. I also do not credit her statements that the telephone calls and letter writing was just something she did to "kill time" and there was nothing more to it than that. (*Exhs. 6, 8, 9 & 12; Testimony of Appellant & Lt. Rezendes*)

9. Some of Mr. Goncalves' story did not seem consistent with other credible evidence. For example I find it hard to fit the volume of letters and phone calls into the short time frame when they first took up with each other and his suspension; his lack of recollection (such being vague about recognizing the telephone number of the body shop); and his changing stories about certain facts (e.g., what his references to "Billy the Goat" meant). (*Exhs.6, 9 & 12*)

10. New Bedford was, at the time, a "Consent Decree" community, subject to federal court orders intended to remediate past discrimination against Black and Hispanic minority candidates for public safety positions by creating a formula for giving persons who "self-identify" as minority (or "C" candidates) priority over non-minority (or "D" candidates) in placement on future eligible lists, and requiring HRD's scrutiny and approval by of all bypass decisions. There was an issue about whether Mr. Goncalves, a Spanish-speaking individual of Portuguese decent, qualified as a "C" or "D" candidate. At some point, based on information he received from HRD, Mr. Goncalves chose to change his status from "D" status and "self-identified" as a "C" candidate for purposes of Certification #04224, but it is not clear how much, if at all, that moved him up on the Certification. (*Exhs.1, 16 through 19; Testimony of Appellant & Lt. Rezendes*) This appeal does not turn on his proper "Consent Decree" status. (*Colloquy with Counsel*)

ed interview with three NBPD Captains, with Lt. Rezendes present. (*Exh. 12; Testimony of Lt. Rezendes*)

26. In 2015, Lt. Rezendes found Mr. Goncalves "likeable" and his brother served as a well-respected NBPD police officer. He also was regarded positively in his new job. In addition, Lt. Rezendes recalled that the BCSO SUI supervisor thought the decision to terminate Mr. Goncalves was "overzealous", and that Mr. Goncalves' immediate supervisor at the BCSO had told Lt. Rezendes that he would recommend Mr. Goncalves be hired as a NBPD police officer. Because of these potentially mitigating factors, Lt. Rezendes chose to give Mr. Goncalves the opportunity to make his case to the Captains Board. (*Testimony of Lt. Rezendes*)

27. After answering some preliminary questions from Lt. Rezendes, the interview panelists focused in on the issue of Mr. Goncalves' conduct while employed at the BCSO, and, in particular, his failure to control himself in dealing with a female inmate while in his custody. His demeanor clearly shifted and became equivocal and defensive when asked questions about this episode. Certain statements Mr. Goncalves made during this interview contradicted earlier statement to Lt. Rezendes, saying, for example, that he verbally reported to superiors that he knew "a couple of" female inmates and stating that he now "wasn't sure" but "didn't think he put any money" on Inmate A's phone. At the end of the interview, the panelists made suggestions to Mr. Goncalves about how he could restore the faith others would have in his ability to become a police officer. (*Exh. 12; Testimony of Lt. Rezendes, Captains Hebert, Souza & Ledo*)[11]

28. The interview panels rated Mr. Goncalves "Unsatisfactory" or "Below Average" in Alertness (Hebert & Souza), Character & Personality (Hebert, Souza & Ledo), Ability to Converse (Hebert & Ledo) and Self-Control (Hebert, Souza & Ledo). The written comments echoed the panelists concerns about the BCSO incident, including, for example:

> "Admitted to no self-control around women"
>
> "When put in a position of trust & responsibility, Applicant violated that trust by lying about his relationship w/a female"
>
> "Could not control himself w/female inmate @ SD. Serious lapse of judgment"
>
> "Failed to explain discrepancies in the background account"
>
> "Was not convincing on couple of questions"

All three Captains clearly were troubled by what Mr. Goncalves had done, but, also, that he appeared to be unable to explain how the NBPD could be assured he would handle himself any differently as a NBPD police officer. (*Exh. 12; Testimony of Captains Herbert, Souza & Ledo*)[12]

29. By letter to HRD dated April 19, 2017, New Bedford Mayor Jonathan Mitchell, the NBPD Appointing Authority, informed HRD that he proposed to bypass Mr. Goncalves for two reasons: (1) his termination from his job with the Bristol County Sheriff's office and (2) and poor interview performance before the Captains Board. (*Exhs. 1 & 14; Stipulated Facts*)

30. By letter dated June 14, 2017, HRD informed Mr. Goncalves that the reasons given by New Bedford for his non-selection were accepted and his bypass was allowed. This appeal duly ensued. (*Exhs. 1, 14 & 15*)

31. On or about September 6, 2017, New Bedford provided HRD with the names of twelve candidates appointed from Certification #04224, which included two names listed as ranked below Mr. Goncalves on the Certification. (*Exh. 2; Stipulated Facts; Testimony of Lt. Rezendes*)

32. At the Commission hearing, Mr. Goncalves initially declined to testify, with counsel leaving it to New Bedford to call him. After I made known, however, that a failure to testify under oath could lead to a negative inference being drawn, his counsel did call him to testify. He again asserted that he did, in fact, tell his superiors in advance about his acquaintance with Inmate A, and also claimed that, at least some of the telephone conversations that were reported in the SIU report were with a person other than himself. On cross-examination he said he was unable to recall most of the specifics of his telephone and mail contacts with Inmate A. After I directed him to Lt. Rezendes' report in which he quoted Mr. Goncalves as stating that he did put $50 dollars on Inmate A's phone account, he acknowledged that he "must have done it." (*Testimony of Appellant*)

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

11. The interview panelists also questioned Mr. Goncalves about his decision to claim minority "C" status on the 2017 certification. Some of the panelists expressed skepticism that he was entitled to do so and asked questions about his motives for doing so. Lacking any definitive answers, Lt. Rezendes indicated he would contact HRD to find out more about whether his claim to minority status was justified. HRD indicated that it does not research a candidate's "self-identification" of minority status, but that a person may claim that status if he or she was "born in a Spanish speaking country OR any person who grew up in a household in which the predominant language spoken was Spanish." Based on the evidence presented, I need not, and do not reach any conclusion about whether or not Mr. Goncalves' claim to minority "C" status was bona fide or justified. (*Exhs. 1, 16 through 19: Testimony of Appellant, Lt. Rezendes, Captains Hebert, Sousa & Lido*)

12. Captain Ledo, a former narcotics officers who was currently in charge of the NBPD's Professional Standards Unit, and who also had prior experience as a Corrections Officer, gave compelling testimony on the seriousness of what Mr. Goncalves did, whether it was just "passing time" in his mind or something more nefarious. He explained how critical and obvious it would be to any corrections officer that he or she must never get involved at a personal level with inmates in any way, noting that, typically, what might start out as a benign request ("can you get me an extra milk") eventually entraps the officer into greater and greater compromising situations. He also explained how similar confrontations arise with police officers who are constantly presented with potentially compromising situations while on patrol or investigating crimes. (*Testimony of Capt. Ledo*)

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 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, by a preponderance of evidence, the appointing authority had "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of a candidate's background and qualifications sufficient to form a "credible basis" to believe allegations of misconduct or other facts that present "legitimate doubts" about the candidate's present fitness to perform the duties of the position. *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***)

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 recognizes that law enforcement officers, in particular, are vested with considerable power and discretion and, when selecting candidates for such a sensitive public safety position, they 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). An appointing authority is justified to refuse to hire and/or to terminate a police officer who repeatedly demonstrates a "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 Condez* v. *Dartmouth*, 28 MCSR 515 (2015), *aff'd*., Bristol Sup. Ct. No. 1473CV00836 (2017); *Everton* v. *Town of Falmouth*, 26 MCSR 488 (2013) and cases cited, *aff'd*., Suffolk Sup.Ct., 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

New Bedford has established by a preponderance of the evidence that its decision to bypass the Appellant was reasonably justified after an impartial and reasonably thorough review of the relevant facts. In particular, the evidence that New Bedford developed concerning Mr. Goncalves' serious misconduct which led to his termination as a BCSO Deputy Sheriff fully supports New Bedford's conclusion that there was a "credible basis" for "legitimate doubts" about Mr. Goncalves' present fitness to serve as a NBPD police officer.

First, Mr. Goncalves admits that he violated BCSO policy by carrying on a clandestine personal relationship with an inmate under his care and custody, a relationship that he knew was wrong. He also admitted that, then in his thirties, he "did not have a girlfriend", was going through a "bad time" and was vulnerable to "letting his emotions get the best of him" and started "falling for this inmate." The evidence presented here, and in particular, the articulate and compelling testimony from NBPD Captain Ledo, Professional Standards Unit commander and former narcotics officer and correction officer, fully supports a "legitimate doubt" about Mr. Goncalves suitability to be trusted as a police officer so soon after an incident of serious and flagrant misconduct, driven by losing self-control and "letting his emotions take over" in carrying on a clandestine personal relationship with an inmate under his custody and control.

Second, New Bedford took appropriate steps to ensure that it made an impartial and thorough review of the facts before deciding to bypass Mr. Goncalves. The NBPD could have stopped at obtaining the SIU report, which, on its face, carries a substantial degree of credibility. NBPD, however, undertook its own independent investigation, interviewing the Appellant and four other percipient witnesses. Further, although Lt. Rezendes had discretion not to advance Mr. Goncalves' application in 2017, he afforded Mr. Goncalves a chance to explain himself and demonstrate that his actions since his termination from the BCSO showed that this incident was behind him and he would not be likely to "let his emotions" control him in the future. I listened carefully to the recorded Captains Board interview. Lt. Rezendes and the NBPD Captains showed courtesy when appropriate, as well as asked all the tough questions when necessary. The panelists uniformly came to the conclusion that Mr. Goncalves did not acquit himself to their satisfaction on the critical issue of whether or not he could be trusted when he promised that his past behavior was no longer a legitimate concern. I find the interview panelists' conclusion to be entirely reasonable and justified in this regard.

Third, I have considered the Appellant's point that the SIU supervisor thought that the BCSO pulled the trigger on Mr. Goncalves too early and, had his side of the story been told, he still would have been disciplined, but might not have been terminated. I also considered that Mr. Goncalves' current and past immediate supervisors thought highly of him. These factors, however, are not sufficient to change the outcome here. To the extent the point relies on the contention that Mr. Goncalves was terminated before the SIU investigation had been completed, that assumption is factually incorrect. Mr. Goncalves was suspended on October 21, 2014, he was terminated on November 10, 2014, more two weeks after the SIU investigator submitted his report taken into account by the NBPD. Moreover, the NBPD fully considered all of these factors. The judgment ultimately made by Lt. Rezendes and the three NBPD Captains was that the underlying evidence of misconduct, revealed in the SIU report and through the NBPD independent investigation and interview of Mr. Goncalves, did not override these mitigating factors. In sum, after considering both the positive and negative factors, the NBPD properly concluded, with "reasonable justification" that there was a "credible basis" to have "legitimate doubt" about Mr. Goncalves suitability to serve as an NBPD police officer.

Fourth, I also considered the Appellant's argument that the Captains Board was a flawed process that began with a pre-determined conclusion to bypass Mr. Goncalves and placed undue weight on his efforts to change his status from non-minority "D" to a minority "C" candidate so that he moved himself up on the eligible list, claiming that was a further example of poor character. I agree that the interview process was highly subjective and largely unstructured and, in most other cases, it would be problematic under basic merit principles to bypass a candidate solely because of such subjective scores. The evidence, however, demonstrated that, under the particular circumstance of this case, the Captains Board interview was not used as a method of ranking Mr. Goncalves against other candidates. Rather, the interview here was largely dedicated to probing Mr. Goncalves on the particular concerns that his background investigation revealed and meant to give Mr. Goncalves a fair chance to explain why his record should not disqualify him. To be sure, he faced a high hurdle going into the Captains Board, but he was treated fairly and professionally. There was no indication of any pre-determined result.

I also agree it would be inappropriate to hold the issue of "Consent Decree" status against Mr. Goncalves. After carefully reviewing the recording of the Captains Board interview and the Commission testimony of the NBPD witnesses, however, I conclude that the inquiry on that subject (on which little time was spent) was, in part, a properly designed information gathering process and, in part, an interviewing technique to "test" Mr. Goncalves ability to explain himself when pressed by a doubtful interrogator. The inquiry did not stray from the permissible limits of interview procedures. The "Consent Decree" issue did not influence the bypass decision.

Fifth, I detected no indicia of bias, political influence or ulterior motives in New Bedford's decision. Indeed, as noted above, the NBPD gave Mr. Goncalves more than the minimum due process that basic merit principles require. He was given two chances to explain himself, first in an hour-long interview with Lt. Rezendes and in a 45-minute Captains Board. The Captains Board panelists took time to explain their concerns and offered concrete suggestions for specific actions Mr. Goncalves could take that would demonstrate, beyond mere verbal promises, that he could be trusted when he says that he is no longer vulnerable to "fudging the truth", losing control or getting carried away by emotions (e.g., establishing a strong employment record in his current job or seeking part-time police work). When, if ever, Mr. Goncalves can meet that challenge is not for the Commission to predict, but remains a matter between him and the NBPD.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Michael Goncalves, is ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 14, 2019.

Notice to:

Christopher T. Saunders, Esq.
Saunders & Saunders, LLP
700 Pleasant Street
New Bedford, MA 02740

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
Solicitor New Bedford City Hall
133 William Street
New Bedford, MA 02740

Melissa A. Thomson, Esq.
Human Resources Division
100 Cambridge Street
Boston, MA 02114

* * * * * *

ADAM LEVESQUE

v.

TOWN OF MIDDLEBOROUGH

D1-12-228
DALA No. CS-12-667

March 14, 2019
Christopher C. Bowman, Chairman

***Commission Practice and Procedure-Decision on Remand From Superior Court-Validity of Last Change Agreement-Disparately Harsh Discipline Resulting in Termination-Just Cause for Termination Apart From Last Change Agreement*—**On remand from the Superior Court, the Commission adopted in full the remand decision of an administrative magistrate finding that the Appellant police officer's conduct warranted termination independently of a valid Last Chance Agreement. The decision also rejects the Appellant's contention that he was singled out for disparately harsh treatment when discharged since he alone, among the comparators he presented, had previous discipline. The Appellant, a Middleborough police officer was discharged for filing inaccurate grant activity reports and, in direct violation of the Chief's order, contacting a witness in order to prepare for the Section 41 hearing.

DECISION AFTER REMAND

On May 1, 2014, the Civil Service Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, making that Tentative Decision the Final Decision of the Commission [27 MCSR 288]. The decision of the Town of Middleborough (Town) to terminate the Appellant was affirmed and the Appellant's appeal was denied.

On September 21, 2015, the decision was remanded to the Commission by the Superior Court "for the limited purpose of considering the validity of [an] August 6, 2010 Last Chance Agreement and whether [the Appellant]'s conduct constitutes just cause for termination independent of the Agreement." The Commission referred the matter back to the Magistrate.

On December 19, 2018, pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision After Remand to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Appellant submitted written objections to the Tentative Decision After Remand and the Respondent submitted a response to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision After Remand of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Town of Middleborough to terminate Mr. Levesque as a police officer is affirmed and Mr. Levesque's appeal under Docket No. D1-12-228 is hereby ***denied***.

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 14, 2019.

December 19, 2018
Angela McConney Scheepers, Administrative Magistrate

SUMMARY OF TENTATIVE DECISION UPON REMAND

The Appellant's conduct warranted termination independently of the valid last chance agreement. After the Middleborough Police Department opened an investigation into the Appellant's filing of inaccurate grant activity reports, he contacted a witness in direct violation of the police chief's order and gained information to assist him in his Section 41 hearing. I therefore recommend that the Civil Service Commission dismiss the appeal.

TENTATIVE DECISION UPON REMAND

On September 21, 2015, this matter was remanded by the Plymouth Superior Court, (Chin, J.) to the Civil Service Commission (Commission) for the limited purpose of considering the validity of the August 6, 2010 Last Chance Agreement (LCA or Agreement) and whether the Appellant's conduct constituted just cause for the termination independent of the Agreement. *Levesque* v. *Massachusetts Civil Serv. Comm'n*., Docket No. CV-00548-A (Plymouth Sup. Ct., Sept. 21, 2015).

On October 2, 2015, the Commission issued an Order after Remand, further remanding the matter to the DALA magistrate in order to (1) further conduct proceedings to address the issues raised by the Court; and (2) issue a revised Tentative Decision to the Commission with the customary comment period afforded to both parties prior to a Commission vote.

The Appellant requested a rehearing. Pursuant to the Commission's October 2, 2015 Order, on October 28, 2015, I ordered the parties to submit briefs by November 30, 2015 on the remanded issues of the Agreement's validity and the whether the Appellant's actions warranted termination independent of the Agreement. In the DALA order, I stated that I would not hold further hearings unless either party could specify what the proposed new testimony would offer and why it could not have been proffered during the three-day Commission hearing.

The Superior Court is clear that this matter was remanded for the limited purpose of determining the validity of the Agreement and whether the Appellant's conduct warranted termination independent of the Agreement. I held a hearing limited to these issues at the Division of Administrative Law Appeals on April 5 and 6, 2017. The hearing was conducted according to the formal rules of the Standard Adjudicatory Rules of Practice and Procedure. 801 CMR § 1.01. The witnesses were sequestered. The stenographic record serves as the official record of the hearing upon remand.

Respondent Town of Middleborough (Town) objected to the remand hearing and the Appellant's proffered exhibits. The Town posited that a critical witness to the validity of the Agreement was Michael Hanley, Esq., who served as counsel for the New England Police Benevolent Association, Inc. (NEPBA), Local 76, Middleborough Police Officers (Union). Mr. Hanley represented the Appellant/Union in the Agreement, the matter of Mr. Levesque's dismissal, and filed the civil service appeal on Mr. Levesque's behalf. (Exhibit 38.) The first civil service hearing was conducted on November 27, 2012, January 31, 2013 and February 6, 2013. Mr. Hanley passed away later in the year on September 30, 2013.[1] The Town posited that Attorney Hanley had successfully saved Mr. Levesque's position by negotiating the Agreement.

The Appellant submitted six additional exhibits, disciplinary records of patrolmen in the Middleborough Police Department (Department) (Exhibits 40-44).[2] I had precluded some of those disciplinary records in the earlier hearing because I did not think they were relevant. I admit them now to illustrate the factual distinction between the conduct of Mr. Levesque and the other police officers who were disciplined.

The Town submitted 30 additional exhibits (Exhibits 45-74). The documents related to the Department's investigation before the matter was resolved by the Agreement; negotiation of the Agreement; and the Appellant's proceeding before the Department of Labor Relations charging that Mr. Hanley had breached his duty of fair representation in a) the negotiation and agreement leading to the LCA and b) the matter leading to the Appellant's 2012 dismissal. The Appellant objected to Exhibits 69, 70 and 71, regarding his Department of Labor Relations appeal and the Union's representation of his matter during the negotiation of the LCA and his later dismissal.[3] This appeal was concurrent with the dates of the first hearing of this civil service matter. I admitted the exhibits.

The Town called Patrolman Angelo Joseph LaPanna, III, Lieutenant David Michael Mankiewicz and retired Chief Bruce Gates. I had precluded Officer LaPanna's testimony as an Appellant's witness in the first hearing.

I marked the Appellant's Remand Brief as Exhibit "C" and marked the Respondent's Remand Brief as Exhibit "D." I marked the Appellant's Remand Brief as Exhibit "E" and marked the Respondent's Remand Brief as Exhibit "F."

I incorporate by reference my original findings, Findings of Fact 1 - 51, as set forth in my decision dated May 1, 2014, and make the following supplemental findings of fact:

FINDINGS OF FACT

I. Discipline of Department Officers

52. Around the first week of July, 2012, Lt. David Michael Mankiewicz, head of Internal Affairs, advised then-Chief Bruce Gates that as a result of the Levesque investigation, he had checked the traffic enforcement grant activity reports of the other officers participating in the Click it or Ticket Program. Lt. Mankiewicz noticed that on his May 17, 2012 grant activity sheet, Patrolman Angelo Joseph LaPanna, III had also entered the registration plate of William Ferdinand. This registration plate had also been recorded on Adam Levesque's grant activity sheets. Chief Gates advised Lt. Mankiewicz to find out from Mr. Ferdinand if he had been stopped by Officer LaPanna. (Exhibit 40.)

53. At the time, Officer LaPanna had been a patrolman for eleven years. He had not had any prior discipline. (Exhibit 40.)

54. Because the chief and the lieutenant were both out of the office for vacation days, they did not speak again until July 20, 2012. At this time, the lieutenant advised Chief Gates that Mr. Ferdinand had not been stopped by any police officers in the last few months. Chief Gates then contacted Officer LaPanna and scheduled an interview for July 30, 2012 at 3:00 p.m. (Exhibit 40.)

55. On July 26, 2012, Chief Gates hand delivered a copy of the May 17, 2012 grant activity sheet and a letter advising of the July 30, 2012 interview, enclosing an order not to discuss the matter with anyone except the chief and his legal representatives. Officer LaPanna admitted to the chief that he had already discussed the matter with his wife and the union representative. (Exhibits 34 and 40.)

56. The interview proceeded as scheduled on July 30, 2012. As part of the investigation, Chief Gates ran an offline CJIS search to check the number of times the registration plate was run. The search revealed that the vehicle had had an active inspection sticker since November 2011. However, Officer LaPanna had said that he pulled over the vehicle because the inspection sticker was invalid. The CJIS search also revealed that the registration plate had

1. Exhibit 72.

2. Exhibit 40. 2012 investigation and discipline file of Patrolman Angelo Joseph LaPanna, III;

Exhibit 40A. Patrolman LaPanna's May 17, 2012 Traffic Enforcement Grant Activity Report;

Exhibit 41. March 17, 2009 Decision of Sergeant R.;

Exhibit 42. March 26, 2010 Letter of Reprimand issued to Patrolman BC;

Exhibit 43. June 22, 2011 report of one-day suspension issued to Patrolman KD; and

Exhibit 44. December 19, 2009 - January 28, 2010 investigation time-line of Chief Bruce Gates.

3. Exhibit 69. Concurrent with his civil service matter, the Appellant filed a January 23, 2013 claim with the Department of Labor Relations (DLR), alleging that the Union had breached its duty of fair representation by a) advising him to sign the LCA; b) allowing the Town to bring another charge against him; c) failing to challenge Chief Gates' June 7, 2012 order; and d) by failing to argue that the Board of Selectmen should not decide on the falsification of records charge against him. The DLR dismissed the matter on April 17, 2013. *Levesque* v. *New England Police Benevolent Assoc., Inc.,* Docket No. MUPL-13-2569, Decision (Dep't. of Labor Relations, Apr. 17, 2013), *aff'd* (Employment Relations Bd., Sept. 24, 2013).

Exhibit 70. The Union's response to the Appellant's April 26, 2013 appeal of the April 17, 2013 DLR decision to the Employment Relations Board (ERB).

Exhibit 71. The ERB affirmed the decision of the DLR investigator. *Levesque* v. *New England Police Benevolent Assoc., Inc.,* Docket No. MUPL-13-2569, Decision (Employment Relations Bd., Sept. 24, 2013).

not been run in the sequence as described by Officer LaPanna. (Exhibit 40.)

57. As part of the investigation, Mr. Ferdinand also submitted written responses to questions from the chief. In his responses, Mr. Ferdinand noted that he had not been pulled over by Officer LaPanna. He confirmed that his vehicle had been properly inspected. (Exhibit 40.)

58. The investigation concluded with a Settlement Agreement among the Town of Middleborough (Town), the Union and Officer LaPanna. Officer LaPanna agreed that he had not pulled Mr. Ferdinand's vehicle over "or go through the other steps required for a motor vehicle stop." The parties agreed that the conduct warranted a suspension without pay for three shifts. However, because of Office LaPanna's lack of a disciplinary record and his agreement to relinquish two vacation days, the Town agreed not to discipline him for the incident. The parties further agreed that if Officer LaPanna did not engage in any other conduct warranting suspension without pay, the document would be removed from his personnel file if a prospective employer requested his file for consideration of a position. (Exhibit 40.)

59. On October 8, 2008 at approximately 2:00 a.m., while he was on duty, uniformed and wearing his service weapon, Sgt. R. drove to his family home in his police cruiser. (Exhibit 41.)

60. Sgt. R. entered the bedroom where his eighteen-year old was sleeping. He struck her in the face, causing pain and bruising. He pulled her hair, yelled at her and informed her that she could no longer live in the family home. (Exhibit 41.)

61. Sgt. R.'s fifteen-year old daughter woke up and went to see what was going on. Sgt. R. yelled at her, pushed her and used his chest and body to bump her back towards her own bedroom. He also grabbed her by the neck, threw her into her bedroom and pushed her on to the bed. When the fifteen-year old kicked at Sgt. R. to keep him away, he raised his closed fist at her. (Exhibit 41.)

62. Sgt. R. eventually left the home, only to drive by a few minutes later, parking and observing the home for approximately ten minutes some distance away. (Exhibit 41.)

63. After the boyfriend of the older daughter came to take both girls to a safe place for the night, Sgt. R. pulled in behind the boyfriend's car so that he couldn't leave. He then exited the cruiser, and began yelling and demanding to know where his daughters were going. Sgt. R. then reached into the passenger side window and tried to slap the younger daughter. He eventually moved the cruiser upon his wife's pleas. As his daughters left in the car, he threatened, "Wait 'til I see you next time." (Exhibit 41.)

64. Before his shift ended at 8:00 a.m., Sgt. R. approached Sergeant Robert Ferreira and gave a false account of the incident, omitting references to his assaultive behavior. Toward the end of his shift, the sergeant also used a Department computer to compose a letter to his wife, complaining about her "sticking up" for her daughters. (Exhibit 41.)

65. On February 5, 2009, Sgt. R. was issued a Notice for a March 4, 2009 Section 41 hearing for the purpose of determining whether he should be disciplined, up to and including discharge from employment, for engaging in misconduct while on duty on the morning of October 8, 2008. The Notice advised of the charge of conduct unbecoming a police officer, with the specific violations of the following Department Rules and Regulations: 1) Professional Conduct and Responsibilities; 2) Improper or Unsuitable Conduct; 3) Criminal Conduct; 4) Neglect of Duty; and 5) Untruthfulness. (Exhibit 41.)

66. Sgt. R., his daughters, the older daughter's boyfriend, the younger daughter's school adjustment counselor and Sgt. Ferreira were among the witnesses. In its March 17, 2009 Notice of Decision, the Board of Selectmen (Board) found that not only was the sergeant's testimony self-serving and not credible, witnesses including his older daughter amended their testimony in order to protect his career. The Board found that Sgt. R. was untruthful in his account of the October 8, 2009 events in his verbal report to Sgt. Ferreira later that morning. The Board also found that he was untruthful during the hearing before the Board. (Exhibit 41.)

67. The Board issued five findings of fact, finding that on October 8, 2009: 1) Sgt. R. had driven his cruiser to his home without authorization; 2) that he had struck his older daughter in the face; 3) that he had assaulted his younger daughter; and 4) that he had a confrontation with his daughter and her boyfriend in the driveway. The Board found that Sgt. R.'s conduct was unacceptable for a Department police officer. Further, his actions were particularly egregious for a police sergeant who is expected to lead by example and is responsible for supervision of subordinate officers. (Exhibit 41.)

68. The Board found that there were unique circumstances, and coupled with the sergeant's lack of previous discipline, decided to impose discipline short of discharge. The Board imposed an immediate three-month suspension, a reduction in rank from sergeant to patrolman, and an order to submit to a mental health evaluation and an order to successfully complete any treatment recommended by the Town's physician. Further, Sgt. R.'s return to work was contingent upon certification from the Town physician. Finally, any failure on Sgt. R.'s part to comply with any of the preceding conditions, or with any follow-up orders from the police chief, would form a separate basis for more discipline, up to and including discharge. (Exhibit 41.)

69. On March 26, 2010, Sgt. Joseph Perkins issued Patrolman BC a letter of reprimand for failing to write a supplemental report for a September 2009 arrest. Due to the heavy call volume on the night of the arrest, the sergeant expected BC to complete the supplemental report at a later time. As the case approached pretrial in February 2010, Sgt. Perkins asked BC again to complete the supplemental report. When the sergeant inquired again early in March 2010, BC admitted that he had lost the information due to the passage of time. Sgt. Perkins reminded BC that per Department policy, all reports should be completed in a timely manner, and all direct orders are to be followed. (Exhibit 42.)

70. On July 15, 2011, Lt. Mackiewicz supervised the 4:00 p.m. to 12:00 a.m. shift. Because of a shortage caused by granting a day off to an officer, the midnight shift fell below the required minimum staffing of five officers. When Lt. Mackiewicz was unable to fill the shift with a patrolman, he offered it to the supervisors and took the position himself. (Exhibit 43.)

71. When roll call was called at 11:45 p.m., Patrolman KD was absent. After KD did not answer repeated calls made to his phone, Sgt. Perkins was dispatched to KD's home to ask him to report to work. When Sgt. Perkins went to KD's home, he found his vehicle parked there and his dogs making a racket, but ended up banging on the door to no avail. (Exhibit 42.)

72. Lt. Mackiewicz then went to bar where KD's girlfriend worked. The bartender telephoned the girlfriend on behalf of the lieutenant, and got KD on the line. Lt. Mackiewicz informed KD that he had a midnight shift and that the Department was running the shift short. When KD replied that he was unaware that he was scheduled to work because 4:00 p.m. to 12:00 a.m. was his regular shift schedule, Lt. Mackiewicz reminded him that the schedule had been posted for a week. KD said that he was at the Taunton Beagles and was unable to report for work. Lt. Mackiewicz told him to expect disciplinary action. (Exhibit 43.)

73. Because Sgt. Debra A. Batista was unable to find someone to fill the shift, the July 16, 2011 12:00 a.m. to 8:00 a.m. shift fell below minimum staffing levels. Lt. Mackiewicz decided to take a patrol sector, and to summon mutual aid if a situation arose. (Exhibit 43.)

74. On July 17, 2011, KD submitted a letter of apology to Lt. Mackiewicz. He admitted that he had been informed of the July 16, 2011 scheduled in an electronic mail message from Lt. Andrade. KD stated that he had made a mistake.

75. On July 22, 2011, KD appeared for an administrative interview with Chief Gates and Officer Schofield. The chief then disciplined KD for violating Department rules in 1) refusing to obey a lawful order when he failed to obey Lt. Mackiewicz's order and report for duty on the July 16, 2011 12:00 a.m. to 8:00 a.m. shift; and 2) and in failing to report for duty whenever so ordered by proper police authorities at a regularly appointed time and absenting himself from duty without leave. The discipline was meted out as follows: one day suspension for refusing to obey a lawful order, reduced to a four-hour extra duty bicycle shift; a one-day suspension for failing to report to duty, reduced to a four-hour extra duty bicycle shift; and deduction of a personal day in order to reimburse the Department for paying him for the unworked July 16, 2011 shift. Chief Gates agreed to purge the disciplinary letter from KD's personnel file if he had no similar disciplinary issues in the following six months. (Exhibit 43.)

76. On July 25, 2011, Chief Gates filed a memorandum in regard to KD's discipline. The chief noted that the officer had no prior discipline, and was credible in his assertion that he had forgotten about his shift change. The chief also noted that KD would not have taken the call on his girlfriend's phone if he had something to hide. KD admitted that he had been drinking, and so could not show up to work. (Exhibit 43.)

Investigation of Appellant's Prior Discipline

77. On March 8, 2010, Chief Gates asked Mr. Levesque to submit a written report as part of the investigation in regard to the compromised drug operation that led to the LCA, including responses to twenty-five provided questions. Question 8 stated:

> Did you want a role in the [JP] investigation? Did you ask to have a role? Who did you ask? Were you disappointed or upset that you were not involved in the [JP] investigation? Did you express it to anyone? To whom? When? What did you say?

(Exhibit 54.)

78. Mr. Levesque responded:

> Yes I did want a role in the [JP] investigation. As a professional I like to utilize the talents that I have to help solve crime. I do not remember if I asked to have a role. I was disappointed that I did not have a role in this investigation because personally I wanted to catch [JP]. As far as expressing this to anyone I do not recall if I did or not.

(Exhibit 55.)

79. As part of the investigation, the Department also interviewed JW. JW is the cousin of JP, and was an individual known to the police. (Exhibit 58.)

80. On May 7, 2010, Chief Gates interviewed Mr. Levesque in the presence of Mr. Hanley, Mr. Peloquin, the Town Counsel, and Lt. Mankiewicz. In the interview, Mr. Levesque confirmed his disappointment that he was not part of the JP investigation. He also admitted that he had arrested JP on at least three occasions. When the chief inquired as to why JW would report that Mr. Levesque had revealed the existence of a GPS device on his cousin JP's car, the following exchange occurred:

> Chief Gates: … I'm asking if you know a reason or motivation for him to try to make that statement up on tape to a Middleborough Police Officer.
>
> Appellant: I have no factual basis, I have my own opinion but nothing factual.
>
> Chief Gates: And what's that opinion?
>
> Appellant: My opinion is that to get me their biggest thorn in their side out of the way and possibly protect someone else.
>
> Chief Gates: And if you would know why do you think [JW] would pick you over thirty-eight other Middleborough Police Offices to make this up?
>
> Appellant: My opinion, Chief, I'm high profile.
>
> Chief Gates: In what manner?
>
> Appellant: In terms of the Police Department, I'm high profile.
>
> Chief Gates: You mean you're proactive?
>
> Appellant: Correct. You know, in terms of that kind of community. I'm well known by the criminals in terms of …
>
> Chief Gates: Why are you well known?

> Appellant: Because I'm very pro-active. I really enjoy my job and I like getting bad guys off the street and I guess that makes a name for yourself within that community.

(Exhibit 58.)

81. The interview continued on June 17, 2010. On July 1, 2010, Mr. Peloquin submitted a proposed Settlement Agreement/Last Chance Agreement to Mr. Hanley in order to resolve the disciplinary matter. The agreement would be subject to the approval of the Board of Selectmen, but the chief and the Town Manager had already agreed to recommend it as an alternative to a civil service hearing. (Exhibits 59 and 60.)

82. On July 1, July 6, July 12, July 14, July 19, July 20, July 21, July 26, July 30, August 2 and August 3, 2010, Mr. Hanley and Mr. Peloquin exchanged electronic mail messages about the drafting of the Agreement. There was negotiation about the terms acceptable to Mr. Levesque. (Exhibits 61-63.)

83. On January 23, 2013, concurrent with his civil service hearing, Officer Levesque filed a breach of duty of fair representation claim against NEPBA with the Division of Labor Relations (DLR). G.L. c. 150E, § 10(b)(1). Mr. Levesque alleged that the Union 1) permitted the Town to violate his due process rights during the termination hearing and the related investigation when it a) failed to demand two separate proceedings to address two separate alleged offenses against him; b) failed to challenge the legality of the Order that the Town claimed he violated, which denied him the ability to speak to his coworkers/potential witnesses about the allegations against him; c) breached its duty of fair representation by failing to require that the Board rule on the central underlying charge—falsification of records—when it voted to terminate; and 2) the Union further breached its duty of fair representation when it advised and permitted Mr. Levesque to execute an unconscionable and grossly unfair Last Chance Agreement dated August 6, 2010. Mr. Levesque claimed that he was unaware of the breach until the time of his termination on August 6, 2012. (Exhibit 68.)

84. On April 17, 2013, the DLR investigator dismissed Mr. Levesque's claim. The investigator specifically addressed Mr. Levesque's claim that he signed the LCA because he was unaware of Lt. Mackiewicz's July 16, 2010 letter that the charge that was unsubstantiated. The investigator noted that the LCA stated within its four corners that the charge of alerting JP was unfounded, and that Mr. Levesque had failed to "provide complete information despite specific and written and verbal directives given to him by the Chief and that this was a violation of the Department's rules and regulations." (Exhibits 4 and 69.)

85. Mr. Levesque appealed the DLR dismissal to the Employment Relations Board (ERB). On September 24, 2013, the ERB reviewed Mr. Levesque's appeal of the DLR decision, and found that Mr. Levesque's arguments quarreled with how the Union had represented him. "However, unions, even when represented by an attorney, are not required by law to represent grievants as an attorney would represent clients." ERB found that the fact that the Union may have made other or different arguments on Mr. Levesque's behalf when representing him is insufficient to establish a violation of the law in the absence of evidence that its strategy amounted to a breach of the duty of fair representation. (Exhibit 71.)

CONCLUSION AND ORDER

I followed the orders of the court, admitted evidence and took testimony for the discrete and limited purpose of determining the validity of the Agreement and whether the Appellant's conduct warranted termination independent of the Agreement.

Both parties submitted new exhibits. I have reviewed all the evidence, and made additional findings.

The Last Chance Agreement was Valid

Mr. Levesque entered into this Agreement with the advice of counsel and upon admission that he should not have shared details about a drug investigation with his wife. Mr. Levesque was actively involved in negotiating the terms of the Agreement. In fact, he and his counsel conferred with the Department many times. The parties exchanged numerous electronic mail messages. It was advantageous for Mr. Levesque to enter into such an agreement, and he did so in lieu of a Board hearing with the potential for termination.

Mr. Levesque has repeatedly referred to the July 16, 2010 Internal Affairs memorandum from Lt. Mackiewicz to Chief Gates, alleging that the Department withheld exonerating information from him during the JP investigation, specifically that the Department could not substantiate that he had improperly revealed that JP was under surveillance. (Exhibit 4.) I find that Mr. Levesque was not coerced or tricked into signing the LCA. The LCA clearly states that the IA "will find that the charge that Levesque alerted [JP] is unfounded," and focused on Mr. Levesque's refusal to obey the chief's directives and supply information during the investigation. Mr. Levesque admitted, and it is stated within the LCA, that "he admits he could have given more complete and definitive information." (Exhibit 3.)

I addressed Mr. Levesque's arrogance and self-aggrandizement in my first decision, and those characteristics are present again in Finding of Fact 79. Mr. Levesque badly wanted to be part of the JP drug investigation, and imagined for himself within the Department a role greater than that of a patrolman. His vanity clouded his judgment and steered his conduct in the JP matter.

Mr. Levesque's Conduct Warranted Termination even in the Absence of a LCA

Even in the absence of a Last Chance Agreement, the Appellant's conduct was egregious. First he submitted incorrect information on his grant activity reports in the Click it or Ticket program. Then he coerced a Department witness to reveal information during the ensuing Department investigation, in violation of the Chief's June 7, 2012 Order not to discuss the matter with anyone. He then used that information during the second day of the Section 41hearing.[4]

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4. [See next page.]

At this point, the Appellant had been a police officer for eleven years, and it was incumbent upon him to obey orders from his chief. In fact, on the second day of his §41 hearing, he admitted that he had made a "terrible mistake" in disobeying the chief's Order not to contact witnesses or discuss the matter except with his Union representative or his attorney.

The Appellant complained that he received disparate treatment in comparison to other police officers who submitted inaccurate grant activity reports or broke other Department rules or regulations. I had precluded some of the Appellant's exhibits from the first evidentiary hearing because they involved police officers who had never been disciplined. I admitted those exhibits, Exhibits 40-44, in the hearing upon remand.

A comparison of the officers in those exhibits reveal that the Appellant was assuredly the only police officer who had had previous discipline. As the only officer with previous discipline, he was the only one subject to a Last Chance Agreement. Officers Collins, LaPanna and Dees cooperated fully with the Department investigations of their conduct. The Board of Selectmen found unique circumstances in the situation of Sgt. R.

The Town's new exhibits shed further light upon the circumstances surrounding the negotiation of the LCA, Mr. Leveque's termination and his Board of Selectmen hearing. I regret that the Town had not offered them in the first hearing. That information may have made the previous administrative record more helpful to the court.

Mr. Levesque submitted incorrect information on the grant activity reports of the Click it or Ticket Program; was untruthful during the ensuring investigation; tampered with a witness in direct violation of Chief Gates' order; and lied under oath at the Board of Selectmen hearing, using the information he had gleaned from the witness tampering. I find that Mr. Levesque's conduct showed a pattern of dishonesty in sharp distinction from the behavior of the other disciplined officers, and warranted termination independently of the Agreement. Further, I find that there was a valid Last Chance Agreement (LCA) in effect which would have triggered his termination.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the Town of Marlborough had just cause to terminate Adam Levesque. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

Notice to:

Timothy G. Kenneally, Esq.
Foley and Foley, P.C.
350 Gifford Street, Suite 26
Falmouth, MA 02540

Leo J. Peloquin, Esq.
Joshua R. Coleman, Esq.
Collins, Loughran and Peloquin, P.C.
220 Norwood Park South, Suite 1D
Norwood, MA 02062

Edward McGrath, Esq.
Chief Administrative Magistrate
Division of Administrative Law Appeals
14 Summer Street
Malden,MA 02148

* * * * * *

4. I wrote in the May 1, 2014 Tentative Decision:

> On June 28, 2012, the Appellant testified on the first day of his §41 hearing. The Appellant testified that he had mistakenly listed the location of the May 29, 2012 Ferdinand motor vehicle stop as Plympton and Thompson Streets, instead of Plympton and Plymouth Streets. I infer that the Appellant's testimony differed from his grant activity reports because he had already spoken to Ferdinand, and learned that Ferdinand had told the Department's investigators that he had traveled to the Appellant's home via Plymouth Street that day. (Findings of Fact 25 and 34.)

ALEX DIAZ

v.

LOWELL POLICE DEPARTMENT

G1-17-074

March 28, 2019
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment to the Lowell Police Department-Driving Record-Stale Information-Other Candidates-Failure to Apply a Uniform Standard-Driving Record in National Guard-Payment Defaults—Commissioner Cynthia A. Ittleman reversed the bypass by the Lowell Police Department of a candidate for original appointment because it was based on driving records that went back almost 20 years and because some of the successful candidates had records that were more troublesome. Also noted in the decision was the fact that Lowell failed to consider the Appellant's very positive driving record in a transportation battalion in the Army National Guard and wrongly relied on the candidate's payment-default license suspensions.

DECISION

On April 19, 2017, the Appellant, Alex Diaz (Mr. Diaz or Appellant), pursuant to G.L. c. 31, s. 2b, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Lowell Police Department (LPD or Respondent) to bypass him for appointment to the position of permanent full-time police officer. A pre-hearing conference was held on May 8, 2017 at the Mercier Community Center in Lowell. A full hearing was held at the same location on June 5, 2017.[1] The hearing was digitally recorded and both parties were provided with a CD of the hearing[2] . The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT

Twenty-four (24) exhibits were entered into evidence at the hearing: Appellant's Exhibits (A.Exs.) 1 - 16; and Respondent's Exhibits (R.Exs.) 1 - 8. Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- James Fay, Sergeant, LPD
- Timothy Crowley, Captain, LPD

Called by the Appellant:

- Alex Diaz, Appellant
- Ms. A, Appellant's fiancé

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

1. The Appellant is Hispanic. At the time of the Commission hearing, the Appellant was thirty-five (35) years old, he was engaged to be married and had young children. In addition to his record of employment, the Appellant served in the Army National Guard from 2012 to 2015, where he was involved in transport of a variety of large vehicles. He received an honorable discharge. During his military service, the Appellant received awards, including the Distinguished Leadership Award in a transportation battalion and being selected as the leader of the transport course. (R.Ex. 4; A.Exs. 7 through 11, and 14; Testimony of Appellant)

2. I take Administrative Notice that Lowell is a civil service community that currently has no upper age limit for entry-level police officers.[3] (*see* https://www.mass.gov/service-details/civil-service-police-departments)

3. The Appellant took and passed the April 25, 2015 civil service police officer examination. (Testimony of Appellant; R.Ex.5) The Appellant did not take the 2017 exam.[4] (Testimony of Appellant)

4. The Respondent requested a certification from which to hire thirty (30) full-time permanent police officers. The state's Human Resource Division (HRD) issued certification 04301 to the Respondent on January 24, 2017 and informed candidates listed thereon to sign the certification at the LPD. Sixty-one (61) candidates, including the Appellant, signed certification 04301. The Appellant was ranked thirty-second (32nd) among the candidates who signed the certification. (R.Ex. 5)

5. The Appellant completed an application for employment. (R.Ex. 4) The Respondent conducted background investigations of the candidates who signed the Certification, including the Appellant, which investigation included a review of the interested candidates' driving records. (Testimony of Fay)

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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. G.L. c. 31, s. 58A provides, "Section 58A. Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty." There is no indication in the record that the Appellant was older than thirty-two (32) years of age when he took the entry-level police officer exam.

4. *See* G.L. c. 31, s. 58 and HRD web page https://www.mass.gov/service-details/civil-service-police-departments regarding the age of police officer examinees and/or candidates.

6. It is the policy of the LPD, when reviewing candidates' driving records as a part of its background investigation, to focus on the candidates' driving records for the previous five (5) years. However, the LPD may also consider driving records up to ten (10) years old, although it would give less weight to such records. With respect to license suspension notices for payment defaults, the Respondent may give little consideration to them since they may relate to whether a candidate could afford to pay the related fine for a citation; the Respondent is more concerned with the underlying infraction for which the candidate received a citation than a payment default. (Testimony of Fay) In addition, Sgt. Fay testified that in reviewing the candidates' driving records, he put more weight on accidents in the candidates' records than on suspensions because RMV suspension notices can be confusing, indicating either that a driver's license has been suspended or that it will be suspended if the driver fails to pay a fine by a certain date. (Testimony of Fay)

7. The Appellant's driving record indicates the following, in pertinent part,

> 8/2/15 speeding (Appellant found **responsible**)
>
> 1/2/14 surchargeable accident
>
> 4/27/09 one-way street (**responsible**)
>
> 11/24/08 surchargeable accident
>
> 6/7/07 surchargeable accident
>
> 2/27/07 bad check - "blocked" indefinite, blocking subsequently released[5]
>
> 8/3/04 speeding (**responsible**)
>
> 4/30/04 failure to stop (**responsible**); lane violation (not responsible)[6]
>
> 11/7/03 surchargeable accident
>
> 5/18/03 speeding (**responsible**); notice of suspension for payment default, followed by release of suspension notice[7] ; lane violation (not responsible)
>
> 12/16/01 seat belt violation (**responsible**); notice of suspension for payment default, followed by release of suspension notice and then reinstatement
>
> 12/22/00 failure to stop (**responsible**); no registration/license in possession (**responsible**) - notice of suspension for payment default, followed by release of suspension notice
>
> 11/14/00 speeding (**responsible**); seat belt violation (**responsible**); failure to give signal (**responsible**); notice of suspension for payment default, followed by release of suspension notice
>
> 4/29/98 - surchargeable accident

(Respondent's Exhibit)(R.Ex.) 1)

I take administrative notice that since the Appellant was thirty-five (35) years old at the time of the Commission hearing in 2017 and that, in 1998, when he was involved in his first accident, the Appellant was approximately twenty (20) years old. (Administrative Notice) As a young man, in his early twenties, the Appellant was poor. (Testimony of Appellant) The Appellant's most recent suspension for payment default occurred in 2003, approximately fourteen (14) years before he applied to the LPD. (R.Ex. 1)

8. The Appellant's 2015 speeding citation occurred when the Appellant was driving his fiancé to the hospital. At the time, the Appellant's fiancé was thirty-six (36) weeks pregnant and believed she was in labor. (Testimony of Appellant; A.Ex. 13) The Appellant was not able to obtain a medical letter explaining this event in time to present it when appealing the citation. (Testimony of Appellant)

9. The Appellant's 2014 surchargeable accident occurred when he was driving to work on January 2, 2014 during a blizzard. The Appellant was driving slowly but hit a snow bank (not another vehicle). (Testimony of Appellant; A.Exs. 15 and 16)

10. Question 22 on page 4 of the Appellant's employment application asks, "Has your license to operate motor vehicles ever been revoked or suspended, in this state or any other?" (R.Ex. 4) The Appellant answered "no". (Id.) Question 19a asks, "Have you ever been involved in a motor vehicle accident? If so explain below." (Id.) The Appellant's application did not provide any information in this regard. (Id.) However, at the Appellant's interview at the LPD, the Appellant was asked if he had ever been in a "serious" driving accident and two (2) or the three (3) interviewers noted that the Appellant said that he had been in two (2) or three (3) such accidents. (R.Ex. 6)

11. After the background investigations were completed, Sgt. James Fay, Captain Crowley and Deputy Superintendent Friedl interviewed the Appellant. (Testimony of Fay; R.Ex. 6) The Appellant did not avoid answering questions about his driving record. The interview panel asked each of the candidates the same questions, making notations in a few or less words on their question forms but did not rank the candidates' interview performance. Following the interviews, Superintendent Taylor met with two (2) Deputy Superintendents, Capt. Crowley and Sgt. Fay to review the candidates' files so that the Superintendent could decide whom to hire as the appointing authority. (Testimony of Fay and Crowley)

12. Superintendent Taylor selected fifteen (15) candidates, four (4) of whom were ranked below the Appellant. (R. Ex. 5) One of the selected candidates is the son of a Sergeant in the LPD who

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5. There does not appear to be a citation related to the bad check entry on the Appellant's driving record.

6. There is an "Improper Equipment" citation also listed on 4/30/04 but there is no disposition indicating whether the Appellant was found responsible or not responsible for this citation.

7. There is inadequate information in the record to indicate whether the Appellant's license was actually suspended or he received a notice indicating that his license *would be* suspended if he did not pay an outstanding fine, except on the one (1) occasion when his license was reinstated after the notice of suspension. Sgt. Fay testified generally about the uncertainty about of similar entries in certain RMV records.

had previously been on active military duty; that candidate was ranked high on the Certification (and higher than the Appellant) and his father was not involved in the hiring process. (Testimony of Crowley)

13. Of the fifteen (15) selected candidates, seven (7) had no record of driving incidents.[8] The remaining selected candidates had the following driving records:

Candidate #1 (ranked highest on the signed list (above the Appellant))

2007 surchargeable accident

2006 no inspection sticker (**responsible**)

2003 no inspection sticker and seat belt violation (not responsible)

Candidate #3 (ranked 3d on the signed list (above the Appellant))

6/26/12 license reinstated after candidate attended required national driver safety course

5/8/12 suspension based on three (3) surchargeable events within two (2) years

8/1/11 surchargeable accident;

2/17/11 failure to stop (**responsible**) and surchargeable accident;

Candidate #4 (ranked 4th on the signed list (above the Appellant))

3/24/16 failure to stop (not responsible)

3/9/16 speeding (not responsible)

4/21/15 reinstated after suspension for three (3) "surcharge" (sic) events

4/20/15 completion of national driver safety course following three (3) surchargeable events in (2) years

2/3/15 suspension based on three (3) surchargeable incidents

9/12/14 surchargeable accident

2/1/13 surchargeable accident

7/20/12 failure to stop (**responsible**)

Candidate #5 (ranked 5th on the signed list (above the Appellant))

10/22/15 default released

9/30/15 suspension payment default indefinite

7/22/15 surchargeable accident

8/4/14 expiration payment default "COR"[9]

7/23/14 suspension payment default indefinite

6/17/14 failure to stop (**responsible**); oversize vehicle (not responsible); no license in possession (not responsible)

3/3/11 expiration payment default release; suspension payment default indefinite;

2/3/11 suspension payment default indefinite

12/10/10 failure to stop (**responsible**)

Candidate #7 (ranked 7th on the signed list (above the Appellant))

3/24/16 surchargeable accident

Candidate #8 (ranked 8th on the signed list (above the Appellant))

3/21/16 surchargeable accident

2/6/13 speeding (**responsible**)

11/4/08 surchargeable accident

Candidate #12 (ranked 12th on the signed list (below the Appellant))

4/18/13 expiration bad check release

4/15/13 blocking bad check indefinite; bad check blocked

12/11/12 failure to stop (not responsible)

6/24/09 unregistered/improper equipment (not responsible); allow unlicensed/suspended operator ("NA")

2/16/09 unregistered/improper equipment ("NP"); seatbelt violation (**responsible**)

12/11/07 surchargeable accident

Candidate #13 (ranked 13th on the signed list (below the Appellant))

6/17/09 no inspection sticker (**responsible**)

Candidate #15 (ranked 15th on the signed list (below the Appellant))

1/25/16 failure to stop (not responsible

5/9/14 failure to stop (not responsible)

14. On March 15, 2017, Police Superintendent William Taylor wrote to HRD stating that the Respondent wanted to bypass the Appellant based on his driving record, stating that his driving record includes "eight (8) citations and five (5) accidents. Mr. Diaz has been cited for speeding on four separate occasions, most recently in 2015. Mr. Diaz's last surcharge able (sic) accident was in 2014. Mr. Diaz has had several license suspensions as a result of payment defaults. It is our finding that hiring Mr. Diaz at this time may prove to be a liability … An individual's past driving history is the best predictor that we have of how they will operate a police cruiser … The public expects a higher standard of behavior from its police officers …. (R.Ex. 3) Capt. Crowley confirmed in his testimony that the Respondent had based its decision to bypass the Appellant based on the Appellant's entire driving record. (Testimony of Crowley) There is no indication in the record

8. The Appellant's Exhibits 1 through 5 are charts that the Appellant produced at the Commission hearing purporting to compare his driving record compared to certain selected candidates. However, at the hearing the Appellant learned that the notation "NR" on RMV records indicates that the candidate was found "not responsible", rendering the Appellant's comparative charts flawed.

9. "COR" is not defined in the record.

that the Respondent had any other concerns about the Appellant's background. (Administrative Notice)

15. On April 19, 2017, the Appellant filed the instant appeal. (Administrative Notice)

16. On April 20, 2017, HRD sent an email message to the Appellant stating that the reasons for bypass provided by the Respondent were acceptable. (R.Ex. 3)

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." *City of Cambridge* v. *Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). 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, s. 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 the 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).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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, 334 (1983). *See Commissioners of Civil Serv.* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

ANALYSIS

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. Concerns about police officers' ability to drive safely on duty, especially in emergencies, are valid but must be applied fairly and consistently or they run the risk of contradicting basic merit principles in their hiring decisions.

There are multiple problems associated with the Respondent's arguments concerning the Appellant's driving record. The Respondent bypassed the Appellant based solely on his driving record dating back to 1998, or nearly two (2) decades prior to his application for employment at the LPD, asserting that his driving record was far longer than any other candidate at the time that the Respondent bypassed him. The Appellant argues that the period of time covered by his driving record puts him at a disadvantage to a candidate who did not obtain a driver's license until many years later. In fact, the Respondent relied upon the Appellant's driving record back to 1998, without saying so, in its letter to HRD seeking to bypass the Appellant. Specifically, the Respondent's bypass letter to HRD stated that the Appellant had eight (8) citations (the oldest of which occurred in 2000); five (5) accidents (the oldest of which occurred in 1998); four (4) citations for speeding (the oldest of which occurred in 2000); and he received suspension notices several times for payment defaults (the oldest of which occurred in 2000). The Appellant's most recent citation was in 2015 for speeding when his fiancé suspected she was in labor with their first child. Prior to the 2015 speeding citation, the Appellant last received such a citation in 2004. The Appellant's most recent accident occurred in 2014 during a blizzard. Prior to the 2014 accident, he had not had an accident since 2008.

Sgt. Fay testified that in making hiring decisions, the Respondent looks at the candidates' driving records for the prior five (5) years but that it also considers the candidates' driving records over the prior ten (10) years, although the older records are given less weight. However, Sgt. Fay also testified that he considered the Appellant's full driving record, which was nearly twenty (20) years old, stating that he believed it showed a pattern of poor driving. Capt. Crowley also testified that he considered the Appellant's full driving record. In addition, Supt. Taylor's bypass letter made no distinction in the weight given to the incidents in the Appellant's driving record all the way back to 1998. However, even the state's criminal offender record law provides, *e.g.*, that the criminal offender record shall include felony convictions for ten (10) years after disposition and five (5) years after disposition for misdemeanor convictions. G.L. c. 6, s. 172. Barring circumstances not in the record in this case, the Respondent should not consider candidates' driving records beyond the prior ten (10) year period. Moreover, candidates who have had drivers' considerably longer than other candidates must be put into the appropriate context to avoid unfairly magnifying and distorting the records.

In *Stylien* v. *Boston Police Department*, G1-17-194 [31 MCSR 154] (2018), the Commission determined that in order to provide a "fair and impartial comparison" of candidates' driving records, the records must "be put in the proper context." *Id*. Mr. Stylien's driving record contained a number of driving incidents and the Commission noted that part of his job of many years as Head Caseworker involved the daily driving of a school van, during rush hour, to transport students to a Boston special education program. In effect, this exposed Mr. Stylien to an increased risk of driving incidents to which other candidates were not exposed. Putting Mr. Stylien's driving record in this context, the Commission ruled, Mr. Stylien's bypass was not justified. The "proper context" in the instant appeal requires equitably comparing Mr. Diaz's driving record to those who the Respondent hired.

If the LPD review of the Appellant's driving record in this case was limited to the prior even ten (10) years, a different result may have occurred. In the ten (years) prior to the Appellant's applica-

tion to the LPD, his driving record included: the one (1) speeding incident in 2015 (relating to his fiancé's pregnancy), accidents in 2007, 2008 and 2014 (the latter incurred during a blizzard and did not involve another car), a bad check (in 2007) and a one-way street citation in 2009. By comparison, three (3) candidates who were selected and ranked above the Appellant on the signed certification had problematic driving records. Candidate #3's[10] most recent incident was the suspension of his or her license in 2012, which was later reinstated after he or she was required to attend the national driver safety course for having had three (3) driving incidents (two (2) surchargeable accidents (2011 and 2012) and a failure to stop (responsible) in 2011) within two (2) years. Candidate #4's[11] most recent incident (for which he was found responsible) involved the completion of the national driver safety course in 2016 after his or her license was suspended in 2015 based on three (3) incidents (car accidents in 2013 and 2014, and a 2012 failure to stop). Candidate #5's[12] most recent incident is a surchargeable accident and subsequent suspension for payment default in 2015, a failure to stop in 2014 followed by another suspension for payment default, a failure to stop in 2010 and subsequent suspension for payment default. I find that the driving records of candidates #4 and #5 contain more recent, condensed and troublesome incidents than the Appellant's driving record over the pertinent time period. The Appellant's bypass also ignored the accolades that the Appellant received for his role in an Army National Guard transportation battalion, where he drove a variety of large vehicles, and for his leadership therein. The Respondent did not apply a uniform standard when it bypassed the Appellant based on his driving record in comparison to the driving records of candidates #4 and #5.

Sgt. Fay also testified that the Respondent does not consider driving record suspensions for payment defaults on a candidate's driving record because it may only indicate the candidate's inability to pay a fine. Rather, he stated, the Respondent considers the citations underlying the payment defaults. However, as noted above, Supt. Taylor's bypass letter specifically relied, *inter alia*, on the Appellant's payment default suspensions. In addition, the bypass letter does not indicate that the Appellant's last suspension was in 2003, fourteen (14) years prior to his application to the LPD. Further, the Appellant testified that around that time, as a young man, he was poor and unable to afford the payments. Thus, the suspension notices for payment defaults in the Appellant's driving record should have been put in the proper context, especially since the most recent one occurred fourteen (14) years before he applied to the LPD. Based on the inequities in the Respondent's consideration of the Appellant's driving record, the Respondent did not establish reasonable justification for bypassing the Appellant.

CONCLUSION

Accordingly, for the above stated reasons, Mr. Diaz's appeal, filed under Docket No. G1-17-074, is hereby ***allowed*** and, 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, HRD shall:

- place the name of Alex Diaz at the top of current and future certifications for the position of permanent full-time police officer in the City of Lowell until he is appointed or bypassed; and
- if the Appellant is selected for employment based on this relief, he shall receive a retroactive civil service seniority date for civil service purposes only, the same as those individuals appointed from certification 04301. This retroactive civil service seniority date shall not entitle the Appellant to any additional compensation or benefits, including creditable service for purposes of retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

Notice to:

Alex Diaz
[Address redacted]

James F. Wellock, Esq.
Assistant City Solicitor
City of Lowell - Law Department
City Hall
375 Merrimack Street, 3d Floor
Lowell, MA 01852

Mark Detwiler, Esq.
Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

10. Candidate #3 was referred to as Candidate A at the hearing.

11. Candidate #4 was referred to as Candidate B at the hearing.

12. Candidate #5 was referred to as Candidate C at the hearing.

FRANCES HEGGIE

v.

CITY OF NEW BEDFORD

D-19-018

March 28, 2019
Paul M. Stein, Commissioner

Commission Practice and Procedure-Disciplinary Appeal-Appointing Authority Hearing—The Commission dismissed an appeal from a New Bedford cemetery clerk of her suspension for incompetence where she failed to request a hearing before the local Appointing Authority which is a prerequisite to the Commission's jurisdiction under Section 41.

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Frances Heggie, acting in reliance on G.L. c. 31, §41-§43, brought this appeal to the Civil Service Commission (Commission), contesting her five-day suspension from her position as Clerk Typist in the Cemetery Division of the Department of Public Infrastructure of the Respondent, City of New Bedford (New Bedford).[1] A pre-hearing conference was held on February 8, 2019 at the UMass School of Law in Dartmouth. On February 21, 2019, New Bedford filed a Motion to Dismiss the appeal for lack of jurisdiction on the grounds that the Appellant failed to seek an appointing authority hearing prior to taking this appeal. The Appellant filed an Opposition to the Respondent's Motion To Dismiss on March 8, 2019. For the reasons explained below, I conclude that Motion to Dismiss should be granted and the appeal be dismissed.

FINDINGS OF FACT

Based on the submissions of the parties and viewing the evidence most favorably to the Appellant, I find the following material facts are not in dispute:

1. The Appellant, Frances Heggie, is a permanent, tenured employee of the New Bedford Department of Public Infrastructure (DPI) in the title of Clerk Typist with the DPI's Cemetery Division.

2. DPI Commissioner Jamie Ponte is the Appointing Authority for the departmental employees of the DPI, including Ms. Heggie.

3. By letter dated January 3, 2019, which Ms. Heggie received on or about that same day, Commissioner Ponte notified Ms. Heggie that she was suspended for five days (from Friday January 4, 2019 through Thursday January 10, 2019) due to her "continuous inadequate work performance" which "continues to decline" despite coaching, and which included, in particular:

- Multiple incorrect entries
- Lack of Communication
- Failure to follow through with daily tasks
- Unable to follow office procedures thoroughly
- Not double checking work before being sent out
- Constant reminding of how to do routine procedures

The January 3, 2019 letter stated that Ms. Heggie "may, within (48) hours after the receipt of this notice file a written request for hearing before me on the question of whether there is just cause for the suspension" and enclosed copies of G.L. c. Chapter 31, Sections 41 through 45.

4. Ms. Heggie never filed a written request for hearing before DPI Commissioner Ponte.

5. On January 11, 2019, Ms. Heggie filed this appeal with the Commission.

STANDARD OF REVIEW

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 CMR 1.01(7) when undisputed facts affirmatively demonstrate "no reasonable expectation" that a party can prevail on at least one "essential element of the case". *See, e.g., Milliken & Co.,* v. *Duro Textiles LLC,* 451 Mass. 547, 550 fn.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, §41,¶2 provides, in relevant part:

> A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions . . . [T]he person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five [of Chapter 31] and with a written notice stating the specific reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there is just cause for the suspension. . . . A person whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended, and he shall be entitled to compensation for the period for which he was suspended.. . . (*emphasis added*)

G.L. c. 31, §41,¶5 provides, in relevant part:

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.

> 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, such person may appeal to the commission as provided in section forty-three.

As New Bedford accurately points out, the Commission's recent decisions have uniformly construed these provisions of the civil service law to mean that an appointing authority *decision, after hearing,* is a prerequisite to the filing of an appeal to the Commission. *See Murray* v. *Department of Correction*, 30 MCSR 258 (2017); *Stiles* v. *Department of Correction*, 29 MCSR 126 (2016); *Jewett* v. *City of Waltham*, 28 MCSR 52 (2015); *Tibbetts* v. *Town of Danvers*, 28 MCSR 513 (2015); *Hurley* v. *City of Lynn*, 23 MCSR 252 (2010), *distinguishing Foley* v. *Boston Police Dep't.*, 22 MCSR 54 (2009) and other cases cited. This appeal presents no special circumstances that would warrant revisiting that line of decisions.

The Appellant contends that the Commission's interpretation of Section 41 to require that a civil service employee must exhaust his or her remedy to an appointing authority hearing before appealing a suspension of five days or less under the second paragraph of Section 41 is "inequitable and not in line with the purpose" of the civil service law. In particular, the Appellant points out that it is likely to be futile for her to request a hearing before the same "appointing authority" who issued the five-day suspension letter. This argument cannot override the plain meaning of the statute, which expressly requires that authority for both the initial pre-hearing suspension and the subsequent hearing are vested in the same "appointing authority", and that, pursuant to G.L. c. 31, §41,¶5, only "after hearing" before the "appointing authority'" may an employee appeal to the Commission from discipline imposed under either "the first paragraph" of Section 41 (discipline greater than five days) OR under the "second paragraph" of Section 41 (discipline of five days or less). The Commission's decisions have articulated sound reasons for having such a statutory scheme. If the Appellant believes it should be changed, that is a matter for the legislature, not for this Commission.

CONCLUSION

Accordingly, for the reasons stated, New Bedford's Motions to Dismiss is ALLOWED and the appeal of the Appellant, Frances Heggie, under Docket No. D-19-019 is ***dismissed.*** The full hearing scheduled for April 26, 2019 is cancelled.

* * *

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on March 28, 2019.

Notice to:

Meghan Ventrella, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02745

* * * * * *

ANDREW (ANDY) PEREIRA

v.

CITY OF NEW BEDFORD

G1-17-146

March 28, 2019
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a New Bedford Police Officer-Untruthfulness Over Medical Military Discharge-Stale and Minor Criminal Offenses-Nepotism—Commissioner Paul M. Stein overturned the bypass of a candidate for appointment to the New Bedford Police Department where the City wrongfully concluded that he had lied about the circumstances of his medical discharge from the military and wrongfully considered negative information about the Complainant from an officer whose brother was on the same certification list and who had once dated the Appellant's significant other. New Bedford also erred in relying on juvenile and other stale information when its own application indicated candidates were not required to disclose this kind of material.

DECISION

The Appellant, Andrew (Andy) Pereira, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass by the City of New Bedford (New Bedford) for appointment as a Police Officer with the New Bedford Police Department (NBPD) and to remove his name from the eligible list pursuant to Personnel Administration Rule PAR.09.[1] A pre-hearing conference was held on September 8, 2017 and a full hearing, which was digitally recorded,[2] was held on January 12, 2018 and February 13, 2018, all at UMass School of Law in Dartmouth. Sixteen exhibits (Exh.1 through Exh.16) were received in evidence, and, at the Commission's request, the Appellant also provided a package of additional documents (PHExh.17). The Commission received Proposed Decisions from the parties on April 2, 2018.

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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 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 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.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBPD Lieutenant A
- NBPD Lieutenant B
- NBPD Detective A
- NBPD Detective B

Called by the Appellant:

- Andrew (Andy) Pereira, Appellant
- NBPD Police Officer A
- NBPD Police Officer B
- Ms. JF

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, Andrew (Andy) Pereira, is a life-long New Bedford resident, graduating in 2001 from the Greater New Bedford Regional Vocational Technical High School. He worked two years as a Group Care Worker for a Plymouth, MA human services provider and, since May 2006, he has been employed as a union laborer in the construction industry for several major Boston area commercial construction contractors. (*Exhs. 1, 2, 5 & 7; Testimony of Appellant*)

2. In January 2003, Mr. Pereira enlisted in the Massachusetts Army National Guard/US Army Reserve (ARNG). He served honorably with a platoon of the 772nd Military Police Company in Taunton, rising to the rank of Specialist (E-4) at the time of his separation in October 2008. (*Exhs. 1, 3 & 5; Testimony of Appellant*)

3. In or about early 2007, Mr. Pereira fell ill. Eventually, after a pulmonary function test, he was diagnosed with asthma and prescribed an inhaler to use as needed to alleviate symptoms (difficulty breathing). (*Testimony of Appellant*)

4. Upon learning of his diagnosis, Mr. Pereira first notified his Army unit medic. Thereafter, the ARNG's Office of the Adjutant General (OAG) informed Mr. Pereira, through his unit commander, that documentation was needed about his medical condition for submission to a Medical Profiling and Record Review Board. Pending the receipt of this documentation, the OAG ordered that Mr. Pereira was not authorized to participate in certain military activities. The OAG Memorandum stated that failure to provide documentation by the "suspense date" (26 June 2007) would result in his separation. (*Exh. 3; Testimony of Appellant*)

5. Mr. Pereira delivered the documents he thought were required to his "admin" specialist, (whom he could remember only by her nickname), and, when those were misplaced, he had copies faxed to her, but, for reasons unknown, the information either still was not sufficient or never got to the review board. (*Testimony of Appellant & JF*)

6. By Memorandum dated 12 October 2007, OAG informed Mr. Pereira's commanding officer:

> "The Medical Profiling and Record Review Board has sent out a Fail to Comply letter . . . with suspense of 12 December 2007. The documentation [provided by Mr. Pereira] was **not sufficient** or **not submitted** by the established suspense date. In order to stop the discharge for Fail to Comply, additional information is required to be **submitted by the Commander** for the State Surgeon to review. . . . This documentation must include . . . [s]pecific limitations, if any, in regards to MOS duties….[r]ecommendations for retaining the soldier in the Massachusetts National Guard. . . [d]iagnosis . . . [t]reatment plan." (**emphasis in original**)

A separate Memorandum dated October 12, 2017 was sent to Mr. Pereira, through his commanding officer, informing him that proper documentation concerning his current medical condition was inadequate and stated: "Unless we receive the previously requested documentation . . . you will be discharged from the Massachusetts Army Guard on [12 December 2007] for failure to meet medical standards." He was also informed that his commander was ordered to ensure that he had not been paid for participating in certain ARNG operations on and after March 26, 2007 per the original OAG letter of that date. (*Exh. 3)*

7. At some point thereafter, Mr. Pereira began mulling whether he wanted to continue his enlistment in the ARNG. After talking it over with his commanding officer and with the commander's approval, Mr. Pereira decided to leave the ARNG rather than further pursue the process needed to clear him as fit for duty, knowing that would mean he would be discharged as medically unfit. The reason for this decision was the fact that his initial six year commitment was up at the end of 2008 and his Military Police unit was slated for overseas deployment, and he would not be discharged for another year or more when the deployment was competed. For the sake of his family, he chose not to extend his enlistment and be put in harm's way, as he and his significant other were expecting their first child.[3] (*Exhs 2 & 3; Testimony of Appellant)*

8. By Memorandum dated 25 September 2008, Mr. Pereira's commander reported to his superiors what Mr. Pereira had decided.

> "SPC Pereira has been told numerous times that he needs to bring in further documentation or be discharged under 'failure to comply'. SPC Pereira has made no attempt to bring in additional documentation stating [either] that he is medically cleared or that he need additional follow-up care. In previous conversation with SPC Pereira, he has made it clear that he does not want to continue his career in the military and wished to get medically discharged."

3. Mr. Pereira's prior duty had involved training as well as domestic activation during declared emergencies and disasters and support of local law enforcement at events such as the Democratic National Convention in Boston in 2004. (*Testimony of Appellant*)

"Any questions should be directed toward the undersigned at (508) 824 -xxxx."

DEREK J. BARAN, CPT, MP
Commanding

9. By Memorandum dated 30 September, the ARNG Office of the State Surgeon ordered that Mr. Pereira be discharged from the ARNG. (*Exh.3*)

10. Mr. Pereira's NG FORM 22 (the National Guard equivalent of a DD214) states the "Authority and Reason" for discharge: "NGR 600-200, 8-35i(8) Medically unfit for retention per AR 40-501" and describes the "Character of Service" as "Honorable". (*Exh. 3*)

11. Mr. Pereira first applied for appointment to the NBPD in 2011 and, again, in April 2012, when he was processed through the background investigation phase and bypassed for failing to disclose in the Employment Application that he was "disciplined" in the military for violating "orders" and providing allegedly false answers to three question (out of more than one hundred questions) on the "Personal History Questionnaire" portion of the application. (*Exh. 1, 2 & 14*)[4]

12. The 2012 background investigation on Mr. Pereira was conducted by NBPD Det. A, who reviewed the background investigation that had been started, but never completed, in connection with Mr. Pereira's first application in 2011. Investigation of residency, neighbors, police contacts, internet search, current employer, personal references, credit report, military record, fingerprint report and firearms check produced many positives and no negative issues. During the "spousal interview" of JA, Mr. Pereira's girlfriend, Det. A showed her Officer A's picture and asked about her prior dating him. (*Exh.2; Testimony of Det. A & JA*)[5]

13. Det. A reviewed Mr. Pereira's application (in which he reported that he had received a "Medical Discharge" from the ARNG, as well as the NG FORM 22 military discharge form Mr. Pereira submitted with the application. Det. A then spoke to a soldier at the Taunton Armory. Det. A "didn't know much about" the person he spoke with but she gave him a copy of a document that, according to her, showed that Mr. Pereira was discharged "because he did not submit medical paperwork that was required to deploy him. . . . which request for paperwork [the soldier] stated would be considered a "direct order." (*Exhs.1 & 2; Testimony of Det. A*)[6]

14. On August 1, 2012, Det. A interviewed Mr. Pereira with three other NBPD officers present (Det. B, Det. C [who did not testify before the Commission] and Officer A). The interview was not recorded. (*Exh. 3; Testimony of Appellant, Det. A, Det. B and Officer A*)

15. According to Det. A's background investigation report, he asked the questions, save for one exchange with Det. C about the 2002 "vandalism" incident and one exchange with Det. B about the New Bedford Madeira Feast, during which exchange, Det. A wrote in his report, that Mr. Pereira became "confrontational with Det. [B]" when Det. B found it incredulous that Mr. Pereira said he had never attended that event. (*Exh.2; Testimony of Appellant, Det. A & Det. B*)

16. According to Det. A's background investigation report, he asked Mr. Pereira about his responses to questions in the application that he was never "disciplined" or violated any "order" in the military, inasmuch as he was discharged for "failure to comply" after not submitting medical documentation, asking: "Isn't that a violation of a direct order and the discipline for not following orders was to be discharged?" Mr. Pereira responded that he did provide some paperwork to his "admin", both personally and, later, his sister also faxed paperwork twice and she would confirm that if he contacted her. Det. A wrote that "it looks like he is blaming his sister for the military not getting his paperwork." (*Exh. 2; Testimony of Appellant & Det. A*)[7]

17. Another subject raised during the 2012 background interview involved Mr. Pereira's prior firearms application (which was part of a prior NBPD hiring package). He initially answered "NO" to a question about whether he had "ever been arrested or appeared in court as a defendant for any criminal offense?"[8] One of his acquaintances on the NBPD saw his application, told Mr. Pereira that he needed to change his answer and provided him with a new form to complete, which he did. (*Testimony of Appellant, Lt. A, Lt. B & Officer A*)

18. Mr. Pereira provided a detailed recollection of the firearms application colloquy, which was substantially as follows: He was asked if a friend in the NBPD told him to change his answers on the firearms application and provided a new application which was substituted for the original one. Mr. Pereira freely acknowl-

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4. The three questions on the questionnaire were: (1) Have you ever been involved in an act of vandalism? [In 2002, he admitted to throwing a bottle at a motor vehicle that broke the windshield, a misdemeanor—he said he didn't know that was considered "vandalism"] (2) Is your name in a case report file with any police department or law enforcement agency that you are aware of? [His name appears on a 2008 incident report of assault and battery for which no criminal complaint issued and as a victim in a 2009 incident report] and (3) "Have you ever stolen anything?" [He was arrested in 1998 with two other juveniles who had shoplifting some cookies from Walmart]. (*Exhs. 1, 2, 5 & 14; Testimony of Appellant*)

5. Sometime prior to 2005, Officer A dated Mr. Pereira's significant other for a month or two. Officer A was a good friend of Mr. Pereira's uncle, had met Mr. Pereira before, and knew that JF and Mr. Pereira had been together for many years. He does not recall when he informed his commanding officer (Lt. B, the background investigations supervisor) of these facts, but he is pretty sure he did so prior to the 2012 hiring cycle. Lt. B did not recall knowing about the relationships until after 2012. (*Testimony of Appellant, JA, Officer A & Lt. B*)

6. The referenced document was not the NG FORM 22 Report of Separation but, rather, it was the commanding officer's Memorandum dated 25 September 2008, described in Finding No. 7 above.

7. Two days after the investigative interview, Det. A phoned Mr. Pereria's sister who confirmed that she faxed paperwork and said that her brother's girlfriend [JF] also faxed some paperwork, but couldn't give him a specific timeframe. (*Exh.3; Testimony of Det. A*)

8. Mr. Pereira's response was based on his understanding that his prior arrests had been removed from his record. I also note that the instructions in the section of the Employment Application about his "Criminal Record" instructed that only certain convictions needed to be disclosed and his two stale misdemeanor arrests on his record fit into a category of offenses that the Employment Application stated did not need to be disclosed. (*Exhs.1 & 5; Testimony of Appellant*)

edged this happened. He was then asked to identify the officer, which he also freely disclosed. At that point, he was told something to the effect: "You just threw your buddy under the bus" and "I wouldn't want someone like you as my patrol partner." (*Exh. 2; Testimony of Appellant*)

19. Nothing about the firearms application was included in Det. A's 2012 background report. The background investigator, Det. A, "barely" recalled the subject of the firearms application coming up during the 2012 (unrecorded) interview. Officer A remembered knowing about this issue but wasn't sure if it was brought up during the 2012 interview he attended or he had learned about it earlier in the process. (*Exh. 2; Testimony of Det. A & Officer A*)

20. In the final paragraph of his report on the investigatory interview, Det. B writes:

> "When the interview concluded . . . [Mr. Pereria] then stated . . . he was told by his Sgt [sic] not to submit the paperwork. . . that his unit was being deployed and his girlfriend was pregnant and he didn't want to be deployed in fear that something might happen. . . . [T]wo of the people in his unit were [later] killed. . . He said he did not regret making that decision . . . I asked him to just give me the Sgt's [sic] name so I could try to make contact. He stated that he didn't remember the name."

(*Exh. 2; Testimony of Det. A*)

21. Det. A concluded his background report, dated August 3, 2012, with the statement:

> "The only negative thing I was able to find on Andy Pereira was his story about his discharge from the Army National Guard, the Army stated several times that Andy ignored a direct order. There is documentation from the National Guard. There is no proof of Andy's story except for his sister stating the same thing Andy told us but she couldn't give me any times or dates. Keep in mind that his discharge took place in 2008 that's not so long ago. Everything else in Andy's background was all positive. . . ."

(*Exh. 2: Testimony of Det. A*)

22. By letter dated September 4, 2012, New Bedford Mayor Mitchell notified HRD that Mr. Pereira was being bypassed for making false statements on his application. (*Exh. 14*)

23. Mr. Pereira continued to pursue his desired to serve as a police officer with the NBPD, reapplying for appointment in 2013, 2014 and 2015 and, finally, on Certification #04224, issued by HRD on December 4, 2016. (*Exhs. 4, 5 & 10; Testimony of Appellant*)

24. In his 2016 NBPD Employment Application, Mr. Pereira described his military discharge as "Honorable". In response to the question about whether "any type of disciplinary action" had been taken against him in the military he checked "YES" and stated: "Failure to Comply—Did not pass in documents on weekend was asked too [sic]". He, again, answered "NO" to all questions in the "Criminal History" section of the Employment Application concerning whether he was convicted of any offenses described in that section. (*Exh. 5; Testimony of Appellant*)[9]

25. Mr. Pereira answered "YES" to the question on the Firearms Application attached to the Employment Application which asked if he had "ever been arrested or appeared in court as a defendant for any criminal offense" and listed the 1998 shoplifting incident, the 2002 Motor vehicle "vandalism" and the 2004 complaint for assault & battery that was dismissed at the probable cause stage. (*Exhs. 2 & 5; Testimony of Appellant*)

26. By the time of the 2016 hiring cycle, Lt. B, the background investigations supervisor, knew that one of his investigating officers, Officer A, had once dated Mr. Pereira's significant other. For this reason, Lt. B decided that a detective outside the background investigative unit should conduct the follow-up background investigation of Mr. Pereira.[10] He asked Lt. A (then Sergeant), a detective in the Professional Standards Unit to perform this task, whose experience was limited to internal affairs investigations. Mr. Pereira's 2016 background investigation was his first of an applicant for appointment to the NBPD. (*Testimony of Lt. A & Lt. B*)

27. Lt. A updated Mr. Pereira's residency, education, driving and criminal record, which turned up nothing significant. He interviewed the references provided by Mr. Pereira, spoke to a neighbor, interviewed his current and two prior supervisors, and conducted a "spouse interview", all of whom provided positive feedback. (*Exh. 7; Testimony of Lt. A & JA)*

28. Lt. A did not conduct any follow-up concerning Mr. Pereira's military service, noting in his report only that "[h]e served from January 2003 until October of 2008, when he was honorably discharged." (*Exh. 7*)

29. Lt. A noted in his report: "There was no internal email sent by this investigator regarding negative or positive feedback from members of this department in relation to applicant Pereira's possible employment for the New Bedford Police Department." (*Exh. 7*)

30. On February 10, 2017, Lt. A conducted a background interview with Mr. Pereira and was "assisted by Lt. [B]". He pressed Mr. Pereira about answers on his prior applications. Mr. Pereira "would not come out and say he was untruthful" but "did say that he has learned from his first application . . . and even sought out the advice of a family member, who happens to be in law enforcement . . . and was honest moving forward." (*Exhs. 6 & 7*)

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9. The NBPD's 2016 Employment Application no longer included the 100-plus "Personnel History Questionnaire" that contained the other questions that tripped up Mr. Pereira in 2012. (*Exhs. 1, 5 & 14*)

10. I take administrative notice that Lt. B also knew that Officer A's brother was one of the other candidates under consideration for appointment to the NBPD during this hiring cycle. After personally conducting the employment history portion of the background investigation of Officer A's brother, who had been terminated from his last job, Lt. B advanced the brother's application for consideration by the NBPD Captains Board, which eventually recommended that the brother be bypassed. (*Administrative Notice [Decision dated March 14, 2019, CSC Docket No. G1-17-140]*)

31. When it came to the military service question, Lt. A reported that Mr. Pereira "was disciplined by the military for failing to follow the orders of providing them with . . . paperwork." (*Exhs 6 & 7; Testimony of Lt. A*)

32. The final two subjects to be raised at the interview were designed to "test" Mr. Pereira's candor and honesty when challenged with a tough question. The basis for both these questions came exclusively from unsolicited information given to Lt. B by Officer A. (*Exhs. 6 & 7; Testimony of Lt. B & Officer A*)

33. Lt. B acknowledged that he was "alarmed" by the fact that Officer A had come to him with derogatory information about Mr. Pereira, and that it did raise "red flags" that there may be a reason for Officer A to have some "dislike for Mr. Pereira", but he believed that, once having the information, he could not ignore it. (*Testimony of Lt. B*)

34. The first question had to do with Mr. Pereira previously substituting a firearms application for the original one he filed to change an answer about his criminal record, with the assistance of an NBPD officer. Lt. B had no issue with making the change, as candidates would routinely be allowed to correct mistakes on their applications. Lt. B simply wanted to see if Mr. Pereira handled the question truthfully. (*Exhs 6 & 7; Testimony of Lt. A & Lt. B*)

35. Mr. Pereira hesitated when Lt. B asked the question (recalling the scolding he received when he was forthcoming about the issue in 2012 interview) and then, when asked if he was "comfortable" answering the question, he said "No." When asked what he would do if he was uncomfortable answering a question when testifying in court, he said that was different and he knew he had to answer the question and tell the truth in a court of law. Lt. B dropped the inquiry without delving further. (*Exhs. 6 & 7; Testimony of Appellant*)

36. The second question concerned a text message that Mr. Pereira sent to a close friend on the NBPD (Officer B) expressing how "desperate" the NBPD must be to finally give him an interview. Officer A was present with Officer B and saw the text message when it came in. Officer A reported it to Lt B. (the background investigations supervisor), who asked Officer A for a copy which he later provided to Lt. B. (*Exh. 6 & 11; Testimony of Appellant, Officer A & Officer B*)

37. Mr. Pereira freely acknowledged sending the message. He stated that he wrote it to express his surprise at being called in for an interview after being bypassed four times, thinking he was never going to get another opportunity. Both Mr. Pereira and Officer B were unaware at the time that Officer A gave a copy of the message to Lt. B. Officer B later questioned Lt. B's motives for using this information without first discussing it with him personally. (*Exhs. 6, 7 & 15 through 17; Testimony of Appellant and Officer B*)

38. Based on Mr. Pereira's interview performance, Lt. B concluded that Mr. Pereira continued to give inconsistent explanations about his departure from the military and was troubled that Mr. Pereira could not "answer a simple question" about the firearms application. Lt. B decided that "nothing had changed" about Mr. Pereira's lack of candor and truthfulness since he was last interviewed in 2012. (*Testimony of Lt. B*)

39. On or about April 10, 2017, Lt. B prepared a letter to HRD for New Bedford Mayor Jonathan Mitchell's signature that stated the reasons for bypassing Mr. Pereira and requested that his name be removed from the eligible list pursuant to PAR.09. These reasons included:

- Prior bypass for Untruthfulness/Misleading Information - "false answers on his employment application in 2012 . . . [and] confrontational . . . during the interview".
- Poor Attention to Detail/Failure to Follow Instructions - failed to date the application, to state he was "lawfully eligible for employment'" and to name all former supervisors.
- Misleading during Interview/Discrepancies - falsely claiming he was not "disciplined" or "violated an order, military rule or procedure"; his discharge for "failure to comply" calls into question his ability to follow orders and suitability to perform "inherent dangerous" work of police officers; texting friend on NBPD; failing to be forthcoming about his prior firearms application.
- Credibility as a witness - If "put in a difficult situation, Mr. Pereira would not be forthcoming", calling in to question his ability to testify as a witness under the so-called "Brady Rule" [*Brady* v. *Maryland*, 373 U.S. 83 (1963)]

Mayor Mitchell was provided no other information from Mr. Pereira's application package or interviews other than what was set forth in the letter drafted by Lt. B. (*Exh. 8*)

40. By letter dated June 12, 2017, HRD informed Mr. Pereira that the reasons provided by New Bedford in its April 10, 2017 letter for bypassing him and removing his name from the eligible list were approved. This appeal duly ensued. (*Exhs. 8 & 9*)

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, by a preponderance of evidence, the appointing authority had "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of a candidate's background and qualifications sufficient to form a "credible basis" to believe allegations of misconduct or other facts that present "legitimate doubts" about the candidate's present fitness to perform the duties of the position. *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*) 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*.

ANALYSIS

New Bedford's contention that it had reasonable justification for bypassing Mr. Pereira is not supported by the preponderance of the evidence presented in this appeal. New Bedford's conclusion that Mr. Pereira falsely claimed that he was never disciplined in the military for disobeying orders was premised on an inadequate investigation and misunderstanding of the circumstances which resulted in his honorable discharge for medical reasons. Information about his prior firearms application and a private text message sent to a friend was impermissibly provided by an NBPD officer who knew he had been excluded from participation in Mr. Pereira's application process and whose brother was competing with Mr. Pereira for appointment and never properly vetted. The remaining other reasons for bypassing Mr. Pereira, based on his answers in 2012 about stale minor criminal offenses and minor clerical mistakes on his 2017 application are insufficient to demonstrate his unsuitability and do not justify his bypass.

Truthfulness

The main thread to New Bedford's rationale for bypassing Mr. Pereria is the conclusion that he lacks the honesty and candor to serve in the position of an NBPD Police Officer. The Commission certainly recognizes that law enforcement officers are vested with considerable power and discretion and, when selecting candidates for such a sensitive public safety position, they 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. *See Falmouth* v. *Civil Service Comm'n*., 61 Mass. App. Ct. 796, 801 (2004) citing *City of Cambridge* v. *Civil Service Comm'n*., 43 Mass. App. Ct. 300, 303-305, *rev.den*., 428 Mass. 1102 (1997) ("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.") An Appointing Authority is well within its rights to bypass an individual for "purposefully" fudging the truth as part of an application process for the position of police officer. *See, e.g*., *Minoie* v. *Town of Braintree*, 27 MCSR 216 (2014) (multiple omissions about prior domestic abuse restraining orders and residences); *Noble* v. *Massachusetts Bay Trans. Auth*., 25 MCSR 391 (2012) (concealing suspension from school for involvement in criminal activity); *Burns* v. *City of Holyoke*, 23 MCSR 162 (2010) (claiming he 'withdrew" from another law enforcement application process from which he was actually disqualified) *Escobar* v. *Boston Police Dep't*., 21 MCSR 168 (2008) (misrepresenting residence)

The Commission also recognizes that, in certain circumstances, a police officer's demonstrated record of untruthfulness may compromise that officer's ability to serve as a credible witness in the prosecution of a criminal case under the obligation that police departments and prosecutors carry to disclose "exculpatory evidence" to defense counsel about the truthfulness of witnesses expected to be called to testify in a criminal prosecution. *See generally*, *United States* v. *Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *See also Kyles* v. *Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995); *United States* v. *Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985).

The corollary to the serious consequences that flow from making what amounts to a career-ending decision that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized under "basic mer-

it principles" 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 mistake interpreting questions on employment application); *Morley* v. *Boston Police Dep't.*, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); *Lucas* v. *Boston Police Dep't.*, 25 MCSR 520 (2012) (mistake in characterizing appellant's prior medical history)

In the present appeal, nothing that New Bedford characterizes as disqualifying untruthfulness by Mr. Pereira fits that description.

First, the most significant example of New Bedford's erroneous conclusion about Mr. Pereira's untruthfulness was his alleged failure to acknowledge that "disciplinary action" was taken against him for "failure to comply" with military "orders" to produce paperwork necessary for the ARNG Medical Profiling and Record Review Board to evaluate his fitness for duty. The only evidence of such "disciplinary action" were hearsay statements of a 2012 conversation between Det. A and a soldier in his former unit (about whom Det. A knew "little") along with documents obtained by Det. A in response to a request to the National Personnel Records Center for copies of Mr. Pereira's military personnel records. This evidence fails to establish New Bedford's contention that Mr. Pereira failed to obey any "orders" or that he was "disciplined" for such misconduct by being "honorably discharged".

- The Authority and Reason cited in his Report of Separation (see Exh. 3), contains no reference to a "discharge for failure to comply". The cited regulatory authority classifies Mr. Pereria's "honorable" discharge for medical reasons as an "administrative separation" and not a punitive action. See NGR 600-200, "Enlisted Separations" at 34-50 & "Terms" at 92-93, https://www. ngbpdc.ngb.army.mil/Portals/27/Publications/ngr/ ngr%20600-200.pdf?ver=2018-10-11-074239-517. See also AR 635-200, "Types of Administrative Discharges/Character of Service", https://armypubs.army.mil/epubs/ DR_pubs/DR_ a/pdf/web/ AR635-200_Web_ FINAL_18JAN2017.pdf

- Nothing in the record indicates that the initial 26 March 2017 request for documentation by the OAG was not complied with by the 26 June 2007 suspense date.

- The 12 October 2007 correspondence from the OAG to Mr. Pereira's chain of command referenced that the State Surgeon and Medical Profiling and Record Review Board had made a prior "review" of Mr. Pereira's medical case (from which I infer that Mr. Pereira did, indeed, submit initial documentation as he claimed), but directed that "additional information" needed to be submitted by the Commander for further review; the corresponding letter to Mr. Pereira through his commander indicates that the State Surgeon had requested a "current letter" from Mr. Pereira's doctor, without which would have to be discharged "for failure to meet medical standards."

- Nothing in the reported hearsay evidence from the soldier with whom Det. A spoke in 2012, or the other personnel records obtained by Det. A, persuade me that the situation as described in these official documents represents an "order" to Mr. Pereira, that his "discharge" was considered by the Army to be "discipline", or that he was "discharged for Failure to Comply" (as opposed to failing to meet medical standards as recited in the official NG FORM 22 Report of Separation).

- I note that the response Det. A received from the National Personnel Records Center indicated that "the medical documentation requested is not at this Center" and directed Det. A to the Veteran's Administration "to obtain copies of the medical records." There was no evidence that Det. A took any further action to track down the medical records.

In sum, the preponderance of the evidence quite accurately tracks Mr. Pereira's credible testimony about what transpired. When he first learned he had asthma, he immediately informed his unit medic and provided evidence of his condition through his unit "admin", both in hand and by fax. He did not submit the follow-up letter from his doctor because, with his initial enlistment period a year or less away, he was no longer sure that he wanted to remain in the ARNG. With the prospect of an extended overseas deployment on the horizon, he chose to let the medical review take its course so that he could be discharged and remain with his family. Thus, I am not persuaded that Mr. Pereira was untruthful, and certainly not purposefully so, when he claimed that he had no military discipline on his record. I am persuaded that he reasonably believed he could truthfully claim that his decision to be medically discharged, in consultation and with the approval of his commanding officer, nullified the need to submit follow-up documentation and did not "violate" any military "orders".

Second, the other statements made by Mr. Pereira during the application process cannot be used as the grounds to disqualify him, i.e., those which he made in his 2012 application about never having committed vandalism, never stolen anything, or whether he "is" listed in any police or law enforcement case file. The NBPD Employment Application expressly stated that Mr. Pereira was not required to disclose juvenile and other stale criminal offenses, especially misdemeanors and those for which he was never charged or convicted. As a matter of law, NBPD is probably prohibited from doing so, even if they had already learned of the record through a CORI review. *See* G.L. c. 31, §20; G.L. c.151B, §4(9). Nevertheless, when asked about these offenses at his 2017 interview, Mr. Pereira was fully forthcoming, but still maintaining that he did not intend to be untruthful in 2012 when he answered these ambiguous questions: "NO". Moreover, in 2016, the NBPD eliminated using the "Personal History Questionnaire", no longer asks applicants those problematic questions and did not use the underlying conduct to justify the bypass. It is inconsistent with basic merit principles to allow New Bedford now to reach back to the answers on the 2012 questionnaire as reason to disqualify Mr. Pereira as unsuitable.

Third, while the Commission appreciates the obligations of the so-called *Brady* rule, it bears notice that the Commonwealth takes a somewhat different path from the federal courts in the type of exculpatory evidence that must be disclosed in a criminal prosecution and, in particular, evidence "beyond information held by agents of the prosecution team" is subject to other, stricter rules. *See, e.g*., Mass.R.Crim.P. 14(a)(1)(A); *Commonwealth* v. *Laguer*, 448 Mass. 585 (2007) Thus, information found in an employment application package, especially involving incidents, such as here, that occurred a decade or more ago and/or when the applicant was a juvenile, if relevant at all to a future prosecution, typically,

would be subject to stricter limits imposed on internal affairs investigation and personnel files. *See, e.g., Worcester Telegram & Gazette Corp.* v. *Chief of Police*, 58 Mass. App. Ct. 1, *rev.den.* 440 Mass. 1103 (2003) (employment applications); *Commonwealth* v. *Wanis*, 426 Mass. 639, 643-44 (1998) (internal affairs files)

Information Provided by Officer A

The criticism about Mr. Pereira's discomfort in answering questions about his 2011 or 2012 firearms application, as well as for sending a text message to his friend on the NBPD upon learning he would be granted another interview after five failed attempts, raises other concerns.

First, the involvement of Officer A in this hiring process, in general, and, in particular, with respect to Mr. Pereira, when he and Lt. B. knew that Officer A's brother was competing for a position with Mr. Pereira and Lt. B knew Officer A may have reason to "dislike" Mr. Pereira, presents an unacceptable appearance of impropriety that must be strictly avoided. *See, e.g., Phillips* v. *City of Methuen*, 28 MCSR 345 (2015 ("Employees whose immediate family members are seeking appointment should have no role in any part of the review and selection process . . ."). *See also*, *Lima* v. *City of Somerville*, 30 MCSR 103 (2017); *Dorney* v. *Wakefield Police Dep't.*, 29 MCSR 405 (2016); *Civil Service Comm'n* v. *Town of Braintree (Investigation)*, 28 MCSR 114 (2015); *Civil Service Comm'n* v. *City of Springfield (Investigation)*, 24 MCSR 627 (2011); *Civil Service Comm'n* v. *Town of Oxford* (Investigation), CSC No. I-11-280, 24 MCSR 627 (2011) For that reason, alone, I am persuaded that basic merit principles precludes New Bedford from relying on Officer A's unsolicited report to Lt. B about the 2011/2012 firearms application that he only knew because of his earlier problematic participation in the 2012 interview with Mr. Pereira and the disclosure of a harmless text message that, in effect, breached the confidence of a fellow officer. I also note that, in this case, the 2017 background investigator, Lt. A, expressly noted in his report that he did not circulate any internal requests to his fellow officers inviting information about Mr. Pereira.[11]

Second, New Bedford exacerbated the problem by choosing to rely on Officer A's information without further vetting and declined to advance Mr. Pereira to the next level—a Captains Board of superior officers (or, as sometimes is warranted, using outside sources to vet candidates when potential conflict situations arise). While not being able to cure the initial impropriety, an independent review would, at least, have had an opportunity to more impartially handle the significance of this issue. In particular, further vetting Lt. B's conclusion that Mr. Pereira lacked candor and honesty because he (truthfully) said he was not "comfortable" answering questions about his firearms application would have discovered he lacked some essential facts because the issue was dropped in the 2017 interview without asking Mr. Pereria why he was uncomfortable and without ever learning what happened in 2012 when this issue was discussed. Officer A did know about the 2012 interview but never shared that part of his knowledge with Lt. B, nor was he ever asked about it until the Commission hearing. This situation is particularly problematic, as Officer A's brother—the key source of the appearance of impropriety—was advanced to the Captains Board, despite a far more serious workplace offense than correcting an application or spouting off to a friend.[12]

Third, wholly apart from the unusual way in which the text message came to Lt. B's attention, New Bedford blew its significance out of proportion, implying at his interview (and in the bypass letter) that, stating the NBPD was "desperate" meant Mr. Pereira admitted he wasn't qualified, when Mr. Pereira meant nothing of the sort. Rather, as he freely explained during his interview and at the Commission hearing, he sent his friend the text because he was surprised that NBPD was going to give him a second chance, which I find the evidence showed to be a plausible, honest and credible explanation for his isolated sarcastic remarks to a friend on the NBPD.

Other Issues

I need address only summarily the remaining reasons New Bedford used to bypass Mr. Pereira. His few clerical errors in completing the 2017 Employment Application are not disqualifying, even in the view of Lt. B, who acknowledged that applicants often make mistakes on the application and are allowed to fix them. The implication that Mr. Pereira was not suited for "dangerous" police work because he chose to leave the military and remain with the expectant mother of his first-born child, rather than have his enlistment extended by a long-term overseas employment, is mere speculation and flies in the face of all of the evidence to the contrary about Mr. Pereira's "honorable" service as a military police officer for almost six years and his persistent commitment to continue a career in law enforcement with the NBPD to "protect and serve" the citizens of New Bedford.

CONCLUSION

In sum, for the reasons stated herein, this appeal of the Appellant, Andrew (Andy) Pereira, is ***allowed.*** Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of New Bedford in its delegated capacity take the following action:

- Place the name of Andrew (Andy) Pereira at the top of any current or future Certification for the position of NBPD permanent full-time Police Officer until he is appointed or bypassed after consideration consistent with this Decision.

- If Mr. Pereira is appointed as an NBPD Police Officer, he shall receive a retroactive civil service seniority date which is the same date

11. I have not overlooked the fact that Lt. B was placed in a difficult position after Officer A came to him with information that was arguably relevant to the NBPD's consideration of a candidate and, once he learned the information, believed he had to make use of it. There may well be a case in which the information about a candidate that routinely came into the possession of the officer whose family member was also a candidate and is so objectively critical to suitability, that its use would be justified, but that would be the exception, not the rule. The circumstance of this appeal do not warrant making that exception here.

12. The same point could be raised about depriving Mr. Pereira an opportunity to state his case that the background investigators got the facts wrong and erroneously treated his honorable administrative discharge as discipline.

as the first candidate ranked below Mr. Pereira who was appointed from Certification No. 04224. This retroactive civil service seniority date is not intended to provide Mr. Pereira with any additional pay or benefits including, without limitation, creditable service toward retirement.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

Notice to:

Joseph Sulman, Esq.
3911 Totton Pond Road, Suite 402
Waltham, MA 02451

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02740

Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

JEFFREY K. REGER, DANIEL E. CRESPI, JOHN F. ADAMS and JEFFREY J. RUSSELL

v.

DEPARTMENT OF STATE POLICE

D-18-178 (Reger) D-18-179 (Crespi)
D-18-180 (Adams) D-18-181 (Russell)

March 28, 2019
Christopher C. Bowman, Chairman

***Civil Service Commission Jurisdiction-State Police-Suspension of Troopers Without Pay-Duty Status Hearing-Just Cause-Due Process*—**In a decision authored by Commission Chair Christopher C. Bowman involving the Troop E overtime scandal, the appeals from four state troopers suspended without pay after a brief "hearing" by a State Police Duty Status Board were allowed as the Commission found that this summary process relying on a simple hearsay memorandum for "evidence" lacked basic due process. Once again, despite losing on this issue many times in Superior Court, the Department argued that the Commission lacked jurisdiction to hear these appeals because the troopers had been suspended administratively and the Department had not taken any action to initiate disciplinary proceedings reviewable by the Commission. Since legislative changes adopted in 2002, the Commission has had jurisdiction over State Police disciplinary appeals under Chapter 31, an authority previously reserved to the District Courts.

SUMMARY OF DECISION

In August 2018, the Appellants, four Massachusetts State Troopers, were summarily "suspended without pay", pending further inquiry into overtime abuse allegedly committed by the Appellants in 2015 and 2016, i.e., claiming pay for shifts not actually, or not fully, worked. If proved, the Appellants alleged overtime abuse, which is tantamount to stealing the public's money, would be a serious breach of the duty of honesty and integrity demanded from all sworn law enforcement officers, and the Civil Service Commission would not serve as a safe haven for those proven to be engaged in such misconduct. That, however, is not the issue presented to the Commission here. Rather, the issues before the Commission are: a) whether, prior to being suspended, the Troopers were provided with due process; and b) whether the Troopers have a right of appeal to the Commission. A review of the entire record and, in my opinion, a correct reading of the law, shows that the Troopers have *not* been afforded due process and *do* have a right of appeal to the Commission.

The Troopers were suspended without pay on two days' notice, after a "hearing" by a State Police Duty Status Board, at which no testimony or evidence was taken other than identification of the implicated number of shifts and time frames involved. The Appellants requested a further hearing before the Colonel in charge of the Department, but, as of the date of the full hearing before the Commission, no such hearing had been held, the Appellants had not been provided with all of the evidence collected by the Department to substantiate their alleged abuse, no criminal charges had been preferred and the Appellants' "duty status" remained "suspended without pay" for the foreseeable future.

The Appellants appealed to the Commission, alleging that the Department's actions violated their statutory rights as tenured State Troopers to be able to defend themselves at a prior evidentiary hearing, at which the Department must first establish just cause, before they can be suspended or discharged, with further recourse to appeal any discipline for another de novo hearing before the Commission. Over the objection of the Department, and under the authority granted to the Commission pursuant to G.L. c. 22C, § 13 and G.L c. 31, § 42 & § 43, the Commission takes jurisdiction of these appeals, sets aside the Appellants' suspensions without pay, and orders the Department to reinstate the Appellants to paid status and to impose no further suspension or other discipline until the Appellants have been afforded their statutory right to a just cause hearing.

Nothing in this Decision prevents the Department from duly completing its investigation and, after affording the Appellants their statutory right to a just cause hearing, imposing appropriate discipline for any misconduct that the preponderance of the evidence establishes. Nor does this Decision affect the Department's right, as expressly authorized by G.L. c.30, § 59, to remove any Appellant from the payroll should they be indicted for misconduct in office.

DECISION

Procedural History related to Civil Service Commission Appeals

1. On September 17th, 18th and 21st, 2018, Jeffrey Reger, Daniel Crespi, John F. Adams and Jeffrey J. Russell (the Appellants), all Troopers with the Department of State Police (Department), filed appeals with the Civil Service Commission (Commission), contesting whether the State Police had just cause to suspend them without pay, effective August 15, 2018 (G.L. c. 31, § 43 Just Cause Appeals) and alleging that the Department failed to follow proper procedural requirements (G.L. c. 31, § 42 Procedural Appeals) (See Appeal Forms).

2. On October 16, 2018, I held a pre-hearing conference which was attended by the Appellants, their counsel, counsel for the State Police and representatives of the State Police Association of Massachusetts (SPAM).

3. As part of the pre-hearing conference, the State Police submitted four (4) identical motions to dismiss the Appellants' appeals, arguing that the Commission lacks jurisdiction on " … any result that stems from a Duty Status hearing …" which is the case here.

4. Counsel for the Appellants argued that the Commission does have jurisdiction to hear appeals from Troopers who receive unpaid suspensions and argued that the Commission should deny the motions and proceed with the scheduling of a full hearing, including a discovery schedule.

5. Consistent with the discussion at the pre-hearing conference, the Appellants had until October 24, 2018 to submit an opposition to the motions to dismiss; and a motion hearing was scheduled.

6. On October 24, 2018, the Appellants submitted their oppositions to the Department's motions to dismiss.

7. On October 26, 2018, I held a motion hearing, which was digitally recorded, at the offices of the Commission and heard oral argument from all parties.

8. After reviewing the parties' briefs and oral arguments, I denied the Department's motions to dismiss and scheduled a full evidentiary hearing regarding the Appellants' appeals.

9. On November 23, 2018, the Department filed motions for reconsideration regarding my decision to deny the Department's motions to dismiss the Appellants' appeals.

10. On November 28, 2018, the Appellants filed oppositions to the Department's motions for reconsideration.

11. On November 29, 2018, I commenced a digitally-recorded full, evidentiary hearing at the offices of the Commission. Present were: counsel for the Department; counsel for the Appellants; and the Appellants.

12. At the outset of the full evidentiary hearing, I denied the Department's motions for reconsideration.

13. Counsel for the Department stated that it would not be presenting any evidence (i.e.—no witnesses, exhibits) as the Department maintained that the Commission has no jurisdiction to hear the instant appeals.

14. Counsel for the Appellants stated that, since the burden of proof is on the Respondent, they would not be presenting any exhibits or witnesses.

15. All parties submitted post-hearing briefs.

FINDINGS OF FACT

Based on the briefs, statements made at the motion and full hearing, and a full review of the record, the following facts appear to be undisputed, unless otherwise noted:

1. The Appellants are all Troopers with the Department of State Police with the following appointment dates:

A. Jeffrey K. Reger: November 1, 2004;

B. Daniel E. Crespi: March 4, 2002;

C. John F. Adams: June 15, 2000;

D. Jeffrey J. Russell: March 4, 2002.

2. On or around August 13, 2018, each of the Appellants was informed via phone that they were being placed on paid administrative leave and a "duty status hearing" was scheduled for August 15, 2018.

3. By letters dated August 14, 2018, Appellants Reger and Crespi were informed that they were the subject of an Internal Affairs Investigation as a result of an Audit of the former "Troop E" (which was primarily responsible for patrol of the Mass. Turnpike) for the years 2015 and 2016.

4. The August 14, 2018 letter to Trooper Reger stated in part that: " … it appears that you were not present for seven (7) Community Action Team (CAT) overtime patrols in 2015 and not present for thirty-two (32) CAT overtime patrols in 2016. Additionally, it appears that you were partially present for nine (9) CAT overtime patrols in 2015 and fourteen (14) CAT overtime patrols in 2016. Also, it appears that you secured early from your assigned Evening Shift CAT patrol early on eight (8) occasions in 2015 and eighteen (18) occasions in 2016." (Attachment B to Reger's Opposition to Motion to Dismiss)

5. The August 14, 2018 letter to Trooper Crespi stated in part that: " … it appears that you were not present for sixty-six (66) Community Action Team (CAT) overtime patrols in 2015 and seventy-one (71) CAT overtime patrols in 2016. Also, it appears you were only partially present for fifteen (15) CAT overtime patrols in 2015 and twenty-six (26) CAT overtime patrols in 2016. Additionally, it appears you secured early from your assigned Evening Shift CAT patrol on fifty-one (51) occasions in 2015 and on sixty-five (65) occasions in 2016." (Attachment B to Crespi's Opposition to Motion to Dismiss)

6. Similar letters for Appellants Adams and Russell are not included in the record before the Commission. However, internal to/from memos dated August 9, 2018 are included in the record and outline the allegations against each trooper.

7. The August 9, 2018 to/from memo regarding Trooper Adams stated in part that: " … As a result of conducting an audit of the Troop E overtime to include Community Action Team (CAT) overtime patrols, irregularities were discovered involving Trooper John F. Adams. Specific examples include, but are not limited to, the following: Based upon an examination of CJIS … history and the Department radio affiliation data, it appears that Trooper Adams was not present for six (6) CAT overtime patrols on [dates in January - March 2015]. Additionally, it appears Trooper Adams left his assigned eve-shift CAT patrol early by securing prior to 11:00 P.M. on seven occasions …" (Attachment A to Appellant Adams's Opposition to Motion to Dismiss)

8. The August 9, 2018 to/from memo regarding Trooper Russell stated in part that: " … it appears that Trooper Russell was not present for thirty-one (31) CAT overtime patrols on [various dates in 2015] … was only partially present for eleven (11) CAT overtime patrols on [various dates in 2015] … left his assigned eve-shift CAT patrol early by securing prior to 11:00 P.M. on twenty-eight (28) occasions on [various dates in 2015]." The to/from also states that "it appears" that the same discrepancies occurred in 2016, allegedly not present for 26 overtime patrols, only partially present for 26 overtime patrols and left shift early on 12 occasions. (Attachment A to Appellant Russell's Opposition to Dismiss)

9. On August 15, 2018, the Appellants learned that their licenses to carry a firearm (LTCs) had been suspended. All of the Appellants have appealed this LTC revocation decision to District Court.

10. Also on August 15, 2018, a "duty status hearing" was held by the "Duty Status Board" regarding each of the Appellants. Other than the to/from memos referenced above, no testimony or other additional evidence was presented at the duty status hearing.

11. At the conclusion of the duty status hearings, each Appellant, effective immediately, was "suspended without pay." (Department Motion to Dismiss)

12. Each of the Appellants filed an appeal with the Department for a hearing by the Colonel.

13. In connection with their request for hearing by the Colonel, the Appellants made discovery requests for disclosure of the evidence that, among other things, could establish whether or not they were present and performing the shifts as they had reported and for which they were paid.

14. As of the date of the full hearing before the Commission, the Department had offered to allow the Appellants to review the documents on-site at the Department, but had not agreed to provide any further discovery.

15. Each of the Appellants filed an appeal with the Civil Service Commission. In addition to asking what discipline is being appealed, Commission appeal forms also ask: "Are you alleging that the Respondent failed to follow any procedural requirements?" Each of the Appellants answered "Yes" on their individual appeal forms.

16. As of the date of the full hearing, no criminal charges had been filed against any of the Appellants.

APPLICABLE LAW

The Appellants brought these appeals to the Commission, invoking the jurisdiction granted to the Commission to review discipline imposed on uniformed members (Troopers) of the Department, set forth in Section 13 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 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." (*emphasis added*)

G.L. c. 22C, § 13, enacted by St.1991, c.412, § 22, as amended by St. 2002, c.43.

The current version of Section 13 contains the same first sentence providing for trial board adjudication of Trooper disciplinary charges, but the original version contained in the 1991 legislation[1] provided that review of the Trial Board was taken by petition to the District Court:

1. [See next page.]

> " . . .Any person aggrieved by the finding of such trial board may within sixty days . . . file a petition in the district court . . . [*T]he court*, after such notice to the colonel as the court deems necessary . . .*shall review such findings and determine whether or not upon all the evidence such finding and punishment was justified.* . . . [T]*he court, in its discretion may direct that the record of the departmental trial board be supplemented by such additional evidence or testimony as the court deems necessary for a just resolution of such review. If the court finds that such finding and punishment was justified the action of the department trial board shall be affirmed; otherwise it shall be reversed and the petitioner shall be reinstated to his office without loss of compensation or other benefits. The decision of the court shall be final and conclusive upon the parties* . . . ." (*emphasis added*)

The 1991 version of Section 13 tracks the procedures that had been in place since at least 1971, which had been interpreted to provide a relatively narrow standard of review. *See Commissioner of Public Safety* v. *Treadway*, 368 Mass. 155, 159 (1975). *See also, Johnson* v. *Superintendent, Massachusetts State Police*, 416 Mass. 616 (1993) (Section 13 granted District Court exclusive jurisdiction to review Trial Board Decisions); *Concannon* v. *Commissioner of Public Safety*, 324 Mass. 503 (1949) (limited review of prior version of disciplinary review board modeled after a military court martial).

The 2002 amendment that substituted the right of appeal to the Commission for District Court review, and incorporated the civil service rights and procedures contained within G.L. c. 31, § 41 through §45 ("inclusive") to State Police disciplinary matters, carried with it several significant changes. For example, the Commission gives de novo review of disciplinary decisions and the appointing authority (the Department) bears the burden of proving just cause for the discipline by a preponderance of the evidence presented to the Commission.[2] Other significant differences include: the parties are allowed broad latitude to call and subpoena witnesses; the Commission is a five-member board that decides all matters by majority vote after deliberation; the Commission's decisions are subject to judicial review and the Commission makes a verbatim record and publishes decisions that contain sufficient findings and conclusions to support that review; substantively, the Commission has the express power to modify discipline and to entertain and resolve complaints that an appointing authority failed to follow the procedural requirements, which include, among other things, the right to notice, prior hearing and a decision explaining the reasons for the discipline, before an employee may be "discharged, removed, suspended for a period of more than five days . . . [or] lowered in rank or compensation." See G.L. c. 31, § 41 through § 45.

The Department relies on separate provisions in Chapter 22C as authority for the actions taken against the Appellants. Specifically, G.L. c. 22C, § 3 & § 10 authorize the Colonel of the State Police, as the executive and administrative head of the Department, to promulgate "all necessary rules and regulations for the government of the department", and "subject to the provisions of [c.22C] and of chapter one hundred and fifty E [collective bargaining law] make rules and regulations for the force, including matters pertaining to the discipline [of officers]" G.L. c. 22C, § 10.

The Department's Rules and Regulations include Article 6, effective since February 1, 2001 entitled "Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty".

- Section 6.1 provides the procedure for placing a Trooper who is "unfit for duty" due to a physical, mental or emotional condition on paid leave for up to five days, pending a fitness for duty evaluation and, thereafter, placed on "appropriate leave or duty status", to include Full Duty, No Duty or Temporary Modified Duty.

- Section 6.2 provides the procedure for convening a "duty status hearing" of a Trooper who (1) is "subject of a criminal investigation, is arrested or indicted or, if a criminal complaint is issued" ; (2) "is the subject of an internal investigation": (3) "engages in a strike or prohibited job action": (4) "failed to attend and successfully complete" mandatory training; (5) "is subject to a court order . . . to refrain from abusing a family or household member"; or (6) exceptional circumstances exist which warrant such duty status hearing. The "hearing" is conducted by a Duty Status Board who shall "expeditiously gather sufficient facts" and "after a review of the facts" recommend, subject to the approval of the Colonel, "whether the Trooper should be continued on full duty, or placed on restricted duty, suspended with pay or suspended without pay."

- Sections 6.3 through 6.4 provide the procedures for initiating "disciplinary action" after "investigation" for violations of Department Rules, Regulations, Policies, Procedures, Orders and Directives, preferring charges, and disposing of the charges without hearing.

- Sections 6.5 through 6.9 provide the procedure for a Trooper who has been "formally charged" to request a Trial Board and prescribes detailed rules for conducting the Trial Board (witnesses are called and cross- examined under oath) and making findings and recommendations to and for the approval of the Colonel.

In addition, the Department relies on the provisions of G.L. c. 22C, § 43, which provides:

> "*Any person affected by an order of the department or of a division or officer thereof, may*, within such times as the colonel may fix, which shall not be less than ten days after notice of such order, *appeal to the colonel who shall thereupon grant a hearing, and after such hearing the colonel may amend, suspend or re-*

1. Chapter 412 of the Acts of 1991 was omnibus legislation consolidating the state police force with several other state law enforcement agencies and placed them all within the Department under the supervision and control of the colonel of the state police. The omnibus legislation exempted all officers from the requirement of Chapter 31 (civil service law) but does require that the "classification of such positions shall be subject to the provisions of section forty-five of chapter 30. See, G.L. c.22C, §10.

2. Under civil service law, 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 Serv. 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' " 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. The Commission's decisions are also informed by the tenet of "basic merit principles" of 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.

> *voke such* order. Any person aggrieved by an order approved by the colonel may appeal to the superior court; provided, that such appeal is taken within fifteen days from the date when such order is approved or made. *The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department* or upon petition of the colonel to enforce all valid orders issued by the department. *Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy*."

ANALYSIS

Prior State Police Challenges to Commission Jurisdiction

The Department's position here follows what has become a familiar pattern. Rather than defend the merits of the action taken, the Department claims that, as a matter of law, the Commission has no jurisdiction to review what they have done. Thus, the Department chose to offer no evidence to justify its decision to indefinitely suspend the Appellants without pay. Rather, the Department contends that they have taken no action to initiate disciplinary proceedings reviewable by the Commission under G.L c. 22C, § 13, but, rather, acted under authority of the Department's enabling statute and regulations which grant broad discretionary "administrative" powers over which the Commission has no power of oversight and review. Time and again, the Department has failed to prevail in this effort to insulate itself from Commission oversight and deprive its tenured members the full panoply of "basic merit principles" that preclude the involuntary suspension, discharge or separation without prior notice and hearing, that the legislature intended to guarantee them.

The State Police began making jurisdictional challenges to the authority of the Commission granted under the 2002 revision to Section 13 in an appeal brought by a Trooper terminated by the Colonel after a Trial Board hearing and recommendations. In *Reilly* v. *Department of State Police*, 19 MCSR 107 (2006), the Commission allowed the Trooper's appeal in part and, under the authority provided by G.L. c. 31, § 43, ¶2, modified the termination to a long-term suspension. On appeal to the Superior Court, the Department argued that the "only intent (or result) of the 2002 amendment of [G.L. c. 22c] Section 13 was to *create an unbiased forum* [i.e.—the Commission] for an aggrieved member *to voice a complaint* … *The disciplinary authority of the Colonel of the Massachusetts State Police is simply not, under Massachusetts General Laws, Chapter 22C, § 13 or any other mandate, subject to the jurisdiction of the Commission*." (*Dep't. of State Police* v. *Civ. Serv. Comm'n & Reilly*, 24 Mass. L. Rptr. (Suffolk Sup. 2008) (Reilly) (*emphasis added*).

The *Reilly* Court (McDonald, J.), rejected the Department's argument and affirmed the Commission's decision, stating in part:

> "The problem with the position of the State Police is that it runs afoul of the basic principle of statutory construction that a court 'will not interpret a statute so as to render it or any portion of it meaningless or superfluous'". [Citations omitted]
>
> The parties agree that the 2002 amendment of Section 13 was filed on behalf of the State Police Association of Massachusetts (the "Association"). . . . Its clear purpose was to obtain what was perceived as the greater protection for Troopers and Sergeants of review by the Commission. The State Police acknowledges that the 2002 revision entitles a Trooper to a hearing before the Commission, but as quoted above, it submits the appellate remedy is limited to the hearing itself, i.e. that it provides no authority in the Commission to alter the Colonel's discipline. Apart from the inherent illogic of such an outcome, this interpretation would result in troopers having substantially less protection from alleged administrative error than they previously had. There is no support in the statutory text or in the legislative history of the 2002 revision for the [Department's] position. Among other things, the legislative history included the event that the Acting Governor's veto of the revised statute (such veto reasonably seen as intended to protect the executive prerogatives of the Colonel) was overridden in the Senate by a vote of 32 to 2". *Reilly*, 24 Mass.L.Rptr. 35, at 1-2.

The Court's opinion also noted the Commission's specific substantive rights and procedural oversight under civil service law that the Commission applied in Trooper Reilly's appeal as a result of the incorporation of those rights and power of oversight through Section 13, as amended:

> "In advancing its argument that the Commission lacked substantial evidence and just cause to vacate two violations found by the Colonel and to modify the Colonel's sanctions, the State Police runs into the obstacle that it failed to incorporate into the appellant record a transcript of the proceedings before the Commission [citing *Covell* v. *Department of Social Services*, 439 Mass. 766, 782 (2003) . . . found that the State Police had failed to inform Reilly of their purpose in advance of the interview in violation of her rights under . . . the collective bargaining agreement. . . found that the sanction against Reilly was disproportionate when viewed against sanctions imposed in comparable cases . . . [a]nd was inequitable when measured against the State Police's actions against her superior who was complicit in Reilly's underlying misconduct . . ."
>
> ". . . .[J]udicial deference to the Commission's judgment . . . .is especially appropriate where the Commission is acting out of its statutory function to guard against inequitable treatment between similarly situated persons . . .and to protect employees from 'overtones of political control or objectives unrelated to merit standards." *Reilly*, 24 Mass.L.Rptr. 35, at 3.[citations omitted]

In *Hickey* v. *Department of State Police*, 20 MCSR 436 (2007), the Commission allowed the appeal by a Trooper who had been required to forfeit twenty (20) days of vacation time by the Colonel after a hearing before the Trial Board. The Commission ordered the twenty (20) days of vacation time restored. On appeal, the Department (a) renewed the argument made in *Reilly* that . . . the Commission had no authority to modify a decision of the Colonel under the amended statute; and (b) the Commission had no authority to review imposition of a forfeiture of vacation time because that form of penalty was not specifically enumerated in G.L. c. 31, §§ 41-45. Once again, the Department's arguments failed. The Court rejected the Department's first argument for the same reasons cited in *Reilly*. In rejecting the Department's second argument, the Court stated in part:

> "The purpose of the statute in affording appellate rights would be defeated if that purpose could be subverted merely by the meting out of an equivalent penalty under a different name). *See Sullivan* v. *Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 24 (2006) ('if a liberal, even not literally exact,

> interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which defeat that purpose'). Even though the loss of accrued time is not specifically enumerated in the statute, the Court holds that such penalty is equivalent to a suspension under the Guidelines and is therefore properly appealable to the Commission."

Department of State Police v. *Civ. Serv. Comm'n*., Suffolk Sup. Crt. No. 07-3766-A (2008)

In 2017, the Department again argued that the Commission had no authority to review a decision by the Colonel to require the forfeiture of vacation time of a Trooper. The Court rejected the Department's challenge for the same reasons stated in *Hickey*. (*See Doherty* v. *Dep't. of State Police and Civ. Serv. Comm'n*., Suffolk Sup. Crt. No. 16-2143-H (May 5, 2017) (ruling on Department's Motion to Dismiss).

In 2014, three (3) Troopers filed appeals with the Commission to contest their termination by the Colonel. *See Gately* v. *Dep't. of State Police*, 28 MCSR 294 (2015); *McGarry* v. *Dep't. of State Police*, 28 MCSR 305 (2015); and *Walsh* v. *Dep't. of State Police*, 28 MCSR 309 (2015). The underlying facts regarding all three (3) appeals were similar. In each case, based on alleged misconduct, the Colonel suspended the Trooper's license to carry a firearm and then, according to the Department, "administratively discharged" each Trooper. Each of the Appellants filed an appeal with the Commission.

In each of the above cases at the Commission, the Department argued that the Commission lacked jurisdiction to hear these appeals. The record in *Walsh* shows that Trooper Walsh had elected to pursue his rights to a Trial Board under G.L. c. 22C, §13, and a Trial Board was actually scheduled to be conducted on September 30, 2014 through October 3, 2014. Prior to September 30th, the Department "administratively discharged" Trooper Walsh and the Trial Board did not go forward. The Department, via a Motion to Dismiss dated October 29, 2014, argued that:

> "The Commission should dismiss this appeal based on a lack of jurisdiction where Appellant was generally discharged through an administrative process and not dishonorably discharged following a disciplinary proceeding. Although granted a limited right of appeal to the Commission by Section 13 of Chapter 22C, tenured members of the uniformed branch of the State Police are not civil service employees and are, in fact, specifically exempted from the requirements of Chapter 31 by MGL c. 22C, § 10. Under MGL c. 31, §§ 41-45, only specific disciplinary actions taken or recommended by an employer or appointing authority is subject to Commission review. To sustain a cognizable appeal, the requirements of both Chapter 22C, §13 and Chapter 31, §§ 41 and 43 must be satisfied. That is, the Appellant must establish that he or she is 'aggrieved' by the findings of a Trial Board and that the discipline imposed is subject to the Commission's limited authority under §§41-45 of Chapter 31. This is not the case here where no Trial Board was held and the Appellant's discharge was not disciplinary in nature."
>
> "As further grounds of the Commission's lack of jurisdiction over this matter, the Appellant has simultaneously filed for an appeal hearing pursuant to MGL c. 22C, §43 … The law is clear in providing the Appellant, who has been 'affected by an order of the department', with an appeal hearing pursuant to MGL c. 22C, §43. Appellant has demonstrated his awareness of this proper means of recourse, as he timely filed for such an appeal with the Department, and that appeal is pending."

In *McGarry*, Trooper McGarry also filed a complaint against the Department in United States District Court. The Department filed a Motion for Judgment on the Pleadings in the U.S. District Court which was heard by Judge William G. Young on March 5, 2015. As part of that hearing, counsel for the Department stated:

> "Mr. McGarry's clearly taking issue with the fact that he was discharged and was not given a hearing under the Trial Board procedure which is set forth in the state police rules under I believe it's Rule 6.7. Now, the case law and, I believe, these are cited in our brief, both O'Neill and Hadfield and others, um, set forth the analysis on the first prong of Parratt-Hudson in that you have to look at whether, um, is this in the state of the official or is this an issue with actual procedure in place?"
>
> "Now, clearly here the state police has adequate procedure in place for disciplinary discharges such as the trial court. So once we acknowledge that, we move on to the second prong, which is are there adequate state remedies that Mr. McGarry can seek, um, post-deprivation remedies. And there are."
>
> "Under Chapter 22C, Section 13, he can appeal to the Civil Service Commission and he has done that. He can also appeal under Chapter 22C, Section 43, to the Superior Court seeking review of the Colonel's decision, um, and he has done that as well ….".

McGarry v. *Alben*, United States District Court No. 1:114-cv-13407-WGY (2015) (Motion Hearing Transcript)

On June 11, 2015, the Commission issued "Orders of Dismissal Pending a Future Effective Date" in *McGarry* and *Walsh* that would allow the Troopers to re-open their appeals after the disposition of the pending Superior Court actions.[3] In those orders, the Commission stated:

> "Nothing in this decision is intended to express any opinion on the merits of the Department's actions in terminating the Appellant's employment in this matter or to decide whether the Department acted within lawful statutory authority to terminate the Appellant[s] without a Trial Board process, whether the Commission is without jurisdiction to review the 'just cause' for the termination under any circumstances, or what effect, if any, the final determinations in the pending civil actions under G.L. c. 140 or G.L. c. 22C, s. 43 may have on such further proceedings before the Commission."

Current State Police Challenge to Commission's Jurisdiction

In the four present appeals, as it did in in *Walsh* and *McGarry*, the Department argues that the Appellants have not been suspended through a *disciplinary* process, but, rather, through an *administrative* process that is not subject to review by the Commission, claiming that the Department's action was taken pursuant to

3. The *Gately* appeal was dismissed as Trooper Gately had subsequently retired with an effective retirement date that preceded the discipline.

the Colonel's power to order "any person" be "suspended without pay" on the recommendation of a Duty Status Board, pursuant to G.L. c. 22C, § 43 and Section 6.2.4 of Article 6 of the Department's Rules and Regulations ("Regulations Establishing Disciplinary Procedures and Temporary Relief From Duty"). The Department asserts that the Appellants have not been disciplined, no "charges" have been "preferred" and no Trial Board hearing has been held. Thus, the Department contends that the Colonel's actions do not come within the scope of G.L. c. 22C, § 13, cannot be appealed to the Commission and the Appellants' remedy is limited to an appeal to the Superior Court after a "Section 43" hearing (that is yet to occur) before the Colonel.

This new variation on the same theme presents the most direct challenge yet to the Commission's oversight of the Department's discipline of its uniformed members and defies logic and commonsense. For several months, the Appellants have been removed from the payroll of the State Police, receiving no pay and no benefits, including loss of employer-sponsored health insurance benefits for themselves and their families. G.L. c. 31, § 1 makes no distinction between so-called disciplinary and non-disciplinary suspensions defining a suspension as: "a *temporary, involuntary separation* of a person from his civil service employment by the appointing authority." Each of the Appellants has, at least, been temporarily and involuntarily separated from their employment. The Legislature, via the 2002 amendment to Section 13, clearly intended for uniformed members of the State Police to be entitled to access the Commission for all adverse employment actions that fall within the scope of G.L. c. 31, § 41, and that includes removal from the payroll, i.e. suspensions without pay.

That leads to the next, related argument of the Department. The Department argues that the Commission's only authority is to review a decision made after a Trial Board has been conducted, arguing in part that: " … the Commission's jurisdiction or 'just cause' review of Department Trial Board decisions is, pursuant to MGL c. 22c, §13, expressly limited to those matters where a member is both aggrieved by the finding of a trial board and as a consequence of that finding, discharged, removed, suspended laid off, transferred, lowered in compensation, or the subject of position elimination as contemplated by MGL c. 31 §§ 41-45. That contradicts what the State Police argued before Judge Young in Federal District Court in March 2015 in *McGarry*. In that case, Trooper McGarry had not been provided with a Trial Board proceeding before being disciplined, yet the State Police stated in part that: "under Chapter 22C, Section 13, he [McGarry] can appeal to the Civil Service Commission and he has done that. He can also appeal under Chapter 22C, Section 43, to the Superior Court seeking review of the Colonel's decision, um, and he has done that as well ….". [emphasis added]. The State Police's argument in *McGarry* more closely aligns with the plain language of G.L. c. 22C, § 43 which states in part:

> "Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy." The Commission's authority to hear and rectify procedural flaws in the appointing authority's actions, in addition to, as well as independent of, the merits of any disciplinary actions is precisely what the Legislature intended by making express provision for such oversight in Sections 42 and 43 of the civil service law.

Here, however, the Department argues that any and all of the Appellants' appeal rights are limited to the Superior Court, *after* the Appellants receive a Section 43 hearing, which, as of the date of the full hearing, had still not been held. The Department argues that all due process requirements will be met as the Appellants will receive (at a time chosen by the State Police) a hearing and that the judicial appeal of the Department's position will require the State Police to show that their decision was based on substantial evidence. This argument fails for several reasons.

First, it is entirely unclear what standard of review applies to a "Section 43" appeal to Superior Court. In the most recent appellate decision in which the issue is discussed, the Department was arguing that the Superior Court must apply a Chapter 30A "arbitrary and capricious" standard under a Chapter 30A review, not a "substantial evidence" standard.

Second, whatever the form of judicial review standard may be, it plainly falls short of the "de novo" review that applies to a Commission appeal. See,e.g., *Police Dep't. of Boston* v. *Kavaleski*, 463 Mass. 680, 688-89 (2012); *City of Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28, rev.den.. 440 Mass. 1108 (2003). The significantly greater level of scrutiny that the Commission gives to a Trooper's appeal from the type of "30A" review that the Trooper would receive in a Superior Court stands as one of the core benefits that the Legislature intended to provide when it amended Section 13. It places form over substance to claim that Section 13 does not apply because the Appellants have not been "formally charged" with misconduct and have not been tried and convicted by a Trial Board, when it is the Department's flouting of those requirements that is the cause of that dilemma.

Third, the summary nature of the "administrative" process that the Department claims permits the Colonel to remove a tenured Trooper from the payroll, pending a hearing that has no specific time frame, rules or procedures to govern it, makes further review of any type virtually impossible. *Cutone* v. *Colonel McKeon and Dep't. of State Police*, Hampden Sup. Crt. No. 16-570 (2017), a "Section 43" appeal in which the Court applied a "substantial evidence" test over the objection of the Department, offers important insight into just how little "due process" the Department believes it needs to provide to uniformed members in a Section 43 proceeding . In *Cutone*, the Colonel had denied the Trooper permission to engage in certain outside employment. The Superior Court judge made the following conclusions:

> "*It is plain from this administrative record that the defendants [State Police] made strategic decisions which had a deleterious effect on the meaningfulness of Trooper Cutone's § 43 hearing*. Despite holding strong opinions, the Colonel elected not to appear at the hearing and testify in support of his reasons for opposing Trooper Cutone's proposed off-duty employment. Neither did the defendants designate any other witness to testify in support of the denial. *This tactic effectively insulated the defendants' motivation from any meaningful scrutiny at the hearing, either by Trooper Cutone, his legal counsel, or the hearing officer*. Trooper Cutone was deprived of an opportunity at the

> hearing to assess and cross-examine the Colonel, or his designee on the accuracy or legitimacy of the reasons for denial. And because defendants present no testimony, Trooper Cutone was further deprived of any opportunity to present rebuttal testimony. Instead, *the defendants elected to sit back, discount the § 43 hearing process guaranteed to one of its troopers, and hold in reserve their perceived right to arbitrarily overrule the hearing officer's findings and conclusions, without providing the Trooper any further administrative recourse. This 'hiding in the weeds' or 'rope a dope' hearing tactic, as some judges have labeled it, deprived Trooper Cutone of a meaningful due process hearing.*"

See also, Costa v. *DiFava*, 12 Mass.L.Rptr. 45 (Sup.Ct. 2000) (Colonel required to promulgate rules and regulations governing the appeals regarding promotional examinations).

The Court's description of the process in *Cutone* has a familiar ring to it. Here, in the instant appeals, the Appellants were removed from the payroll after a brief duty status hearing in which the only evidence presented was a hearsay memo to which the Appellants effectively had no opportunity to respond. With the Appellants now off the payroll, the Department unilaterally decides when the Section 43 hearing will be held, thus keeping the Appellants on unpaid leave and preventing them even from filing an appeal in Superior Court. Here, as of the date of the full hearing, the Appellants had been without pay or benefits for several months. During the motion hearing proceeding, I asked counsel for the Department, if, after a Section 43 hearing, no formal disciplinary charges were preferred, whether the Troopers would receive their lost pay and benefits. The equivocal answer I received was that the Troopers could make a "request" to be reimbursed. This does not strike me as being consistent with the due process rights required of public employees whose pay and benefits have been stopped by their employer. As tenured members of the Department (more than one year of service), the Appellants possess a protected property interest in continued employment and have a right to due process before the Department can deprive them of it. E,g., *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). *See Dasey* v. *Anderson*, 304 F.3d 148, 157-57 (1st Cir. 2002) (distinguishing probationary Troopers, who may be discharged without any pre-termination hearing, from tenured troopers with more than one year experience, who are guaranteed the right to a pre-termination hearing under G.L. c. 22C, §13, MSP Rule 6.5.1 and a collective bargaining agreement); *Gurry* v. *Colonel, Dep't. of State Police*, 88 Mass. App. Ct. 1101 (2015 (Rule 1:28 decision) (same).

More broadly, when the Legislature intended public employers to have the ability to remove employees from the payroll without typical due process protections such as a prior hearing, it has said so, as it has in G.L. c. 30, § 59 which states:

> An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, … if he was appointed by some other appointing authority, be suspended by such authority, whether or not such appointment was subject to approval in any manner. Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered or sent shall automatically suspend the authority of said person to perform the duties of his office or employment until he is notified in like manner that his suspension is removed. A copy of any such notice together with an affidavit of service shall be filed with the state secretary.
>
> Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him, subject to section 15 of chapter 32. The employer of any person so suspended shall immediately notify the retirement system of which the person is a member of the suspension and shall notify the retirement board of the outcome of any charges brought against the individual.
>
> …
>
> If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement." (emphasis added)

The Department has cited no authority, and I have been made aware of none, that has construed Section 43 and/or Department Rule 6.2 (Duty Status Hearing) to circumvent the established disciplinary process set forth in Department Rules 6.4 through 6.9, and, similarly, allow the removal of a Trooper from the payroll without the prior investigation, charges and pre-discipline Trial Board hearing that the latter requires.[4]

In addition, the use of the "duty status" approach to making what amount to findings of serious misconduct is fraught with problems for the accuser, as the absolute privilege for defamatory statements in internal affairs investigations attaches only when proceedings are "quasi-judicial" in nature,[and a trial board would qualify but a duty status board probably would not. *See Fisher* v. *Lint*, 69 Mass. App. Ct. 360 (2007).

4. The Department's citation to a footnote in *McCormack* v. *Department of State Police*, D1-12-308, [27 MCSR 119] (2014) that the Commission has "long recognized" that uniformed members of the State Police appeal to the Commission regarding an order to suspend a Trooper without pay following a duty status hearing is inapposite. McCormack never filed a timely appeal with the Commission challenging his suspension without pay after a duty status hearing and the Commission Decision did not turn on this point.. Moreover, the Commission's position on this issue was squarely addressed in its more recent decisions in *Walsh* and *McGarry*, referenced above.

There may well be circumstances under which Section 43 may be invoked to enable the Colonel to effect true administrative changes in the "duty status" of tenured (as opposed to probationary) uniformed members of the Department.[5] *See, e.g.*, *Gray* v. *Foley*, 26 Mass.L.Rptr. 239 (2009) (demotion of major to captain without affording officer the right to answer charges before a trial board "may have been a technical violation of G.L. c.22C, §13 and Articles 6.5 and 6.7 of the Rules and regulations", the Colonel had the complete discretion to select members of his "command staff" and "whatever procedural irregularities" occurred, the officer was not entitled to any relief under any applicable law); *Greaney* v. *Colonel, Dep't. of State Police*, 52 Mass. App. Ct. 789 (2000), *aff'd*., 438 Mass. 1008 (2002). Using Section 43, however, as an exclusive means to replace the proper channels for investigating, charging and reviewing Departmental disciplinary actions in the guise of administrative "duty status" changes would create an absurd result that, in effect, would invite use of that process in nearly every future disciplinary matter, essentially nullifying the 2002 amendment of Section 13, an outcome that is clearly inconsistent with the overall purpose of the law and the intent of the Legislature. *See generally*, *Benoit* v. *Hillman*, 1998 WL 1181783 (Supt Ct. 1998) (citing authority to suggest that, by the proviso in the final sentence of Section 43, the Legislature expressed an intent that Section 43 would not be the exclusive vehicle to redress injury caused by Departmental orders even when covered by that section of the law).

CONCLUSION AND RELIEF TO BE GRANTED

For all of the above reasons, I have concluded that: (1) the Appellants have been deprived of their right to a hearing before they may be suspended without pay, as intended by the provisions of G.L. c. 22C, § 13, G.L. c. 31, § 41 through 45, Department Rules 6.4 through 6.9, and, to the extent applicable, the provisions of the collective bargaining agreement governing their employment with the Department; and (2) the Appellants may contest their suspensions to the Commission, which has jurisdiction to rectify procedural irregularities pursuant to G.L. c. 31, §42, as well as require that the Department prove just cause for their suspension by a preponderance of the evidence, pursuant to G.L. c. 31, § 43.

The relief to be granted in this situation would be the same whether the Commission acts under its authority to rectify procedural error under G.L. c. 31, § 42, or for the failure of the Department to meet its burden to establish just cause for the suspensions by a preponderance of the evidence presented to the Commission. As the Department has violated the Appellants' procedural rights to a hearing prior to imposing the suspensions, and has chosen to present no evidence at the full hearing, the Appellants are entitled to be reinstated to their positions. Nothing in this Decision precludes the Department from initiating appropriate disciplinary proceedings to investigate, charge, and after a Trial Board hearing, convict, one or more of the Appellants, for the misconduct which has been established, subject to the Appellants further appeal, if necessary, for a de novo review by the Commission.

G.L. c. 31, § 42 states:

> 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. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. *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*. (*emphasis added*)

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)

In sum, the Appeals of the Appellants are ***allowed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

Notice to:

Joseph Kittredge, Esq.
Rafanelli Kittredge, P.C.
One Keefe Road
Acton, MA 01720

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5. Department Rule 6.2.1 identifies some examples that would seem appropriate for administrative action, including a member who has been indicted, under a domestic abuse order, and Rule 6.2.4 provides for placing an officer on "restricted duty" or "suspended with pay ", which are actions that would not offend the rights of tenured troopers under Section 13 or the collective bargaining agreement. Allowing such actions for an officer who is "the subject of an internal investigation" or in other undefined "exceptional circumstances" however, are situations that are problematic and offend those rights. Where the provisions of Department Rule 6.2 purport to authorize "suspension without pay" under other circumstances that lack statutory support and are in conflict with the provisions of the applicable collective bargaining agreement, that is when they are unlawful and unenforceable. *See., e.g., Dasey* v. *Anderson*, 304 F.3d 148 (1st Cir. 2002); *Sulivan* v. *Superintendent, Dep't. of State Police*, 92 Mass. App. Ct. 1128 (2018)

Daniel J. Moynihan, P.C.
271 Main Street, Suite 302
Stoneham, MA 02180

Daniel Brunelli, Esq.
Department of State Police
470 Worcester Road
Framingham, MA 01702

* * * * * *

DEBRA J. BAYE

v.

UMASS AMHERST

C-17-255

April 11, 2019
Christopher C. Bowman, Chairman

Reclassification Appeal-University of Massachusetts-Clerk in Property Office-Administrative Assistant—A Clerk IV in the Property Office at the University of Massachusetts won her reclassification appeal to Administrative Assistant I where she had become the Department's "go to" person for tracking the institution's vast physical inventory and did not have simple "clerical" duties. The decision notes that her job falls squarely into the Inventory Management or Storekeeper Series listed in the Municlass Manual maintained by HRD but this classification was not available here.

DECISION

On December 15, 2017, the Appellant, Debra Baye (Ms. Baye), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the November 30, 2017 decision of the state's Human Resources Division (HRD) in which HRD affirmed UMASS Amherst (UMASS)'s denial of her request to be reclassified from Clerk III[1] to Administrative Assistant I (AA 1).

On January 24, 2018, I held a pre-hearing at the Springfield State Building in Springfield, MA. On August 29, 2018, I held a full hearing at the Whitmore Administration Building at UMASS Amherst.[2] The hearing was digitally recorded and one CD was made of the hearing.[3]

FINDINGS OF FACT

Twenty-three (23) exhibits were entered into evidence. Based on the documents submitted into evidence and the testimony of:

Called by UMASS Amherst:

- Tetna, Classification Specialist, UMASS Amherst;
- Margaret March, Compensation Supervisor, UMASS Amherst;
- Glenn Hartmann, Assistant Controller, UMASS Amherst;

Called by Ms. Baye:

- Debra J. Baye, 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:

BACKGROUND

1. Ms. Baye began working at UMASS in 1978 in Disability Services and has been employed as a Clerk in the Property Office since 1982. (Testimony of Appellant; Stipulated Facts; Exhibit 8)

2. On June 15, 2016, Ms. Baye filed a request for reclassification with UMASS to be reclassified from Clerk III to AA I. (Stipulated Fact)

3. As a result of an audit completed by UMASS on April 18, 2017, UMASS reclassified Ms. Baye (and her co-worker) from Clerk III to Clerk IV, retroactive to June 12, 2016. (Testimony of Appellant & March; Exhibit 9) Ms. Baye appealed that decision to HRD, as she continued to believe that a reclassification to the title of AA I was justified. (Testimony of Appellant)

HRD Job Specifications (Last Updated in 1987)

CLERK

4. Incumbents of positions in the Clerk series maintain files and records; answer telephones; prepare and mail outgoing correspondence, forms, files and reports for processing, storage or forwarding; answer inquiries; operate standard office machines and equipment; and perform related work as required. (Exhibit 6)

5. A Clerk IV if the first level supervisory job in the series or, based on assignment, may be the second-level supervisory job in the series. (Exhibit 6)

6. A Clerk IV: 1) explains provisions and contents of various documents or program including effective rates, options, eligibility, benefits, etc. to employees and others; 2) Interviews applicants for clerical positions and make recommendations to superiors; and 3) prepares and processes personnel actions such as promotions, appointments, demotions, terminations, transfers and leaves of absence by recording such actions and completing forms for forwarding for approval. (Exhibit 6)

1. UMASS Amherst reclassified Ms. Baye from Clerk III to Clerk IV. Ms. Baye continued with the appeal process, maintaining that she should be classified to the title of AA I, which is a higher pay grade than Clerk IV.

2. 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. 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.

7. A Clerk IV receives general supervision from administrative or other employees of higher grade who provide procedural guidance and review performance through conferences and reports for effectiveness, accuracy and compliance with standard procedures. (Exhibit 6)

AA

8. Incumbents of positions in the AA series monitor assigned unit activities; confer with agency staff; maintain liaison with others; review and analyze data concerning assigned unit activities; prepare reports; respond to inquiries; compile data; and perform related work as required. (Exhibit 5)

9. An AA I is the first-level supervisory job in the series. (Exhibit 5)

10. Examples of duties of an AA include: 1) monitoring assigned unit activities to ensure effective operations in compliance with established standards; 2) conferring with agency staff in order to exchange information to coordinate efforts and to obtain information concerning agency program and activities; 3) maintaining liaison with various local, state and federal agencies and others to exchange information, to resolve problems and to coordinate activities; 4) reviewing and analyzing data concerning assigned unit activities in order to improve work methods, determine progress, revise established procedures and/or to provide information to superiors; 5) preparing reports concerning assigned unit activities in order to furnish required information and to make recommendations concerning procedures, program and activities.; 6) responding to inquiries in order to provide information concerning assigned unit activities; 7) performing related duties such as compiling data for use in reporting assigned unit activities. (Exhibit 5)

11. An AA I receives general supervision from Administrative Assistants or other employees of higher grade who provide procedural and policy guidance, assign work and review performance through conferences and reports for effectiveness and compliance with laws, rules and regulations. (Exhibit 5)

Ms. Baye's Job Duties and Responsibilities

12. Ms. Baye works in the Property Office within the Controller's Office which is responsible for maintaining the inventory of UMASS assets through a barcoding and tracking system. (Testimony of Appellant)

13. There are currently two (2) incumbents in the position held by the Appellant. (Testimony of Hartmann). Ms. Baye and another employee monitor the physical equipment and property of UMASS and each has jurisdiction of one half of the campus, according to an established division. (Testimony of Hartmann and Appellant).

14. Ms. Baye is responsible for locating and affixing barcodes on new equipment and other property received by UMASS, which allows for tracking and monitoring of each individual item. (Exhibit 2; Testimony of Hartmann and Appellant). She conducts biannual inventories of all UMASS property within her assigned half of campus. She assists in any and all audits concerning UMASS property. (Exhibit 2; Testimony of Hartmann and Appellant).

15. Ms. Baye regularly receives a report from the Property Supervisor in the Controller's Office, that identifies newly received UMASS property ordered by one of the offices or departments on Ms. Baye's half of campus. (Testimony of Hartmann and Appellant). Ms. Baye locates the purchase order for each item in UMASS's database to obtain relevant information on each item. (Exhibit 2; Testimony of Appellant). Ms. Baye arranges for a barcoding visit with each office or department by phone or e-mail, then goes to the offices and departments where each item on that report should be located and applies a barcode to each item that enables UMASS to track each item. (Exhibit 2; Testimony of Hartmann and Appellant). While visiting UMASS offices and departments, Ms. Baye confirms property received conforms to that identified on the relevant purchase order and collects information on each item for entry into the property management module of the PeopleSoft Enterprise software package, including a description of the equipment, the barcode, the manufacturer, model number, serial number, and for computers, the user and location. (Exhibit 2; Testimony of Appellant). She uploads that data into the asset management module of PeopleSoft, which is used to inventory and track UMASS property. (Exhibit 2; Testimony of Hartmann and Appellant).

16. Ms. Baye must inventory UMASS property within her jurisdiction once every two years, meaning each item in the asset management database that is located on her half of campus must be physically located and its barcode must be scanned once every two years. (Exhibit 2; Testimony of Hartmann and Appellant). Each UMASS office and department has a designated Equipment Coordinator appointed from among the staff of that office or department. (Exhibit 2; Testimony of Hartmann and Appellant). Before visiting an office or department to conduct a physical inventory, Ms. Baye makes arrangements with the Equipment Coordinator to ensure the inventory process goes smoothly. (Exhibit 2; Testimony of Appellant). To do so, she provides the office or department, a letter explaining when she will visit and what assistance will be expected when she visits, and includes a copy of the Equipment Coordinator information form to ensure the database of Equipment Coordinators is up-to-date. (Exhibit 2; Testimony of Appellant). Ms. Baye extracts data on all of the property recorded in the asset management database for the department or office she plans to inventory and uploads it to a "Blackberry-style" cell phone she uses to scan barcodes. After Ms. Baye has visited an office or department and has scanned the barcode of every item she was able to locate at that time, she uploads it to the asset management database and generates a list of exceptions for property not successfully scanned. (Exhibits 2 and 23; Testimony of Hartmann and Appellant). She works with the Equipment Coordinator for any required follow up, such as arranging to scan equipment that was absent during the inventory visit (e.g., a faculty member was using some equipment for research in the field at the time of the initial visit). Ms. Baye assumed responsibility for follow up on exceptions and missing property in February 2016. (Exhibits 2 and 20). She will assist Equipment Coordinators and other personnel in following the protocol for disposition of

missing property and eliminating it from the property management database (e.g., a piece of equipment has been stolen, broken or is hopelessly missing and decisions must be made on whether a police report must be filed or whether a piece of equipment had exceeded its useful life). (Exhibits 2 and 23; Testimony of Hartmann and Appellant). Ms. Baye manages scheduling and execution of the biannual inventory process without any supervision by anyone in the Controller's office or any other UMASS office or department. (Exhibit 22; Testimony of Appellant). Ms. Baye is the sole point of contact between the Controller's office and the Equipment Coordinators and she is solely responsible for answering questions on property management and disposition for the offices and departments. (Exhibits 2 and 22; Testimony of Appellant). In doing so, Ms. Baye interprets and applies the property management protocol and gives direct instruction to the Equipment Coordinators. (Exhibit 2 and 22; Testimony of Hartmann and Appellant). Ms. Baye also manages the barcoding and inventory process for several off-campus satellite locations that involves remote management through personnel located on site which involves instruction, training and troubleshooting for those off-campus personnel by phone and email. (Exhibit 2).

17. Ms. Baye is responsible for serving as a liaison or interface between inside and outside auditors and the Property Office insofar as audits of UMASS equipment and physical property is concerned. (Exhibit 2; Testimony of Hartmann and Appellant). Those responsibilities primarily include chaperoning the auditors while they are visiting UMASS offices and departments, guiding auditors to the location of equipment and physical property they have asked to examine and answering questions about UMASS's property management protocol, as needed. (Exhibit 2; Testimony of Hartmann and Appellant). From time to time, this is a time-consuming duty for Ms. Baye. (Testimony of Hartmann and Appellant). Ms. Baye is responsible for maintaining a list of the Equipment Coordinators in each office or department as of June 2016 as a result of auditors' demands that office and department-level Property Office liaisons be established for control purposes. (Exhibits 2 and 20; Testimony of Hartmann).

UMASS Review of Reclassification Request

18. Tetna is a classification specialist at UMASS and has been employed as such for thirty (30) years. His job duties include collecting information about various jobs at UMASS, interviewing the employees in each job and creating files for review by the Compensation Supervisor. He was responsible for interviewing the Appellant's request for reclassification. (Testimony of Tetna)

19. Margaret March (Hereinafter "March") is the Compensation Supervisor and has been employed by UMASS for forty-five (45) years. She conducted an appeals review of Baye's reclassification request. Her review consisted of reviewing the paper file, Baye's request for reconsideration and direct observation of Baye performing her job. (Testimony of March)

20. Tetna did not consider the majority of the job duties of the Appellant to fall within the Administrative Assistant series. (Testimony of Tetna)

21. Tetna does not make classification recommendations to UMASS. He interviewed the Appellant, collected the information, and gave his opinion about job functions. (Testimony of Tetna)

22. March recognized that the increased complexity of Appellant's job warranted a reclassification to Clerk IV but not to Administrative Assistant, because she concluded that Baye did not have overall responsibility to monitor the functions of a Department. (Testimony of March)

23. Ms. March did not consider the job classifications of individuals performing inventory functions on other UMASS campuses as part of her determination. She did consider Form 30s for other Clerk III's and IV's and Administrative Assistants on the UMASS Amherst campus in making her determination. (Testimony of March)

24. Glenn Hartmann, Assistant Controller and her intermediate supervisor, considers Baye as an employee with a great deal of experience performing inventory management functions who operates within standard procedures, controlling her workflow in a competent manner. (Testimony of Hartmann)

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, § 49.

Ms. Baye must show that he performs the duties of the AA I title more than 50% of the time. *See Gaffey* v. *Dep't. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also 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 duties encompassed within the higher level position the majority of the time….").

UMASS Argument

UMASS argues that, based on the Appellant's own testimony, more than 50% of her time is spent tagging new equipment and uploading information into an asset database, scheduling appointments in order to inventory new and existing equipment and insuring that the requirements of the office standard procedures for the tracking of assets are met. According to UMASS, Ms. Baye is highly competent with respect to these functions and takes great pride in her accuracy and reliability performing these functions, as she should. However, UMASS argues that the fact remains that while she is given great latitude in scheduling her work in insuring that the inventories assigned to her are completed accurately and timely, she is at all times operating under standard procedures, her assignments are made by her direct supervisor, a Clerk V, on a weekly basis and deadlines are established by Department policy and the dictates of the bi-annual inventory requirement. According

to UMASS, more generalized reports and inventory analysis are conducted by those in higher level positions than Ms. Baye. While the Appellant also provides instruction out in the field, UMASS maintains that this instruction is consistent with the duties of the Clerk Classification series.

In summary, UMASS argues that, based upon the Interview Guide and testimony at hearing, there is no indication that Appellant performs specific, fundamental duties associated with the Administrative Assistant classification more than fifty (50%) of the time, such as on the job training, reviewing, analyzing and preparing reports and overseeing and coordinating the activities of subordinates.

Appellant's Argument

Ms. Baye argues that she performs none of the office support functions that comprise a Clerk series position. Rather, according to Ms. Baye, she spends substantially all of her work time on duties and tasks allocated to the Administrative Assistant series. In support of this argument, Ms. Baye asserts that incumbents in Clerk series positions provide basic office support services at the behest of professional and supervisory staff that are manual or routine in nature, are directly supervised, do not require exercise of judgment or discretion and are not substantially improved or informed by experience. There is no specialized skill or training required for tasks such as filing, preparing letters and packages for mailing, receiving and distributing incoming mail, answering and directing incoming phone calls, retrieving hardcopy and electronic records for use by others and using standard office equipment, such as fax and copier machines.

Ms. Baye argues that her job duties and responsibilities more closely align with AA I which requires incumbents to monitor actual workflow of the office or department, confer with University staff outside of their own office on a formal, work-related basis, prepare reports concerning their own work, respond to inquiries from outside of their office and compile data for external reporting purposes. Ms. Baye argues that she has shown that she conducts specialized job functions without direct supervision and applies skills gained through knowledge and training based on her informed judgment and experience. Further, she states that she has shown that she has broad discretion over the timing and sequence of her work and spends a considerable amount of her work time communicating with University personnel outside of the Property Office, most notably Equipment Coordinators and internal and external auditors that examine the University's books and property. Ms. Baye stresses that the barcoding-related responsibilities and the biannual inventory process are unsupervised, conducted independent of other Property Office and Controller's Office personnel and that she sets the schedule and makes all process-related judgment calls independently.

Finally, Ms. Baye argues that she performs some supervisory functions as she provides advice to UMASS personnel on how to resolve specific equipment-related issues and provides instructions to personnel located on-site and remotely.

ANALYSIS

UMASS takes reclassification appeals seriously. They work hard to provide a fair, objective and thorough review process for employees requesting a reclassification. Here, they carefully reviewed Ms. Baye's job duties and responsibilities, reached out to appropriate individuals and made their best assessment of what job title best matches the employee's job duties and responsibilities. That is not an easy task considering that many of the job specifications, including the Clerk and AA series, have not been updated since 1987. An additional challenge is that some job titles available for use by civil service municipalities may not be available for use by UMASS. Within this framework, UMASS ultimately determined that the title of Clerk IV, as opposed to AA I, best reflected the job duties and responsibilities performed by Ms. Baye. Thus, they reclassified Ms. Baye from Clerk III to Clerk IV.

Based on a review of all the evidence, it appears to me that neither Clerk IV or AA I best reflects Ms. Baye's job duties and responsibilities. Rather, her job appears to fall squarely into the Inventory Management or Storekeeper Series listed in the "Municlass Manual" maintained by HRD. However, what is effectively before me now is, of the two titles, Clerk IV or AA I, which better describes the duties performed by Ms. Baye a majority of the time.

Both parties provided persuasive arguments, but Ms. Baye has shown, by a slight preponderance of the evidence, that AA I is the more appropriate title here. After listening (and re-listening) to all relevant testimony and reviewing all of the relevant documents, I don't believe Ms. Baye's duties are only "clerical" in nature. Rather, she has shown that she has become a go-to person regarding the vital task of tracking the vast physical inventory at UMASS and that her job duties are more consistent with an AA I than a Clerk IV. She has shown that she does monitor assigned unit activities to ensure effective operations in compliance with established standards; she does consult with agency staff in order to exchange information to coordinate efforts and to obtain information concerning agency program and activities; and she does serve as a liaison to other employees regarding the correct processes for maintaining inventory. Although she does not analyze data concerning assigned unit activities in order to improve work methods, she does review the data and provide the information to superiors. She also certainly responds to inquiries in order to provide information concerning assigned unit activities; and she does collect (and arguably compile) data for use in reporting the activities of the unit.

Finally, given that both Clerk IV and AA I are described as being a first level supervisory position, I don't think the fact that Ms. Baye is not a supervisor, alone, can be dispositive of this appeal.

I recognize that this decision (further) potentially upsets the proverbial apple cart, given that one (1) other Clerk IV performs the same duties and responsibilities as Ms. Baye and that both of them report to a Clerk V, titles that were just recently adjusted by UMASS after they determined that Ms. Baye should be reclassified from a Clerk III to a Clerk IV. However, that does not change the fact that Ms. Baye spends a majority of her time performing

the duties of an AA I and this, is not a valid reason for denying Ms. Baye's appeal. I do, however, believe it is appropriate to delay the effective date of this decision, giving the parties the opportunity to work with HRD to identify a more appropriate series and title (i.e. - Storekeeper, Inventory Management series) that can be applied here.

CONCLUSION

For all of the above reasons, Ms. Baye's appeal under Docket No. C-17-255 is ***allowed*** and she shall be reclassified to the position of Administrative Assistant I. The effective date of this decision is July 1, 2019. If, on or before July 1st, UMASS is able to identify and obtain authorization to use a more appropriate title to assign to Ms. Baye, UMASS may file a motion to re-open this appeal for the Commission to reconsider and/or modify its decision here. Otherwise, this decision shall become effective July 1, 2019.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Ryan Dunn, Esq.
Massachusetts Teachers Association
Two Heritage Drive, 8th Floor
Quincy, MA 02171

Helen Bowler, Esq.
Associate Counsel - Labor
UMASS Amherst
320 Whitmore Administration Bldg.
Amherst, MA 01003

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RONALD BURNS

v.

TOWN OF NORTH ATTLEBOROUGH

E-18-207

April 11, 2019
Paul M. Stein, Commissioner

Provisional Employment-Failure of North Attleborough Fire Lieutenant to Be Promoted to Captain-Nepotism—A North Attleborough Fire Lieutenant failed to establish any reasonable expectation that his non-selection for provisional promotion to Captain was based on an unfair selection process or affected by nepotism where one of the successful candidates was the Fire Chief's brother. The decision notes that the Town used an outside panel of five Fire Chiefs to make the selections and that the appointment would be of short duration as a new eligible list from which permanent promotions would be made would be available within a year. The Commission also declined the Appellant's request for an investigation into the matter.

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Ronald Burns, appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c. 31, §2(b), to contest his non-selection by the Town of North Attleborough (North Attleborough) for appointment to the position of provisional Fire Captain in the North Attleborough Fire Department (NAFD).[1] The Commission held a pre-hearing conference on December 7, 2018 at the UMass School of Law at Dartmouth. On January 10, 2019, the Commission received the "Respondent Town of North Attleborough's Motion to Dismiss/ Motion for Summary Decision" (Respondent's Motion). On February 18, 2019, the Appellant filed his "Opposition to Respondent's Motion To Dismiss" (Appellant's Opposition), which also requested that the Commission open an investigation pursuant to G.L. c. 31, §2(a) into issues of alleged bias, nepotism and discrimination in the provisional promotion process. On February 22, 2019, I held a motion hearing at the UMass School of Law at Dartmouth and requested additional submissions from the parties. On March 22, 2019 I received the "Town of North Attleborough's Response to Appellant's Opposition Filing" (Town's Response) and the Appellant's "Supplement to Opposition to Respondent's Motion to Dismiss" (Appellant's Supplement).

For the reasons more fully explained below, I have concluded that the motion to dismiss should be allowed and the Appellant's Section 2(b) appeal should be dismissed. The Appellant's request for a Section 2(a) investigation is addressed separately.

FINDINGS OF FACT

Based on the submissions of the parties, viewing the evidence in the light most favorable to the Appellant, I find the following material facts are not disputed:

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.

1. The Appellant, Ronald Burns, is employed as a Lieutenant with the NAFD. (*Respondent's Motion; Appellant's Opposition*)

2. The Appointing Authority for the NAFD is the North Attleborough Board of Selectmen (BOS). (*Respondent's Motion; Appellant's Opposition*)

3. Lt. Burns took the November 2016 Fire Captain's promotional examination and his name appeared first on the NAFD Fire Captain's eligible list established on March 21, 2017. (*Respondent's Motion; Appellant's Opposition*)

4. From the start, the 2017 NAFD Fire Captain's eligible list actually contained only two names of candidates who would be willing to accept appointment, Lt. Burns and Lt. Christopher Colman, ranked third. The second ranked candidate was out of work on medical leave (from which he never returned) when the list was established. (*Respondent's Motion; Appellant's Opposition*)

5. On June 8, 2017 the BOS voted 3-0 (two absent) to provisionally promote Lt. Coleman to Captain. (*Respondent's Motion; Appellant's Opposition; Administrative Notice [BOS meeting video at 44:30-1:01:00, https://northtvvideovault.viebit.com]*)

6. During the public comment period of the BOS meeting, Lt. Burns spoke briefly that he thought he was being "unjustly bypassed" and asked the BOS to "not only consider the Chief's recommendation" but also "consider the marks" on the examination and table the appointment until the BOS conducts its own interviews of the two candidates. (*Respondent's Motion; Appellant's Opposition; Administrative Notice [BOS meeting video at 11:00-12:00, https://northtvvideovault.viebit.com]*)

7. The June 2017 provisional Captain's appointment (along with a provisional appointment of a Lieutenant to fill the Captain's vacancy created by that appointment) was made after a 15-minute deliberation, based on the presentation of Fire Chief Brousseau, who explained that his recommendations were made after interviews of both candidates by a panel of NAFD personnel and outside Fire Chiefs which unanimously favored the selected candidate. Nothing negative about Lt. Burns was mentioned. (*Administrative Notice [BOS meeting video at 44:30-1:01:00, https://northtvvideovault.viebit.com]*)

8. The following day, Lt. Burns spoke to Chief Brousseau by telephone and informed him that he was on his way to a medical facility where he was admitted. He remained out on sick leave for two weeks, after which he took three weeks of vacation leave, returning to duty on July 18, 2017. Chief Brousseau informed the North Attleborough Town Administrator of these developments and documented this information in a File Memo placed in a file kept in his office. (*Appellant's Opposition; Town's Response*)

9. In June 2018, Chief Brousseau informed the BOS that the NAFD needed to make another promotion to Captain to fill a vacancy due to an expected September 2018 retirement in September. He noted that only one candidate remained on the existing eligible list, he proposed filling the position provisionally and (due to the "short list") opening up the provisional appointment to all eight NAFD Lieutenants, with the expectation that the position would be filled permanently after a new eligible list was established following the next promotional examination scheduled for November 2018. The BOS took no action on this request. (*Respondent's Motion; Appellant's Opposition*)

10. On or about September 6, 2018, Chief Brousseau met with Lt. Burns and Lt. McKinnon, the local firefighters' union representative. (*Appellant's Opposition*)

11. On September 7, 2018, Chief Brousseau circulated an internal e-mail that stated:

> "At the direction of the Board of Selectmen:
>
> "Lieut. Ron Burns will be promoted to Provisional Fire Prevention Captain at their next meeting on Sept. 20, 2018.
>
> "The Civil Service exam for Fire Captain will be cancelled, and an Assessment Center will be conducted for all permanent Captain promotions. The assessment center will be scheduled and posted once the impact of the change to the Memorandum of Agreement is negotiated with Local 1992."

(*Appellant's Opposition*)

12. Upon learning that he would not be immediately promoted to Captain permanently, but only provisionally, Lt. Burns became upset and began to feel "extreme stress and anxiety" and "needed to leave" in the middle of his shift. (*Appellant's Opposition*)

13. On September 12, 2018, Chief Brousseau circulated another internal e-mail stating:

> "The below [September 7, 2018] email regarding Captain promotions is rescinded. I will advise you of the status of the Captain promotional process, once it is determined by the appointing authority."

Lt. Burns contends this action was taken in direct retaliation for his use of sick leave. (*Appellant's Opposition; Appellant's Supplement*)

14. At the October 11, 2018 BOS meeting, Chief Brousseau reported on plans to appoint a new Deputy Chief (through an assessment center) and one or two provisional Captains, that would be open to all lieutenants, pending the November 2018 Captain's Exam and establishment of a new eligible list for Captain from the results of that examination, expected in April 2019. The BOS approved that plan. (*Respondent's Motion; Appellant's Opposition; Town's Response*)

15. Chief Brousseau recused himself from the Deputy Chief's appointment process because his brother, Brian Brousseau had applied for that position. He continued to manage the provisional Captain's promotional process, however, sending out an internal email requesting interested candidates to submit an application by October 18, 2018, with a view to scheduling internal interviews by October 23, 2018 with recommendations to the BOS at their next meeting on October 25, 2018. (*Respondent's Motion; Appellant's Opposition; Town's Response*)

16. At the October 25, 2018 BOS Meeting, as it had become known that Chief Brousseau's brother (who didn't get the Deputy Chief's job) was going to apply for the provisional Captain's position(s) and on advice of Labor Counsel, the BOS ordered that Chief Brousseau also recuse himself from that process and assigned the future management of the Captain's promotion to the North Attleborough Town Administrator and the North Attleborough Town HR Director. (*Respondent's Motion; Appellant's Opposition*)

17. Under the direction of the Town Administrator, the Town HR director informed all potential candidates for the Captain position(s) that the internal interviews scheduled for October 25, 2018 were cancelled and they would be informed when a replacement process had been established. Thereafter, the HR director recruited three (3) municipal area Fire Chiefs to interview the candidates (the Portsmouth RI Fire Chief [formerly Brookline Fire Chief and Fall River Fire Chief], the Fall River Fire Chief and the Norton Fire Chief). (*Respondent's Motion*)

18. On October 25, 2018, Lt. Burns filed this appeal with the Commission. (*Claim of Appeal*)

19. By letter dated November 5, 2018, the Massachusetts Human Resources Division (HRD) informed North Attleborough that less than four applications were received from NAFD individuals eligible to take the HRD-administered written promotional examination for Fire Captain scheduled for November 17, 2018.[2] Therefore, as required by G.L. c. 31, §59, the examination was postponed, to be rescheduled for a later date unless an alternative (i.e. Sole Assessment Center request) is received and approved. The next HRD departmental examination is now scheduled for November 2019. (*Town's Response*)

20. On November 13, 2018, the NAFD Provisional Captain(s) Chief's Panel (Chief's Panel) conducted a semi-structured interview, including a review of the candidate's education and experience, standard interview questions, role play scenario(s) and fire service related problems. A numerical scoring index was used, with the five candidates' scores in rank order: (1) Lt. Brousseau (75.67); (2) Lt. McKinnon (71.67); Lt. Bristol (63.67); Lt. A (61.33); Lt. Burns (50.67). (*Respondent's Motion*)

21. At the BOS Meeting held on November 15, 2018, the BOS voted 5-0 to provisionally appoint Lt. Brousseau and Lt. McKinnon to Captain, the two candidates ranked number one and two, respectively, by the Chief's Panel. (*Respondent's Motion*)[3]

22. At the BOS Meeting on January 31, 2019, on the recommendation of Chief Brousseau, the BOS voted to make a third provisional promotion to Captain, appointing Lt. Bristol, the next-highest ranked candidate as determined by the November 13, 2018 Chiefs Panel. (*Appellant's Opposition; Town's Response; Administrative Notice [BOS meeting video at 6:30-10:00, https://northtvvideovault.viebit.com]*)

23. Later in the January 31, 2019 BOS Meeting, during the "Resident and Community Comment" period, Lt. Burns was recognized and he, along with his brother, addressed the BOS for approximately 15 minutes concerning his grievances about being rejected for promotion to Fire Captain for what he called "politics and nepotism". Lt. Burns suggested, in essence, that the BOS had not been fully informed and had allowed Chief Brousseau, either knowingly or unwittingly, to act on a bias against him for taking sick leave to deal with the stress of being bypassed and for speaking out at the BOS meeting two years earlier. (*Appellant's Opposition; Town's Response; Administrative Notice [BOS meeting video at 14:00-30:00, https://northtvvideovault.viebit.com]*)

24. On February 5, 2019, Lt. Burns filed a complaint with the Massachusetts Commission against Discrimination, claiming that he was denied promotion in retaliation for stating his grievances and because Chief Brousseau "perceived" him as disabled. (*Town's Response*)

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)

APPLICABLE CIVIL SERVICE LAW FOR APPEALS

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)

G.L. c. 31, §2(b) authorizes appeals to the Commission by persons "aggrieved" by certain violations of civil service law by the Massachusetts Human Resources Division (HRD) and appoint-

2. Lt. Burns did not sign up for the November 2018 examination. Had he done so, HRD would not have had to postpone the examination. (*Town's Response*)

3. Prior to the vote, Chief Brousseau introduced Lt. McKinnon to the BOS and summarized his qualifications. The Chief's brother, Lt. Brousseau, was on vacation and Chief Brousseau made no comment about him other than his introductory remarks that the candidates being recommended were the two top ranked candidates as determined by the Chief's Panel. (*Administrative Notice[BOS meeting video at 7:30-13:00, https://northtvvideovault.viebit.com]*)

ing authorities to whom HRD has delegated certain authority and provides:

> *No person shall be deemed to be aggrieved . . . unless such person has made specific allegations* in writing that a decision, action, or failure to act [by HRD or a delegated appointing authority] was in violation of [civil service law], 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*. *Id*. (*emphasis added*)

Chapter 310 of the Acts of 1993 provides discretionary authority to remediate such violations:

> *If the rights of any person* acquired under [civil service law] 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. (*emphasis added*)

THE SECTION 2(B) APPEAL

This appeal challenges the loss of an opportunity for a provisional promotion to Fire Captain, the second-level supervisory position in the civil service fire service. A provisional promotion is permitted, under G.L. c.31, §15, as an exception to the general rule that fire service promotions must be made on a full-time, permanent basis after certification from an eligible list established after a competitive examination pursuant to G.L. c. 31, §9 through §11 & §59. G.L. c. 31, §15,¶1 provides:

> "*An appointing authority may*, with the approval of the administrator . . . *make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit* . . . if there is no suitable eligible list, or *if the list contains the names of less than three persons eligible for and willing to accept employment* . . . . No provisional promotion shall be continued after a certification . . . of the names of three persons eligible for and willing to accept promotion to such position."

(*emphasis added*)

Provisionally promoted employees continue to hold their permanency in their lower title. *See* G.L. c. 31, §15,¶3. They have no civil service rights in the position to which they are provisionally promoted and may be disciplined or displaced by an appointing authority and/or returned to their tenured positions at any time without the benefit of notice, hearing and appeal rights that are afforded to persons holding permanent civil service appointments. *See, e.g., LeFrancois* v. *Department of Revenue*, 23 MCSR 639 (2010) and cases cited.

In particular, since a provisional promotion, by definition, is not made after certification from an eligible list, the selection process is not subject to the requirement that selection must be made from one of the top three candidates on the list (the so-called 2n+1 formula) or that non-selected candidates are entitled to be informed of the reasons for their non-selection and have the right to file a "bypass" appeal with the Commission to challenge the appointment of a lower ranked candidate on the list. *See* G.L. c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.08(4) & PAR.09.

The Commission has repeatedly held that, so long as an appointing authority follows the statutory requirements in making a provisional promotion of any "qualified" candidate in the next lower title, none of the other non-selected candidates have a right of appeal to the Commission. The Commission has repeatedly held that Section 15 does not require that the appointing authority select the "most qualified" candidate or the one with the most seniority. *See, e.g., Felder* v. *City of Boston*, 29 MCSR 384 (2016); *Shugrue* v. *Department of Correction*, 28 MCSR 82 (2015); *Allison* v. *City of Cambridge*, 27 MCSR 379 (2014); *Higgins* v. *Boston Public Schools*, 25 MCSR 416 (2012); *Sullivan* v. *City of Boston*, 20 MCSR 11 (2007).

Although provisional promotions are not subject to the traditional rules governing bypass decisions and appeals to the Commission, they are not entirely without other safeguards embedded in the statutory scheme designed to ensure that an appointing authority does not compromise fundamental "basic merit principles" under Massachusetts civil service law, so that only persons who are qualified by training and experience are chosen for advancement, free of political influence or other unlawful personal bias. These safeguards include the fact that provisional promotions are meant to be short-term and require prompt scheduling of a competitive examination to make the promotion on a permanent basis, as well as the mandated preference for promoting persons from the "next lower title" over "skipping one or more grades" and requiring heightened scrutiny when promotions do skip one or more grades. *See Kelleher* v. *Personnel Administrator*, 421 Mass. 382, 386-390(1995) (The . . . . statutory scheme is to assure the competence of the civil service and to guard against favoritism and bias . . . Where a vacancy is filled provisionally by promotion, there is a greater assurance that the person chosen will have demonstrated some [on-the job] competence and familiarity with the duties of the office.")

Applying these applicable legal principles to the facts of this appeal, Lt. Burns failed to show that North Attleborough's failure to select him for promotion to Fire Captain violated any of his civil service rights that would entitle him to relief from the Commission.

First, it is undisputed that, at the time North Attleborough decided to make provisional promotions to the position of Fire Captain in 2018, the eligible list contained only one name (Lt. Burns), and therefore, qualified as a "short list" which entitled North Attleborough to invoke the authority to make provisional promotions under civil service law.[4] Consistent with the requirements of

4. Lt. Burns did not appeal from the 2017 promotion of the candidate ranked below him on the list and the time to do so has long expired. Lt. Burns does not appear to argue here that North Attleborough should have made a permanent promotion in 2018 of the one remaining name (his) on the list and the law is well-established that such an argument would fail, as an appointing authority has broad discretion whether to promote from a short list, make a provisional promotion, or to make no

the statute, a departmental promotional examination will be held later this year and the provisional promotions will come to an end. The selection of the permanent Fire Captains will be made from the eligible list, subject to all the safeguards imposed on those appointments under civil service law. Should a candidate who ranks below Lt. Burns on the eligible list be promoted to permanent Fire Captain, Lt. Burns will have a right to appeal his bypass for permanent appointment to the Commission and to present the evidence that he believes demonstrates why the Town did not have reasonable justification to bypass him.

Second, the selection process that North Attleborough used to make the provisional appointments was reasonably tailored to ensure a fair assessment of all five candidates through use of an outside panel of Fire Chiefs who employed a pre-designed, structured interview format and numerically scored each candidate's performance. The candidates' rating were the determining factor in choosing which candidates were offered promotion. The two candidates promoted in November 2018 scored 75.67 and 71.67 (out of a possible 100), putting them in the Excellent category. The candidate promoted in January 2019 scored 63.67, putting him in the Average category. Lt. Burns scored 50.67, also putting him in the Average Category, but last of all five candidates.

Third, I realize that it would appear reasonable to infer that the panel of Fire Chiefs from nearby communities would have known that one candidate (Lt. Brousseau) was NAFD Fire Chief Brousseau's brother. In the absence of any allegation that the interviewing Fire Chiefs treated Lt. Brousseau any differently than the other four candidates, however, I cannot find any reasonable expectation that Lt. Burns would be able to prove that the familial connection was a factor in the panel members' honest evaluation of the five candidates on a basically level playing field. I note that the reason that the BOS ordered the Town Administrator to assemble the outside panel was to ensure, to the extent possible, that Chief Brousseau did not have any role in the evaluation of the candidates.

Fourth, the provisional promotions here are short-lived and will last only so long as it takes for HRD to administer the next HRD-administered written examination and issue a new eligible list from which permanent promotions to these Fire Captains' positions may be made.[5] Lt. Burns will have the opportunity to be appointed to the position after the eligible list was established consistent with civil service law and rules as determined by his place on that list.

Fifth, the circumstances presented in this appeal are quite different from those that the Commission found in *Alston* v. *Town of Brookline*, 32 MCSR 37 (2019) cited by the Appellant. The *Alston* appeal involved the discharge of a tenured firefighter after he failed to return to work following years of suffering from multiple incidents of harassment and retaliation at the hands of his fellow firefighters and superior officers that made it impossible for him to return to duty. Here, by contrast, construing the evidence most favorably to the Appellant, his claims consist of retaliation for having spoken to the BOS in June 2017 to advocate for his own promotion to Fire Captain, putting himself in the hospital after learning that he had been bypassed and, finally, when he learned in September 2018 that he would be provisionally promoted to Fire Captain but, because he had hoped to get promoted permanently, the news was so upsetting that he took sick time and went home early. These isolated incidents fall well short of establishing any reasonable expectation that Lt. Burns' civil service rights have been infringed by alleged violations of the discrimination laws or his First Amendment rights.

In sum, Lt. Burns has failed to establish any reasonable expectation that his non-selection for provisional appointment to the position of NAFD Fire Captain was made in violation of his civil service rights or that he is otherwise "aggrieved" and entitled to any equitable relief from the Commission.

THE SECTION 2(A) INVESTIGATION REQUEST

G.L. c. 31, §2(a) vests the Commission with independent statutory authority to conduct an investigation into any form of a violation of civil service law, on its own initiative or at the written request of "the governor, the executive council, the general court or either of its branches, the administrator [HRD], an aggrieved person, or by ten persons registered to vote in the commonwealth." Section 2(a) grants the Commission broad discretion to decide, if at all, what response and to what extent an investigation is appropriate. *See, e,g, Dennehy* v. *Civil Service Comm'n*., Suffolk Superior Court C.A. No. 2013-00540 (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.") *See also Erickson* v. *Civil Service Comm'n*., Suffolk Superior Court C.A. No. 2013-00639 (2014); *Boston Police Patrolmen's Association et al.* v. *Civil Service Comm'n*., Suffolk Superior Court C.A. No. 2006-4617 (2007). The Commission's exercise of its power to investigate is not subject to the general rules for judicial review of administrative agency decisions under G.L. c.30A, but can be challenged solely for an "abuse of discretion". *See Erickson* v. *Civil Service Comm'n*., Suffolk Superior Court C.A. No. 2013-00639 (2014), citing *Mayor of Revere* v. *Civil Service Comm'n*., 31 Mass. App. Ct. 315, 321-22 (1991).

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promotion at all. *See, e.g., Brackett* v. *Civil Service Comm'n*., 447 Mass. 223, 252-53 (2006) ("The civil service system does not guarantee an applicant a promotion at a certain date or upon a specific event"); *Bergeron* v. *Town of Falmouth*, 29 MCSR 547 (2016) and cases cited.

5. This appeal is distinguishable from the line of Commission Decisions that express concern for the "plight of the provisional", namely, save for the fire service involved in this appeal and other public safety positions, civil service jobs in the official service in Massachusetts can only be filled provisionally because, for decades, there have been no eligible lists from which a certification of names can be made for permanent appointments or promotions due to the fact that HRD stopped administering civil service examinations used to establish such eligible lists for most civil service jobs. Thus, except for police, fire and correctional services, an appointment "which is provisional in form may be permanent in fact." *Kelleher* v. *Personnel Administrator*, 421 Mass. 382, 399 (1995). *See also Phillips* v. *City of Cambridge*, 29 MCSR 364 (2016); *Felder* v. *City of Boston*, 29 MCSR 384 (2016)

The Commission exercises its discretion to conduct an investigation only "sparingly" and, typically, when there is clear and convincing evidence of an irreparable political or personal bias that can be rectified only by the Commission's affirmative remedial intervention into the hiring process. *See, e.g.*, *Shugrue* v. *Department of Correction*, 28 MCSR 82 (2015) (declining to investigate Department of Correction's provisional promotion to Captain). For example, after learning that the BPD had hired candidates and began placing them into the Police Academy without having informed numerous bypassed candidates of the right to challenge their non-selection by appeal to the Commission, the Commission recently did initiate a thorough review of the BPD's 2015 hiring cycle, which resulted in the entry of numerous orders to the BPD to implement changes, both retrospective and prospective, to rectify the violations found by the Commission with the BPD's bypass procedures, with which the BPD has complied. *See Investigation Re: Boston Police Dep't. and Due Process of Non-Selected Candidates*, 29 MCSR 367, *supplemental decision*, 29 MCSR 397 (2016). *See also In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield*, 24 MCSR 627 (2011) (investigation into hiring spearheaded by Deputy Fire Chief which resulted in his son's appointment and required reconsideration of numerous candidates through a new hiring cycle conducted by outsiders not connected with the Springfield Fire Department); *In Re: 2011 Review and Selection of Permanent Intermittent Police Officers By the Town of Oxford*, CSC No. I-11-280 (2011) (investigation of alleged nepotism in hiring Selectmen's relatives required reconsideration of all 19 candidates through an new independent process); *Dumont* v. *City of Methuen*, 22 MCSR 391 (2009), *findings and orders after investigation*, CSC No. I-09-290 (2011) (rescinding hiring process and reconsideration of all candidates after Police Chief had participated in selection of her niece).

After careful consideration, I have determined that an investigation is not warranted here.

CONCLUSION

In sum, for the reasons stated herein, North Attleborough's Motion to Dismiss/Motion for Summary Decision is hereby ***granted*** and the Section 2(b) appeal of the Appellant, Ronald Burns, in Docket No. E-18-207, is ***dismissed.***

In response to the Appellant's request for an investigation under Section 2(a), the parties are informed that, after due consideration, the Commission will not take further action to open the requested investigation.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Joseph Sulman, Esq.
391 Totten Pond Road - Suite 402
Waltham, MA 02451

Wendy H. Chu, Esq.
Valerio Dominello & Hillman, LLC
One University Avenue, Suite 300B
Westwood, MA 02090

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TIMOTHY CALLINAN

v.

TOWN OF WINTHROP

E-19-057

April 11, 2019
Christopher C. Bowman, Chairman

***Provisional Employment-Discontinuance of a Position-Promotional List to Police Sergeant-Pending Litigation*—**Commission Chairman Christopher C. Bowman entered an order dismissing nisi an appeal from a Winthrop police officer seeking a promotional appointment to sergeant in a position currently filled provisionally although an eligible list exists. In this case, the Superior Court had intervened in the hiring process as part of an award of $2 million to a Winthrop female police officer for discrimination and had ordered Winthrop to give the Plaintiff six months to study for the sergeant's promotional exam while retaining the provisional sergeant. Chairman Bowman's order of dismissal carries an effective date in July with the dismissal subject to revocation if the Town has not made the promotional appointments by then.

ORDER OF DISMISSAL EFFECTIVE JULY 11, 2019

On June 4, 2018, three (3) Winthrop police officers (Timothy Callinan, Giulio Bonavita & Shawn McCarthy) filed appeals with the Civil Service Commission (Commission) stating that " … a promotional list for the position of Sergeant has been certified for over thirty days with more than three names of persons eligible / willing to accept the appointment. The Town of Winthrop refuses to discontinue a Provisional Sergeant occupying a position for a Sergeant."

2. On July 10, 2018, I held a pre-hearing conference which was attended by the Appellants, counsel for the Appellants and counsel for the Town.

3. As part of the pre-hearing conference, counsel for the Town stated that the position in question (provisional sergeant) is currently occupied by a Winthrop Police Officer who recently was awarded just over $2.0 million after a jury trial in Suffolk Superior Court related to a discrimination complaint.

4. Also, according to counsel for the Town, the police officer, after receiving the above-referenced judgment, filed a motion in Superior Court seeking, in part, to allow her time to take a make-up promotional examination for sergeant, which she did not take in April 2018. According to counsel for the Town, the police officer argued to the Court that she was unable to prepare for the examination due to her pending litigation.

5. The Town and the police officer subsequently entered into an agreement, that was accepted and ordered by the Court, in which the police officer was granted six (6) months' exam preparation time and then allowed to take a make-up examination. In the interim, the Town was enjoined from removing the police officer from her position as provisional sergeant until October 30, 2018.

6. Counsel for the police officers argued that the order was not consistent with the civil service law, which requires the rescission of a provisional promotion within 30 days of the establishment of an eligible list.

7. I advised all parties that the Commission was unlikely to take any action that is contrary to a Superior Court order and suggested that the proper venue, if any, for the police officers to contest the Superior Court order may be the Superior Court.

8. The Town submitted a motion to dismiss and the police officers submitted a reply / opposition.

9. On September 27, 2018, the Commission issued a decision (*Callinan et al* v. *Winthrop*, 31 MCSR 297 (2018)), dismissing the Appellants' appeals, concluding in part that: "the Superior Court, acting in the context of discrimination litigation, ordered additional relief that it deemed reasonable and proper to a victim of discrimination. Importantly, that relief is fairly limited and set to expire within weeks. In that context, relief by the Commission is not warranted here."

10. On March 14, 2019, the Appellant, Michael Callinan (Mr. Callinan), filed this subsequent appeal with the Commission, stating in part: "As of today, there still has been NO ACTION by the Town of Winthrop to promote from the eligible list which was created on May 2nd, 2018. The few weeks until expiration has now turned into several months. The EXPIRED relief that was deemed to be 'fairly limited" has been the result of numerous adverse effects, including issued with the appeals process, candidate scoring complaints, and unfair prejudice toward examinees who have done nothing but abide by the laws of MGL c. 31, which the Commission has primary jurisdiction over."

11. On April 2, 2019, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Callinan and counsel for the Town.

12. According to the parties, a new eligible list for Sergeant was established on April 1, 2019. Mr. Callinan is still ranked first on this revised eligible list.

13. According to the Town, a Certification will be generated from this eligible list to fill two (2) sergeant vacancies; the candidates will have ten (10) says to sign the Certification as willing to accept appointment; and the Town will complete a review process to make promotional appointments from those candidates within the statutory 2N+1 formula.

For all of the above reasons, this appeal is ***dismissed nisi***, to become effective July 11, 2019. In the event that the Town has not made promotional appointments on or before July 11, 2019, the Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than July 11, 2019, seeking to reinstate the Appellant's appeal for further consideration. In the absence of a Motion to Revoke, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, on July 11, 2019.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Timothy Callinan
[Address redacted]

Howard Greenspan, Esq.
200 Broadway
Lynnfield, MA 01940

* * * * * *

HENRY B. DIAZ

v.

CITY OF SOMERVILLE

D1-17-259

April 11, 2019
Christopher C. Bowman, Commissioner

Disciplinary Action-Discharge of Somerville Police Officer-Conduct Unbecoming-Beating Up a Civilian While Off Duty-Lying-Gay Slur-De Novo Commission Jurisdiction-Progressive Discipline—A unanimous Commission affirmed the discharge of a previously undisciplined Somerville police officer who pummeled a private citizen on the street who was not posing a physical threat to him, and then lied about the reasons for this misconduct.

DECISION

On December 27, 2017, the Appellant, Henry Diaz (Mr. Diaz), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to discharge him from the position of police officer from the City's Police Department (Department) for conduct unbecoming a police officer and untruthfulness.

I held a pre-hearing conference at the offices of the Commission on January 23, 2018 and three (3) days of hearing were held at the same location on June 11th, July 13th and August 17th, 2018.[1] [2] A digital recording was created of the hearing and both parties were provided with a CD of the proceeding.[3]

Following the close of the hearing, proposed decisions were submitted by both parties on October 5, 2018.

FINDINGS OF FACT

Based upon the documents admitted into evidence (Exhibits 1-17 & A-M) and the testimony of:

Called by the City:

- Lt. Timothy Mitsakis, Somerville Police Department;
- Police Chief David Fallon, Somerville Police Department;
- AA, Civilian witness;
- Lt. Michael Kenneally, Somerville Police Department;

Called by Mr. Diaz:

- KT, Civilian Witness;
- Captain Dan Cotter, Somerville Police Department;
- Deputy Chief Stephen Carrabino, Somerville Police Department;
- Henry Diaz, Appellant.

I make the following findings of fact:

1. Mr. Diaz is a resident of Somerville, MA. He has lived in Somerville, MA since moving to the United States from the Dominican Republic in 1986 when he was seven or eight years old. He graduated from Somerville High School and received a Bachelor's degree from Curry College in criminal justice. (Testimony of Appellant)

2. Mr. Diaz served in the United States Army for eight (8) years with three (3) years of active duty from 2003-2006. He was deployed and served in Iraq in combat in 2004/2005. He was honorably discharged from active duty at which time he served for two (2) years in the U.S. Army Reserve in the intelligence unit out of Fort Devens. Mr. Diaz was honorably discharged from the U.S. Army Reserve, and completed the remainder of the eight years in the "ready reserve list", a list from which you are selected first if there is a draft. (Testimony of Appellant)

3. In February 2008, Mr. Diaz was appointed as a police officer for the City of Somerville Police Department. Mr. Diaz has no prior discipline in his record. (Stipulated Facts)

4. Mayor Joseph A. Curtatone is the Appointing Authority for the City of Somerville. (Exhibit 2)

June 30, 2017 Incident

5. Sometime between 1:41 A.M. and 3:00 A.M.[4] on June 30, 2017, Mr. Diaz, while off-duty from his position as a Somerville Police Officer, was driving down Chelsea Street in East Boston with his friend KT in the passenger seat of his vehicle. (Testimony of Appellant and KT)

6. Mr. Diaz and KT had just left a bar in Maverick Square. (Testimony of Appellant and KT)

1. The full hearing was initially scheduled to be held on March 16, 2018, but was continued due to an emergency closure of the State Office building.

2. 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.

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, these CDs should be used to transcribe the hearing.

4. The parties do not agree on the exact time that this incident occurred. The City, apparently relying on a security video from a local restaurant, puts the beginning time at 1:41 A.M. while the Appellant puts the time at approximately 3:00 A.M. Based on the time that two (2) civilians filed a police report with the Boston Police Department regarding this incident, it appears that the security video time may have been off by one (1) hour, putting the correct start time of the incident at 2:41 A.M. Ultimately, however, the exact time is not relevant to whether Mr. Diaz engaged in misconduct or whether there was just cause for the City to terminate his employment.

7. While at the bar, Mr. Diaz had consumed three (3), sixteen (16) ounce beers from 11:45 P.M. to 2:00 A.M. (Testimony of Appellant)

8. Mr. Diaz was driving at a low rate of speed. (Exhibit 8)

9. Mr. Diaz and KT were searching for a place to eat and their attention was drawn to a restaurant on their left. (Testimony of KT)

10. At some point, KT, the passenger in Mr. Diaz's vehicle, saw a male civilian (DB), walk in front of Mr. Diaz's moving vehicle. KT told Mr. Diaz to "stop". (Testimony of KT)

11. Mr. Diaz's vehicle came to a sudden stop, avoiding any contact with the civilian who was crossing the street. (Exhibit 8)

12. DB approached the driver's side of Mr. Diaz's vehicle and they exchanged words back and forth. DB, speaking in Spanish, referred to Mr. Diaz as a "maricon", a derogatory term used to describe gay men. Mr. Diaz then referred to DB as a "maricon." (Testimony of Appellant)

13. DB began to walk away from Mr. Diaz's vehicle, but then turned and pointed back towards Mr. Diaz as the two men appear to exchange words. DB then walked back to the driver's side of Mr. Diaz's vehicle and continued speaking with Mr. Diaz. While this was occurring, AA, a male friend of DB, walked toward Mr. Diaz's vehicle and stood a step or two behind DB. (Exhibit 8)

14. While there is no audio to accompany the video submitted into evidence at the Commission hearing, the video plainly shows that AA, both at this juncture and throughout the entire incident in question here, is an agitator. He continuously jabs his finger in the air and darts back and forth across the street akin to someone in a boxing ring. (Exhibit 8)

15. DB and AA eventually walk backwards toward the sidewalk on the opposite side of the street and Mr. Diaz begins to drive away. (Exhibit 8)

16. AA can then be seen in the video jabbing his finger in the air and apparently yelling something toward Mr. Diaz. Mr. Diaz then stopped and got out of his vehicle. (Exhibit 8)

17. After Mr. Diaz got out of his vehicle, AA made a reference to a gun. (Testimony of KT)[5]

18. DB then walked quickly across the street (behind Mr. Diaz's vehicle) and walked toward his own parked vehicle (parked nose-in) which was approximately 2 or 3 car lengths behind Mr. Diaz's vehicle, which was now stopped in the road. (Exhibit 8)

19. Mr. Diaz followed DB to his (DB's) car. Eventually, Mr. Diaz and DB are standing behind DB's car, where the car's trunk is slightly ajar. (Exhibit 8)

20. During this same time period, KT, the passenger in Mr. Diaz's vehicle, got out of the passenger side of Mr. Diaz's vehicle and walked over to where Mr. Diaz and DB were standing (behind DB's car). (Exhibit 8 and Testimony of KT)

21. AA, DB's friend, also walks over to the same location. (Exhibit 8)

22. While KT was walking over to where Mr. Diaz and DB were standing, KT yelled out that Mr. Diaz was a Somerville Police Officer. (Testimony of KT)

23. For just over one (1) minute, the four (4) men (Mr. Diaz, KT, DB and AA) are all located just behind or near DB's car. (Exhibit 8)

24. During this approximately one (1) minute period:

A. DB slightly opens and closes the trunk of his car. (Testimony of Appellant and Exhibit 8)

B. There is no gun visible in DB's car and Mr. Diaz concluded that DB did not actually have a gun in his car. (Testimony of Appellant)

C. AA is jabbing his finger in the air, apparently yelling something at Mr. Diaz. (Exhibit 8)

D. Mr. Diaz walked toward AA and exchanged words with him. (Exhibit 8)

E. KT got in between Mr. Diaz and AA. (Exhibit 8)

F. Mr. Diaz and DB "belly-bump" each other near the back of DB's car. (Testimony of Appellant and Exhibit 8)

25. When KT stated that Mr. Diaz was a Somerville Police Officer, AA said words to the effect: "Go back to Somerville you corrupt cop; this is little Colombia; we run this place" to which Mr. Diaz replied with words to the effect: "No, this is America, if you want to be pulling shit like this, go back to Colombia." (Testimony of Appellant)

26. After approximately one (1) minute, the four men disburse. KT leads Mr. Diaz back to his vehicle; DB walks back across the street; and AA walks back and forth across the street, eventually standing several feet behind Mr. Diaz's vehicle. While they are disbursing, Mr. Diaz and DB can be seen jabbing their fingers in the air, apparently yelling at each other. At one point, DB appears to raise his middle finger at Mr. Diaz, who is now standing next to the driver's side of his car. (Exhibit 8)

27. Eventually, Mr. Diaz is standing next to the opened driver's side door of his vehicle and DB is across the street, leaning against a truck that is parallel-parked on the side of the street. The two men are facing each other and Mr. Diaz can be seen jabbing his finger toward DB. (Exhibit 8)

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5. There is divergent testimony on this point. AA states that there was never any reference to a gun, but, rather, to a "bat or something". Mr. Diaz testified that AA stated "get the gun" *before* he (Mr. Diaz) exited his vehicle. KT, the passenger, testified that AA made a reference to a gun *after* Mr. Diaz stepped out of his vehicle. Ultimately, after carefully listening to the testimony (twice) of the three (3) relevant witnesses and reviewing their prior statements on this matter, I credited the testimony of KT. It is the most plausible scenario and is consistent with what can be seen on the video.

28. At the 1:45:35 mark in the video, Mr. Diaz takes six (6) or seven (7) quick steps across the street, stands in front of DB and punches DB in the head and side, causing DB to fall backwards onto the ground, at which time Mr. Diaz leans down and punches DB in the head three (3) additional times. (Exhibit 8)

29. The video does not show DB raising his arms or hands before Mr. Diaz initially struck him. (Exhibit 8)

30. The video shows that, while on the ground, DB was in a defensive posture, trying to avoid incoming punches from Mr. Diaz. (Exhibit 8)

31. Mr. Diaz then walks toward AA who begins jumping and skipping around the street, trying to avoid Mr. Diaz. (Exhibit 8)

32. Mr. Diaz eventually starts walking back to the driver's side of his truck. DB has gotten up off the ground at this point and can be seen stumbling toward Mr. Diaz. Mr. Diaz appears to get in his truck and, although it cannot be seen on video, it appears that DB walks in front of Mr. Diaz's truck. (Exhibit 8)

33. Mr. Diaz drove his truck away with KT in the passenger side. (Exhibit 8)[6]

34. At or around 3:19 A.M., DB and AA went to the District 7 Boston police station to report what had happened. (Exhibit 4 and Testimony of AA)

35. The Boston police officer who completed the incident report wrote in part that he " … could observe a large bump on [DB]'s forehead which he [DB] states was caused by the punch from the suspect. He also had a scratch on the back of his neck as well as a scrape on his left forearm caused by the fall after he was hit." (Exhibits 4 & B)

36. On July 7, 2017, the Boston Police filed a criminal complaint against Mr. Diaz for assault and battery. (Exhibit 4)

37. On July 11, 2017, Mr. Diaz was placed on paid administrative leave. (Testimony of Carabino)

38. On July 28, 2017, a Clerk Magistrate hearing was held. Neither DB or AA appeared. The Magistrate denied the complaint without prejudice and told the Boston Police to reapply if they were able to convince DB or AA to attend a hearing. (Exhibit H)

39. Lt. Mitsakis of the Somerville Police Department completed an internal investigation of the June 30th incident. (Testimony of Mitsakis and Exhibit 3)

40. The investigation included a review of the Boston Police documents, video of the incident and interviews with DB, AA, KT and Mr. Diaz. (Testimony of Mitsakis and Exhibit 3)

41. During the interview with Mr. Diaz, Mr. Diaz stated that, at the time he struck DB, he was in fear for his life, DB was going after him and he struck DB out of fear because he thought DB was going to hit him. (Exhibit 9 and Testimony of Mitsakis)

42. Specifically, Mr. Diaz stated during his interview with Lt. Mitsakis that:

> "Male 1 after he belly butts me, he kind of, you know, runs off, keeps on taunting me, you know. I walk towards him, we're arguing back and forth and talking to each other, you know. He's taunting me, taunting me, getting close to me. I remember putting my arms up to get him away from me. He comes back at me, you know. At this point I felt I was in imminent danger and I struck him because I felt that he was going to strike me. I put my hands up, he kept coming at me. He did that maybe about once or so. When I noticed that wasn't enough, I struck. I struck him. He went to the ground. I struck him a couple more times. KT came over, grabbed me and as I'm walking away, the second male starts instigating things, starts walking behind me."

(Exhibit 9)

43. After providing Mr. Diaz with notice, a local appointing authority hearing was held on November 2, 2017 by a hearing officer designated by the City's Mayor. Mr. Diaz did not testify. (Stipulated Facts)

44. Prior to the local hearing, Mr. Diaz's union representative contacted him and asked Mr. Diaz if he would be interested in discussing a settlement agreement with the Town in which Mr. Diaz would accept some form of punishment short of termination. Mr. Diaz said he wasn't interested because "he didn't do anything wrong." (Testimony of Appellant)

45. Via letter dated December 13, 2017, the Mayor adopted the findings of the hearing officer and terminated Mr. Diaz from his position as a police officer. (Exhibit 2)

46. The Hearing Officer found that:

- " … Officer Diaz engaged in conduct unbecoming an officer when he punched [DB] four times, without warning or provocation, on June 30, 2017. The video recorded indisputable evidence of that happened during the incident. Nothing in the video supports Officer Diaz's claim that he felt in imminent danger before he assaulted [DB]. Rather the video shows Officer Diaz to be the aggressor striding forcefully across the street towards [DB] with a clear purpose to attack [DB].
- Officer Diaz's "cop instincts" required that Officer Diaz avoid unnecessary conflict, maintain courageous calm in the face of danger and preserve public peace. Officer Diaz could have avoided any escalation of the altercation with [DB] at any time by simply driving away. Instead, Officer Diaz continued to increase the level of conflict by aggressively approaching, in a threatening manner, both [DB] and [AA].. Officer Diaz's remedy was to call 911, not continue to engage and escalate the animosity.
- Officer Diaz's behavior throughout the incident, especially since [KT] made [DB], [AA] and nearby bystanders aware that Diaz was

6. I do not credit the testimony of the Appellant and KT that DB came around to driver's side of Mr. Diaz's truck and punched Mr. Diaz before or while Mr. Diaz was driving away. This alleged incident, which would have been out of sight of the video, simply didn't ring true to me. Even, however, if true, it could not justify the four (4) punches thrown by Mr. Diaz, as that interaction occurred well before this alleged altercation at the driver's side window.

a Somerville Police Officer, constituted immoral, improper, disorderly, and intemperate personal conduct which brought discredit upon Officer Diaz himself, upon fellow officers, and upon the Somerville Police Department.

- Officer Diaz further engaged in conduct unbecoming an officer when he made a derogatory comment to [DB] to the affect that "in this country we follow the laws" which was offensive to both [DB] and [AA]. Officer Diaz's behavior violated his duty to treat every individual with civility, courtesy, sensitivity, and respect.

- I find that Officer Diaz was untruthful during his interview by Lt. Mitsakis. Officer Diaz attempted to justify his unbecoming behavior by claiming that he was acting in self-defense or was reacting to the immediate threat of a gun. The video tape provided positive proof that Officer Diaz was the aggressor when he punched [DB]. Officer Diaz was not acting in self-defense to protect himself against an immediate threat but was clearly on the attack. Officer Diaz contradicted himself during his interview by Lt. Mitsakis when Officer Diaz admitted that he did not believe that [DB] or [AA] actually had a gun.

- Although Officer Diaz has no prior discipline in his record, the brutality of Officer Diaz's attack upon [DB] at a time when Officer Diaz was not in danger and should have removed himself from conflict, along with the totality of Officer Diaz's conduct during the incident, coupled with Officer Diaz's untruthfulness in answering Lt. Mitsakis' questions, justify termination of Officer Diaz's employment."

(Exhibit 2)

47. The local hearing officer also completed a review of all disciplinary matters which Mr. Diaz argued showed that he was being subject to disparate treatment and conclude that the matters were not similar. (Exhibit 2)

APPLICABLE CIVIL SERVICE 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 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); *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); *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 ma de 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

By a preponderance of the evidence, the City has shown that Mr. Diaz engaged in substantial misconduct which adversely affects the public interest. Based upon review of the clear surveillance video of the incident in question, and evidence presented during the course of the hearing, Mr. Diaz did not act in self-defense when striking DB repeatedly on June 30, 2017. Rather, the evidence shows Mr. Diaz was the aggressor during this incident.

There is case law pointing out that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens. Citing four previous decisions of this court, as "but a sample" of the law on the obligations of police officers, the Appeals Court has said:

> "These cases teach a simple lesson. Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment 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. of Boston v. *Civil Serv. Comm'n*., 22 Mass. App. Ct. 364, 371 (1986). Consistent with these observations, the Appeals Court has upheld the discharge of police officers who behaved inappropriately while off duty. *See Police Comm'r. of Boston* v. *Civil Serv. Comm'n*., 39 Mass. App. Ct. 594, 601 (1996) (officer lost his firearm while intoxicated and verbally abused other officers); *McIsaac* v. *Civil Serv. Comm'n.,* 38 Mass. App. Ct. 473, 475, 476 (1995) (officer negligently handled firearm

while intoxicated and verbally abused other officers). *See also Commissioners of Civil Serv.* v. *Municipal Court of the Brighton Dist*., 369 Mass. 166, 170-171, 338 (1975), cert. denied sub nom. *Patuto* v. *Commissioners of Civil Serv*., 429 U.S. 845, 97 S.Ct. 125, 50 L.Ed.2d 116 (1976) (upholding discharge of off-duty police officer who accompanied others while they uttered forged money orders).

The video does not support Mr. Diaz's claim that he felt imminent danger before he struck DB. Rather, the video shows Mr. Diaz to be the aggressor by striding forcefully across the street towards DB with a clear purpose to strike DB. At that point, DB had withdrawn from the conflict.

More generally, Mr. Diaz failed repeatedly to de-escalate what began as a rather minor and routine incident. Mr. Diaz stopped his truck and exited the vehicle to continue to engage in an altercation with a civilian beginning when he jaywalked. While DB and Mr. Diaz appeared to have a verbal exchange of words, this does not justify the escalation that occurred, including Mr. Diaz exiting his vehicle. As referenced in the findings, Mr. Diaz exited his vehicle before there was any reference to a gun. Instead of getting out of his vehicle, he had the opportunity to leave the scene and avoid the continued interaction. He admits he was angry during the incident and could not explain why he did not stay in his car and drive away other than it being a bad mistake.

The City has also shown that Mr. Diaz was untruthful. During his recorded interview as part of the internal affairs investigation, he initially told the interviewer that he hit [DB] in self- defense as he felt in imminent danger. He described in detail how he felt he was about to be struck and had no choice but to hit [DB]. During his testimony before the Commission, Mr. Diaz acknowledged that the video does not support his prior statements to investigators. Specifically, he acknowledged during his testimony before the Commission that any alleged raising of the hands by DB would have occurred after Mr. Diaz had repeatedly struck DB. Mr. Diaz's argument that simply remembering things differently does not constitute untruthfulness is not persuasive for two reasons. First, he chose not to testify at the local hearing and offer that explanation at the time the City was deciding whether there was just cause to terminate him as a police officer. Second, his explanation is not plausible. This is not a case of simply failing to remember a minor detail (i.e.—what words were exchanged, how many times he struck DB, etc.). Rather, he stated to investigators that he was in fear of DB and that he continued to strike DB until he was no longer in fear. Mr. Diaz's own testimony, the video evidence and common sense show that this *core argument* by Mr. Diaz (rather than a minor detail) was simply not true. It cannot be attributed to an innocent lapse of memory.

The City did not show, by a preponderance of the evidence, that Mr. Diaz made a derogatory comment to [DB] to the affect that "in this country we follow the laws" which was offensive to both [DB] and [AA] and, according to the City, constituted misconduct. Rather, I credit the testimony of Mr. Diaz that AA referred to him as a corrupt cop and made references to him [AA] controlling what he called "little Colombia". In that context, I don't consider Mr. Diaz's response to constitute misconduct. As part of this de novo hearing, however, I do find Mr. Diaz's use of a derogatory term regarding gay men as conduct unbecoming a police officer.

Having determined that Mr. Diaz did engage in the alleged misconduct, I must determine whether the level of discipline (termination) 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).

My findings do not differ significantly from those reported by the City. Similar to the City, I have found that Mr. Diaz engaged in conduct unbecoming an officer and untruthfulness.

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). 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). Therefore, "a police officer that has lost his credibility can no longer effectively perform the duties of the position," *Pearson* v. *Whitman*, 16 MCSR 46, 50 (2003). Consequently, the discharges of police officers based upon their

dishonesty have often been upheld by the Commission. The following cases are illustrative:

In *Royston* v. *Billerica*, the Commission upheld the discharge of a police officer who "knowingly lied to the Chief during a departmental investigation to cover up" his own misconduct.

In *Garrett* v. *Haverhill*, the Commission found that there was reasonable justification for the discharge of a police officer who repeatedly presented false testimony during the departmental investigation of the officer's misconduct.

In *Meaney* v. *Wobum*, 18 MCSR 129, 133-35 (2005), the discharge of a police officer was upheld based, in part, on the officer's consistent dishonesty and "selective memory" during the departmental investigation of that officer's misconduct.

In *Pearson* v. *Whitman*, the Appointing Authority's discharge of a police officer who had "a problem with telling the truth" was upheld.

In *Eisenbeiser* v. *West Springfield*, 7 MCSR 99, 104, the discharge of a police officer was upheld based on, inter alia, the officer's dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement.

And, in *Desharnias* v. *City of Westfield*, 23 MCSR 418 (2010), a police officer's discharge was upheld based primarily on the officer's dishonesty about a relatively minor infraction that occurred on his shift.

During his testimony, Mr. Diaz suggested that past negative interactions that he had with now Deputy-Chief Carrabino may have played a role in the City's decision to terminate him here. The evidence simply doesn't support his argument that some relatively minor negative interactions that occurred years ago played any role in the City's decision here.

Mr. Diaz, citing several employees referenced in Exhibit 14, argues that they either received less discipline for similar offenses / rules violations or reached a settlement with the City that resulted in separation from employment to avoid termination. As stated in the findings, Mr. Diaz himself ruled out any type of settlement agreement when the issue was broached by his union representative. I carefully reviewed all of the documents in Exhibit 14 and the parties' arguments regarding whether the actions or inactions by the City showed that Mr. Diaz was subject to disparate treatment. In each case, I have found that the City has distinguished those matters from the instant appeal, either because the misconduct was not as serious, the employees are no longer employed as police officers or the matters were subject to settlement agreements.

Further, even if the City imposed less discipline in the past for similar offenses, which does not appear to be the case here, the Supreme Judicial Court's decision in *City of Boston* v. *Boston Police Patrolmen's Association*, 443 Mass. 813 (2005) would still tend to argue against Mr. Diaz's reinstatement. In that case, a Boston police officer had a number of disciplinary charges lodged against him including one or more for untruthfulness. He was terminated from his position by the Department and, subject to the collective bargaining agreement, he sought an arbitrator's review. The arbitrator found that some of the charges against the police officer (i.e.—excessive or improper force) could not be substantiated while others (knowing[ly] enter[ing] inaccurate, false and incomplete information in a department report and making false criminal allegations against a private citizen) were substantiated.

In regard to the issue of disparate treatment, the SJC described a portion of the arbitrator's decision as follows:

> "The arbitrator determined that termination was too harsh a sanction for DiSciullo, in light of evidence offered by the association that, under the department's current and immediate past leadership, police officers found to have engaged in similar or more serious misconduct had received penalties short of termination. She reasoned that suspending DiScuillo without pay for one full year would sufficiently 'impart the message that officers must be held to the highest standards of integrity and professionalism.'"

City of Boston v. *Boston Police Patrolmen's Association, ibid*., at p. 817.

Ultimately, the SJC vacated the arbitrator's decision, concluding that it would be repugnant to public policy requiring that police officers be truthful and obey the laws in the performance of their official duties. As part of that decision, the SJC stated in relevant part:

> " … That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in those cases is not before us. In any event, there is no suggestion that the reasons for DiSciullo's termination were pretexts or motivated by improper considerations. Nor do we credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming such leniency occurred) cannot lead a police officer to commit reprehensible actions in the expectation that he will receive a light punishment."

City of Boston v. *Boston Police Patrolmen's Association, ibid*., at p. 822, footnote 9.

Finally, I considered that Mr. Diaz has no prior discipline in his record. While the Commission has consistently stated that progressive discipline is consistent with the requirement of basic merit principles, the seriousness of the misconduct here, which includes pummeling a private citizen who was not posing a physical threat to Mr. Diaz, and then lying about the reasons for this misconduct, warrant termination, even in the absence of prior discipline.

CONCLUSION

For all of the above reasons, Mr. Diaz's appeal under Docket No. D-17-259 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Stephen C. Pfaff, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Shannon Phillips, Esq.
Assistant City Solicitor
City Hall—93 Highland Avenue
Somerville, MA 02143

* * * * * *

RICHARD LaBELLE

v.

SPRINGFIELD POLICE DEPARTMENT

D-18-024

April 11, 2019
Christopher C. Bowman, Commissioner

***Disciplinary Action-One Day Suspension of a Springfield Police Captain-Off Duty Misconduct-On Line Courtesy and Respect toward Civilians*—**The Commission affirmed the one-day suspension of a Springfield police captain found to have posted offensive and boorish comments on-line vilifying citizens in the context of an originally political discussion. Although the discussion took place while the Appellant was off-duty and related to matters of public concern, the Appellant's harsh language flew in the face of his duty as a police officer to treat all citizens with respect and courtesy. The Commission had previously affirmed the promotional bypass of this police officer in 2008 based on a 2001 motor-vehicle accident that resulted in the death of two children, for which the Appellant was charged with motor-vehicle homicide but ultimately convicted only of negligent operation of a motor vehicle. The bypass was also affirmed because the Appellant's night-shift position in the Records division gave him little contact with the public or other departmental personnel.

DECISION

On February 9, 2018, the Appellant, Richard LaBelle (Captain LaBelle), pursuant to the provisions of G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Respondent, the City of Springfield (City)'s Police Department to suspend him for one (1) day from his position as Police Captain for violating Department Rules related to Respectful Treatment of the General Public. On March 28, 2018, I held a pre-hearing conference at the Springfield State Building in Springfield, MA. I held a full hearing at the same location on June 13, 2018.[1] As no written notice was received from either party, the hearing was declared private. A CD was made of the hearing.[2]

FINDINGS OF FACT

Thirteen (13) Exhibits were entered into evidence. Based upon these exhibits, stipulated facts, and the testimony of:

Called by the Springfield Police Department:

- Commissioner John Barbieri, Springfield Police Department[3];
- Sgt. Monique McCoy, Springfield Police Department;
- C.S., civilian, Springfield, MA;

Called by Captain LaBelle:

- Richard LaBelle, 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 City of Springfield does not have a Social Media Policy that is applicable to members of the Police Department. (Testimony of Commissioner Barbieri)

2. The Department does have Rules and Regulations applicable to all members of the Department. (Testimony of Commissioner Barbieri)

3. Rule 29 provides, in part: "RESPECTFUL TREATMENT: Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates, and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate a particular race or ethnic group except when necessary in police reports or testimony." (Exhibit #13)

4. Captain LaBelle has been employed by the Springfield Police Department for approximately twenty-one (21) years and has been a Captain since 2017. (Testimony of Captain LaBelle)

5. There was no prior discipline of Captain LaBelle. (Stipulation of the parties)

6. Captain LaBelle had a Facebook account on the date of the incident, September 25, 2017. (Testimony of Captain LaBelle)

7. The profile for the account indicated that Captain LaBelle "Works at City of Springfield, MA", but did not indicate that he was a police officer. (Exhibit #11, Testimony of Captain LaBelle)

1. The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq*., apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

2. If there is a judicial appeal of this decision, the plaintiff 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. Commissioner Barbieri has subsequently retired from the Springfield Police Department.

8. MassLive is a media outlet in the Springfield area with a newspaper, a website and a Facebook page where it publishes news articles. (Testimony of C.S. and Captain LaBelle)

9. On the morning of September 25, 2017, MassLive published an article concerning New England Patriots players and the team owner kneeling during the national anthem before the game. (Testimony of C.S.)

10. In the comments section of the article, J.S. posted a cartoon on the MassLive Facebook page. The cartoon depicted a white man wearing a white T-shirt with an American flag logo saying, "That's offensive!" as he points at a uniformed, kneeling football player meant to be Colin Kaepernick, while the man's back is to an unarmed black man (as written on his shirt) sprawled face down with blood pooling around him. (Exhibit #11)

11. C.S. saw the cartoon post on Facebook early that morning before she went to work and she added her own post to the comments, "EXACTLY!!!". (Exhibit #11, Testimony of C.S.)

12. Captain LaBelle also saw the cartoon post in the comments section of the Patriots article on Facebook that morning. At the time, Captain LaBelle was off-duty and at home. Captain LaBelle posted a reply that said, "Exactly, shows the world what a lying bigot you are." (Exhibit #11, Testimony of Captain LaBelle)

13. After Captain LaBelle posted his comment on the MassLive Facebook page, C.S. got an anonymous call telling her that Richard LaBelle was a police officer who was high up in the Springfield Police Department and that she should be careful. (Testimony of C.S.)

14. After the call, C.S. again posted to the Facebook page, "officer.... I'm not sure who you're calling a lying bigot but try and understand why these players are silently protesting, just think about it." (Exhibit #11)

15. Captain Labelle's next post to the Facebook page said, "They are pushing their dishonest hateful political agenda by slandering other Americans … you're the one who needs to do some thinking." (Exhibit #11)

16. J.S. then commented, "Richard thank you. I see we are in agreement about Trump and his sheep." (Exhibit #11)

17. There were also other posts to the comments section added by other individuals throughout the back-and-forth listed here, but they do not have a bearing on the exchange among J.S., C.S. and Captain LaBelle. (Exhibit #11)

18. C.S. added another post, saying, "Richard I have informed the municipality you work for since you have violated their social media policy by spreading slander." (Exhibit #11)

19. Captain LaBelle then posted, "Got it [C.S.] you're a liar and morally reprehensible." (Exhibit #11, Testimony of Captain LaBelle)

20. He then added another post directed to J.S., "Childish response but not surprising from someone who couldn't keep a job bagging groceries…lol sheep, you are the one out to pasture." (Exhibit #11)

21. Captain LaBelle indicated that "bagging groceries" was a reference to J.S.'s Facebook profile listing him as a former service clerk. (Testimony of Captain LaBelle)

22. Later that afternoon during her break at work, C.S. called the Police Department's Internal Investigation Unit to complain about Captain LaBelle's Facebook posts. (Testimony of Sgt. McCoy, Exhibit #6)

23. After talking to C.S., Sgt. McCoy printed copies of the Facebook posts and forwarded them along with her report to then-Commissioner Barbieri, who was the Appointing Authority. (Exhibit #6, Testimony of Commissioner Barbieri and Sgt. McCoy)

24. According to the department's procedures, Commissioner Barbieri assigned the complaint to then-Deputy Chief Cheryl Clapprood on September 27, 2017, for investigation. (Testimony of Commissioner Barbieri, Exhibit #1)

25. As part of her investigation, then-Deputy Chief Clapprood spoke to C.S., and she had Captain Labelle submit a report concerning his postings. (Exhibit #4, Testimony of C.S.)

26. On October 10, 2017, then-Deputy Chief Clapprood concluded her investigation with a report to the Commissioner that recommended no further action. She found no violation of any rules or regulations of the department because Captain LaBelle did not use or infer his status as a police supervisor in his posts. She did not find that Captain LaBelle used his position, status or employment, nor did he threaten or try to intimidate anyone by his posts. (Exhibit #4)

27. The next step in the complaint process was review by the Community Police Hearing Board made up of civilians, which was established by the Mayor and the Law Department. (Testimony of Commissioner Barbieri)

28. On November 8, 2017, two members of the Community Police Hearing Board did that review of the investigation, and they recommended the issuance of a charge letter and a hearing before the full Board to get more information. (Exhibit #2)

29. On November 9, 2017, then-Deputy Chief Clapprood reiterated that she did not find any violation by Captain LaBelle of the department's rules or regulations but acquiesced to the hearing request. (Exhibit #3)

30. On the same date, then-Commissioner Barbieri forwarded the complaint on for a hearing before the Community Police Hearing Board. (Exhibit #3)

31. On November 10, 2017, Sgt. McCoy received additional information from C.S., and she filed a supplemental report containing the last two Facebook posts made by Captain LaBelle after

C.S. advised him that she was filing a complaint. (Exhibit #7, Testimony of Sgt. McCoy)

32. On November 14, 2017, the Commissioner issued a Notice of Inter-Departmental Charges to Captain LaBelle, containing five charges. (Exhibit #8)

33. On January 24, 2018, the Community Police Hearing Board held a hearing on the charges and sustained only the charge under Rule 29 (Respectful Treatment) by a vote of three to two. (Exhibit #9, #10)

34. Based upon the finding of the Community Police Hearing Board and the recommendation of the City's Labor Relations attorney, Commissioner Barbieri suspended Captain Labelle for one-day without pay by a notice dated January 30, 2018, received by Captain LaBelle on February 1, 2018. The notice specified that the suspension was for posting comments on Facebook that a citizen took as offensive. (Testimony of Commissioner Barbieri, Exhibit #13)

35. In his testimony, Commissioner Barbieri stated that he based his decision on the postings made by Captain LaBelle after C.S. identified him as "officer" because of their content and manner, agreeing with the position that they were disrespectful and derogatory. (Testimony of Commissioner Barbieri)

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 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); *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); *Murray* v. *Second Dist. Ct.*, 389 Mass. 508, 514 (1983).

ANALYSIS

In their post-hearing briefs, both parties have cited relevant federal court decisions regarding the balance between a government employee's First Amendment rights and the interests of a government employer in promoting the efficiency of the public services it performs through its employees. I have carefully reviewed those arguments.

I agree with Captain LaBelle that the underlying topic related to these online postings was a matter of public concern; that he made the postings while he was off-duty; and that he did not use Department resources (i.e.—a Department computer) to make these postings, all of which, from the outset, tip the balance toward the First Amendment rights afforded to Captain LaBelle.

It is undisputed, however, that, at the mid-point of their online conversation, Captain Labelle knew that C.S. was aware of his position as a police officer for the Springfield Police Department. I gave the most weight to the postings made from this point forward, including Captain LaBelle's posting to C.S. stating: "Got it [C.S.] you're a liar and morally reprehensible" and his posting to J.S. stating: "Childish response but not surprising from someone *who couldn't keep a job bagging groceries* … lol sheep, you are the one out to pasture." (emphasis added)

The fact that the underlying topic here was a matter of public concern did not give Captain LaBelle, a superior officer in the Springfield Police Department, free reign to call a citizen "morally reprehensible" or to tell another citizen (J.S.) (who has a Spanish surname) that he "couldn't keep a job bagging groceries", even when viewed in the context of Captain LaBelle's First Amendment rights and the recognition that discourse on matters of public concern can sometimes be caustic.

The Department has a right to expect that its police officers, particularly those who hold the position of Captain, treat *all* citizens with respect and courtesy—and the Department's Rules explicitly require it. Captain LaBelle violated that rule and the City's decision to implement a short, one-day suspension to correct his boorish behavior did not violate Captain LaBelle's First Amendment rights.

CONCLUSION

For all of the above reasons, Captain LaBelle's appeal under Docket No. D-18-024 is ***denied***.

* * *

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, Commissioners [Tivnan—No][4]) on April 11, 2019.

4. Commissioner Tivnan voted no as he believes that, based on the facts presented, including the lack of prior discipline, that a written warning, as opposed to a one-day suspension, is warranted here.

Notice to:

Austin M. Joyce, Esq.
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Maurice M. Cahillane, Esq.
City of Springfield
36 Court Street, Room 05
Springfield, MA 01103

* * * * * *

BRIAN MARTIN

v.

DRACUT HOUSING AUTHORITY

D-17-030

April 11, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Demotion-Modification of Penalty by Commission-Dracut Housing Authority Maintenance Supervisor-Standard of Review-Chapter 31 Section 41A-Submission of Disciplinary Hearing Directly to Commission Bypassing Local Authority-Unprofessional Conduct-Inappropriate Language—The Commission substituted a five-day suspension for the demotion urged by the Dracut Housing Authority with respect to a Maintenance Supervisor with management deficiencies and a tendency toward unprofessional conduct and inappropriate language. In so doing, the decision by Commissioner Cynthia A. Ittleman noted that the Housing Authority failed to provide him with sufficient notice and due process to allow him to correct his deficiencies or give him clearer guidance on the duties and standards he should be expected to meet.

CLARIFIED AND FINAL DECISION

On February 16, 2017, the Appellant, Brian Martin (Mr. Martin or Appellant), pursuant to G.L. c. 31, s. 41A and G.L. c. 121B, s. 29, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Dracut Housing Authority (DHA or Respondent) to demote him from the position of Maintenance Supervisor to the position of Maintenance Laborer. A pre-hearing conference was held on March 13, 2017 at the Mercier Community Center in Lowell. Prior to the prehearing conference, the Respondent filed a Motion to Dismiss (Motion) alleging that the Commission lacks substantive jurisdiction on a public housing authority's demotion of an employee and that the appeal was untimely. On March 31, 2017, the Appellant filed an opposition to the Motion (Opposition). On June 22, 2017, the Commission denied the Motion, ruling that the Commission does have jurisdiction to hear appeals regarding demotions of certain Housing Authority employees and ordered the case to go forward to a full hearing. Subsequently, counsel for the Appellant indicated that he would be filing a Motion for Summary Decision, pursuant to G.L. c. 31, s. 42, arguing that the Housing Authority failed to conduct a hearing prior to demoting the Appellant. That prompted a July 5, 2017 conference call between Commissioner Bowman and counsel for the parties.

As there was no dispute that the Housing Authority, believing that the Commission lacked jurisdiction over demotions, did not conduct a hearing prior to the demotion, the Housing Authority agreed to reimburse the Appellant for lost wages from January 9, 2017 (the date of the demotion) to July 5, 2017 (the date of the conference call). In exchange, counsel for the Appellant agreed to waive his Section 42 claim and move forward with a full hearing before the Commission under Section 43 regarding whether the Housing Authority had just cause to demote the Appellant.

The Section 43 hearing was held on August 28, 2017 at the Mercier Community Center and on October 30, 2017 at the Commission's Boston office.[1] Witnesses, except the Appellant and Respondent's Executive Director, Mary Karabatsos[2] , were sequestered. Since neither party requested a public hearing, the hearing was conducted in private. The hearing was digitally recorded and both parties were provided with a CD of the hearing[3] . The parties filed post-hearing briefs on December 18, 2017. For the reasons stated herein, , the Appellant's appeal is allowed in part. The discipline is modified from a demotion to a five (5)-day suspension.

FINDINGS OF FACT

Forty-one (41) exhibits were entered into evidence.[4] Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent

- Mary Karabatsos, Executive Director, DHA
- Kelley Szymanski, Deputy Director, DHA

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. Ms. Karabatsos assisted counsel for the Respondent after she testified as the Respondent's first witness.

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.

4. The proposed exhibits were numbered 1 to 51 but the parties agreed to delete proposed exhibits 24 through 41, retaining the numbers for proposed exhibits marked 42 and higher. Thus, the remaining exhibits entered into evidence at the hearing were Joint Exhibits 1 - 4, 12, 14, 20 - 23, 42 - 44, and 46 - 51; and Respondent's Exhibits 5 - 11, 13, 15 - 19, 45, and 52 - 56. Respondent's Exhibits 5 - 11 were entered into the record over the Appellant's objection, which objection the Appellant asked to be noted in the record; so noted. Exhibit 23 was entered jointly in part (notes of January 9, 2017 and December 20, 2016 relating to the Appellant) and as Respondent's Exhibit 23A (notes of September 9, 2016 relating to the Appellant). In response to my order at the hearing, the Respondent produced after the hearing Respondent's Exhibits 57 (five (5) year employment contract between Respondent and Executive Director Karabatsos beginning 2017) and 58 (Executive Director Job Description).

- Michael Hubert, Maintenance Laborer, DHA
- Jim Murphy, Maintenance Laborer, DHA

Called by the Appellant

- Brian Martin, Appellant

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

BACKGROUND

1. The Appellant was hired as a Maintenance Laborer by the DHA in 1997; as such, he is a tenured employee under G.L. c. 121B, s. 29. In November 2011, the Appellant was promoted to Maintenance Supervisor and he received appropriate training, including training pertaining to supervision. (Testimony of Appellant and Karabatsos; Ex. 42).

2. At pertinent times, the DHA personnel included Ms. Karabatsos, Executive Director; Kelley Szymanski, Executive Assistant to the Director; a part-time receptionist; the Section 8 Administrator; a Maintenance Supervisor; and two Maintenance Laborers. (Testimony of Szymanski; Ex. 55)

3. Ms. Karabatsos has "general supervision over the administration of the authority's business and affairs, subject to the direction of the Board Members of the Authority, … [and is] … the Authority's chief administrative officer and shall be directly in charge of personnel and shall be responsible, subject to the review and approval of the Board, for the hiring and discharging of all personnel." (Ex. 57; *see also* Ex. 58)

4. At pertinent times prior to January 23, 2017, the Maintenance Laborers were supervised by the Maintenance Supervisor and/or the Executive Director. (Exs. 44, 50 and 51)(emphasis added)

5. Mr. I worked in Maintenance at DHA for many years up until early 2015. Mr. I was the Maintenance Supervisor for a period of time, during which he supervised the Appellant. (Testimony of Karabatsos and Szymanski)

6. Mr. G worked in Maintenance at DHA for many years up until September 2015. Mr. G was the Maintenance Supervisor for a period of time, during which time he supervised the Appellant. (Testimony of Karabatsos and Szymanski)

7. The Appellant was appointed Maintenance Supervisor in 2011, after Mr. I and Mr. G had served as Maintenance Supervisors. (Testimony of Karabatsos)

8. In February 2015, Jim Murphy (Mr. Murphy) was hired as a DHA Maintenance Laborer, filling the vacancy left upon Mr. I's departure. The Appellant supervised Mr. Murphy until January 2017. (Testimony of Murphy)

9. In October 2015, Mike Hubert (Mr. Hubert) was hired as a DHA Maintenance Laborer, filling the vacancy left upon Mr. G's departure. The Appellant supervised Mr. Hubert until January 2017. (Testimony of Hubert).

10. The DHA Maintenance personnel have a history of not getting along well. (Testimony of Karabatsos)

11. At various times during the Appellant's tenure as DHA Maintenance Supervisor (November 7, 2011 to January 9, 2017), morale was poor. (Testimony of Murphy, Hubert, Szymanski and Director Karabatsos).

12. DHA Maintenance staff does not have access to computers to obtain work orders. Until sometime in or about May 2016, the DHA Administrative office personnel would print out work orders and give them to the Maintenance personnel and/or giving the Appellant a master list of work orders. (Testimony of Karabatsos) The Maintenance personnel carried DHA cell phones for communication. (Testimony of Appellant)

13. Until in or about May 2016, the Appellant, as Maintenance Supervisor, would meet with Mr. Hubert and Mr. Murphy at the beginning of the day to distribute work orders to be addressed. (Testimony of Murphy and Hubert) However, this approach made it difficult for the administrative staff to monitor completion of work orders. (Testimony of Szymanski)

14. At various times when the Appellant was Maintenance Supervisor, Ms. Karabatsos would communicate with the Appellant on his DHA cell phone regarding work to be done and related matters. (Ex. 45)

December 1, 2011 Incident

15. On December 5, 2011, Mr. I, then a DHA Maintenance Laborer, submitted a written complaint to Ms. Karabatsos regarding a December 1, 2011 incident in which he felt that the Appellant's conduct was "threatening, intimidating and bullying".[5] Mr. I signed the complaint and Mr. G signed it as a witness. (Ex. 5) This was not the first time that Mr. I had seen the Appellant behave in this manner. (*Id.*)

16. Specifically, the December 5, 2011 letter stated, in part, that after the Appellant informed Mr. I and Mr. G about upcoming work in some empty apartments and Mr. G and Mr. I had no response, the Appellant raised his voice and said, "what the fuck! Am I talking to my fucking self or what?" (Ex. 5) Mr. I asked the Appellant if he was serious or joking and the Appellant said, "your (sic) dam (sic) right I'm fucking serious". (*Id.*) Mr. G submitted a similar written complaint on his own. (Ex. 6)

5. During her testimony, Ms. Karabatsos complained to me that the Appellant was staring at her as she testified. I asked Ms. Karabatsos if she felt intimidated. She stated that she felt uncomfortable because he was staring at her. I asked the Appellant to be sensitive to Ms. Karabatsos' concerns and he indicated that he would. Full Hearing recording at approximately 3 hours and 33 minutes.

17. On December 12, 2011, the Appellant filed a written response to the December 5, 2011 complaint stating that Mr. I (and Mr. G) did not respond to him when he mentioned the upcoming work in other apartments but denying that he used inappropriate language at that time. (Ex. 7) However, the Appellant testified at the Commission hearing that he had used the inappropriate language on December 1, 2011. (Testimony of Appellant)

18. On or about December 22, 2011, Ms. Karabatsos told Mr. G that she consulted an attorney about his complaint against the Appellant and she would speak to the Appellant and "tell him that inappropriate language is not acceptable. [She] also told [Mr. G] that work must progress and if the conflicts in the maintenance department impede work than (sic) progressive discipline will be the result. [She] explained to him that [the Appellant] is the Maintenance Supervisor whether he liked it or not." (Ex. 9) Ms. Karabatsos spoke to Mr. I and repeated the statements she had made to Mr. G. (Ex. 10) Ms. Karabatsos made contemporaneous notations dated December 22, 2011 indicating that she had consulted an attorney and spoken to Mr. G and Mr. I in this regard and put her notes in a file in her office, not the Appellant's personnel file. (Testimony of Karabatsos) The Appellant did not receive copies of Ms. Karabatsos' notations until he was demoted and requested them. (Testimony of Appellant)

19. On or about December 23, 2011, Ms. Karabatsos spoke with the Appellant about the December 5, 2011 complaint against him. (Testimony of Karabatsos) She told him that she had consulted an attorney for legal advice and that he advised her to speak with Mr. I, Mr. G and the Appellant separately. She further informed the Appellant that there would be no further action taken on the December 5 complaint, that she told Mr. I and Mr. G that "personnel issues will not impede work and that the three maintenance men will have to learn to work together". (Ex. 11) Ms. Karabatsos added that, "if it was true that [the Appellant] swore at [Mr. I] that [the Appellant] needs to make sure that he does not use any inappropriate language in the future in the workplace." (*Id.*) Ms. Karabatsos made contemporaneous notations that day regarding her conversation with the Appellant and put them in a file in her office relating to the Appellant. (Testimony of Karabatsos; Ex. 11)

September 2015 Events

20. Ms. Szymanski was promoted from Executive Assistant to Ms. Karabatsos to Deputy Director in September 2015. (Testimony of Szymanski) At that time, the Deputy Director job description did not include overseeing Maintenance staff. (Ex. 55) Since she was promoted, Ms. Szymanski has had a number of conversations with the Appellant in which he indicated his discontent with her promotion. (Testimony of Szymanski)

21. Also in September 2015, Ms. Karabatsos and/or Ms. Szymanski began scheduling mandatory end of day meetings several times per week to improve communication. The Appellant would attend these meetings and, at times, not participate and/or he would make negative comments about the meetings and/or personnel. (Testimony of Karabatsos)

November 19, 2015 Incident

22. At approximately 7:30 PM on Thursday, November 19, 2015, Mr. Murphy arrived at the Lo Kai restaurant where at least some of the DHA Board Commissioners, Ms. Karabatsos and Ms. Szymanski were gathered at an event for one of the DHA Board Commissioners. Mr. Murphy saw the Appellant as he was leaving the restaurant. Mr. Murphy extended his hand to greet the Appellant and the Appellant said to Mr. Murphy, "we have a big fucking problem you and I". (Testimony of Murphy) Mr. Murphy then attempted to ask the Appellant what he meant but the Appellant did not respond and brushed by Mr. Murphy. (Testimony of Murphy)

23. Earlier in the evening of November 19, 2015, the Appellant had an argument with Jim Murphy's father, Paul Murphy. Jim Murphy was not aware of the argument between his father and the Appellant that night. (Testimony of Jim Murphy)

24. Jim Murphy had confided in his father about how he felt about the manner in which the Appellant treated him (Jim Murphy). Jim Murphy did not ask his father to discuss the matter with the Appellant. (Testimony of Jim Murphy).

25. By letter dated November 20, 2015, the Appellant filed a complaint with Ms. Karabatsos alleging that the confrontation between the Appellant and Paul Murphy on November 19, 2015 at the Lo Kai restaurant had created a hostile work environment. Specifically, the Appellant's letter states, in part,

> … when I was leaving the event … I noticed [DHA] employee Jim Murphy's father, Paul Murphy.... [Paul Murphy said] 'oh, I need to talk to you.... I asked him 'what's up'? Paul replied, You can tell [a former DHA Commissioner] and your crew to leave my kid alone (or words to the affect).... He said 'you called him a brown nose' and that I was using my position to harass him.... I told him he was out of line having this conversation with me. I continued to tell him he was out of line. He said 'my kid is a gentleman, keep it up and I will kick your ass … then we walked away … when he stopped quick in front of me and I bumped into him. After we bumped he said, 'What, you want to go at it?'. I then said again 'you are out of line'. He started walking away saying, 'keep it up and I will have your job'....
>
> I am concerned about this situation because since you have appointed Kelly (sic) Szymanski to the position of Deputy Director, employee Jim Murphy listens to what Kelly (sic) instructs him to do. As you know, I have expressed my concerns about employees Jim Murphy and Michael Hubert following the direction of Kelly (sic) and I don't know what is going on, where or what they are doing. I also expressed to Kelly (sic) that I thought that employee Murphy's father was telling him to listen to Deputy Director Szymanski and not to me....
>
> … I now believe that Jim Murphy and his father Paul have created a hostile work environment for me by threatening my job. I am respectfully requesting that your (sic) take the necessary steps to correct this situation.

(Ex. 12)

26. Upon receiving the Appellant's November 20, 2015 complaint, Ms. Karabatsos contacted an attorney who had been retained by DHA, Mr. Horgan, for advice on how to handle and

process the Appellant's complaint. (Testimony of Karabatsos) On November 24, 2015, Ms. Karabatsos asked the Appellant to meet at her office, at which time she advised the Appellant that the DHA had asked Attorney Horgan to investigate his November 20, 2015 complaint. (Testimony of Karabatsos)

27. Attorney Horgan reviewed the Appellant's November 20, 2015 complaint and expressed his assessment of the matter to Ms. Karabatsos. (Testimony of Karabatsos) Thereafter, Ms. Karabatsos issued a written decision to the Appellant on December 1, 2015 stating, in part,

> … Attorney Horgan reviewed your letter and responded stating that his assessment was that this situation did not rise to the level of a hostile work environment. He stated that the Massachusetts Commission Against Discrimination (MCAD) guidelines state that in order to create a hostile work environment the conduct must be hostile, intimidating, humiliating or offensive both from an objective and subjective perspective, and the alleged conduct must be pervasive and severe. This appears to be an isolated incident with the fellow employee's father. There is no evidence to suggest that it is anything more than that. At this point I've done my due diligence in investigating this incident in feel as though what happened was unfortunate and unnecessary, but there is no indication that a hostile work environment has been created.
>
> Also, in response to your concerns that both Mike Hubert and Jim Murphy have been taking direction from Deputy Director Szymanski rather than you; as the maintenance supervisor the chain of command dictates that both Mike and Jim are under your direct supervision. The Dracut Housing Authority's organizational chart is as follows (sic) the executive director, Deputy Director, Maintenance Supervisor and Maintenance Staff. There will be times when both Mike and Jim are required to take direction from both Deputy Director Szymanski and myself. This is in no way meant to circumvent your position but rather to create an environment that works well together and is focused on the end result.

(Ex. 14)

April 2016 Incidents

28. On April 6, 2016, at approximately 2:00 p.m., Ms. Karabatsos had a meeting with the Appellant after he again complained that Mr. Hubert and Mr. Murphy were not listening to him and that he could not talk to them. (Ex. 15) Ms. Karabatsos informed the Appellant that if he could not talk to his subordinates it would be impossible for him to properly supervise and lead and that he needed to improve on both of these managerial skills. (Testimony of Karabatsos; Ex. 15) Ms. Karabatsos made a contemporaneous notation about this discussion with the Appellant and put the notation in her file with other notations regarding the Appellant. (*Id*.)

29. On April 20, 2016, Ms. Karabatsos had a meeting with the Appellant to discuss the reason he had not signed the DHA's new credit card policy for supplies that the Board of Commissioners approved in February, 2016. (Testimony of Karabatsos; Ex. 16) The Appellant was the only DHA employee who had not signed the new credit card policy. (Testimony of Karabatsos; Ex. 16) Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (*Id*.)

30. Ms. Karabatsos had a conversation with the Appellant on April 25, 2016 in which she again asked the Appellant to sign the new credit card policy or return his DHA credit card. The Appellant reiterated that he was unable to talk to his subordinates. Ms. Karabatsos again reminded the Appellant that he needed to improve his communication with his subordinates in order to be a proper supervisor and leader and that if he could not talk to his subordinates, he could not properly supervise. In response, the Appellant raised his voice at Ms. Karabatsos and she told him not to raise his voice at her. Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. The Appellant later signed the credit card policy/ (Testimony of Karabatsos; Ex. 17)

May 2016 Incidents

31. The Appellant went to Ms. Karabatsos' office on May 5, 2016 at or about 11:00 a.m., complaining again about Mr. Hubert and Mr. Murphy, this time stating that they were handling work orders on their own without telling him. He added that he had not yet seen them that day. Ms. Karabatsos again informed the Appellant that he needed to supervise and communicate with his staff. After a few words, the Appellant left the office and slammed the door. Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (Testimony of Karabatsos; Ex. 18)

32. Following her May 5, 2016 meeting with the Appellant, Ms. Karabatsos believed that he was not adequately performing his duties as a maintenance supervisor and, despite repeated conversations with the Appellant regarding his managerial skills and work performance, his conduct and managerial skills had not improved. (Testimony of Karabatsos) However, other than repeatedly telling the Appellant to "supervise" and "lead" the Laborers, Ms. Karabatsos did not provide guidance about how to do so more effectively. (Testimony of Appellant)

33. On May 10, 2016, Ms. Karabatsos met with the Appellant and issued him a letter of reprimand that states, in part,

> … This is an official written reprimand for your <u>failure to not only perform the functions of your position appropriately, but also for the acts of insubordination that you continually engage in</u>. Over the past three months you have informed me on at least three occasions that 'you cannot talk to Mike and Jim'. You have gone on to say 'that you do not know what they are doing or where they are'. The most basic skill of a maintenance supervisor is the 'ability to supervise and motivate others'. The fact that you have relayed to me that you are not able to "talk to your staff" leads me to the conclusion that your supervisory position is not being fulfilled. During these discussions, I have relayed to you that you need to 'supervise' and 'lead'. Unfortunately however, <u>you repeatedly act out, in an unprofessional manner to Deputy Director Kelley Szymanski and myself. Many of these incidents have become volatile, with you raising your voice and slamming doors as you leave the office</u>.[6] These occurrences have disrupted the professional atmosphere that the Dracut Housing Authority persistently strives for.

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6. [See next page.]

> I am recommending that you attend anger management courses that will be paid for and provided to you by the Dracut Housing Authority, failure to do so will indicate to me that you are not taking this reprimand seriously.
>
> This letter of reprimand, stands as a reminder that your position requires you 'to supervise and lead', it also demands professionalism while you fulfill your responsibilities as the maintenance supervisor. Any future incidents of insubordination or unprofessionalism will not be tolerated, and will result in additional disciplinary action up to and including the possibility of demotion....

(Ex. 20)(emphasis added)

34. The Appellant refused to open this letter in Ms. Karabatsos' presence and said to her, in part, "this is how it's going to be around here", "you have no idea what's going on around here", and "this is the beginning of an all-out war. I hope you don't think that I am going to take this sitting down". (Ex. 19)[7] On May 10, 2016, Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (Testimony of Karabatsos; Ex. 19)

35. The Appellant later informed Ms. Karabatsos in writing that he had attended an anger management course pursuant to the letter of reprimand and acknowledged that he had had conversations with Ms. Karabatsos regarding Ms. Szymanski's assignment of work orders to Maintenance Laborers but he denied that he had not performed the function of his position appropriately and he denied that he had been insubordinate. The Appellant's letter further stated that he "respectfully disagree[d] with the content" of Ms. Karabatsos' reprimand letter. (Ex. 22)

36. Sometime in May 2016, per the order of Ms. Karabatsos, the responsibility for assigning work orders to Maintenance personnel was transferred from the Appellant to Ms. Szymanski. (Testimony of Szymanski and Karabatsos) This was done to establish a daily process/system to more efficiently monitor both the distribution and completion of the work orders. (Testimony of Szymanski)

37. Ms. Szymanski had a phone conversation with the Appellant on May 11, 2016 regarding the implementation of a new policy that would require all Maintenance staff to inform the DHA administrative office whenever they would leave the Town of Dracut to conduct official DHA business. (Testimony of Szymanski)

38. McCartin's Electrical Supply store is located in Lowell, Massachusetts and was routinely visited by the Appellant to purchase supplies for the DHA. With the implementation of Ms. Szymanski's new policy, the Appellant was required to advise Ms. Szymanski whenever he was going to McCartin's Electrical Supply store for work as well as what supplies he intended to purchase. The new policy was intended to create a more efficient work environment wherein the DHA administrative office would know the whereabouts of DHA employees and the amount of money being spent on work supplies. (Testimony of Szymanski)

39. When Ms. Szymanski informed the Appellant of the new policy over the phone, he angrily replied that he could not believe that they were having this conversation and that he now had to tell her when and why he was going to the supply store. The Appellant then abruptly hung up the phone on Ms. Szymanski. (Testimony of Szymanski)

40. On May 16, 2016, the Appellant again voiced his dissatisfaction to Ms. Szymanski regarding the new policy and when she asked him what he was trying to purchase at McCartin's Electrical Supply that day, the Appellant stated words to the effect that someone was going after his job. (Testimony of Szymanski)

41. On May 17, 2016, at a meeting at the end of the day, the Appellant informed Ms. Karabatsos that he did not believe Mr. Murphy or Mr. Hubert should be taking any direction from her, that they should only take direction from him, and that he should be distributing the work orders. (Testimony of Karabatsos)

42. Ms. Szymanski also attended the end of day meeting on May 17, 2016. She also had a discussion with the Appellant at the meeting regarding oversight of the Maintenance staff. The Appellant told Ms. Szymanski that he believed the system for issuing work orders was not working and that she should not be calling Mr. Murphy or Mr. Hubert to do anything for the DHA. (Testimony of Szymanski)

December 20, 2016 Incident

43. On the morning of December 20, 2016, the Appellant went to Ms. Karabatsos' office complaining that Mr. Hubert had met with her the day before regarding an issue at the bathroom at a Myron Street property of the DHA. The Appellant complained to Ms. Karabatsos that Mr. Hubert should discuss the Myron Street property issue with him, not her. Ms. Karabatsos told the Appellant to supervise Mr. Hubert and discuss the matter with him. The Appellant complained to Ms. Karabatsos that it's always his fault, adding "you are not going to like it if I talk to him because I will be all over him". (Ex. 23) Ms. Karabatsos made contemporaneous notations that day regarding her conversation with the Appellant and put them in a file in her office relating to the Appellant. (Testimony of Karabatsos; Ex. 23)

44. At the end of the work day on December 20, 2016, the Appellant, Mr. Murphy and Mr. Humbert went to the administrative office, as scheduled, to discuss the work accomplished that day. Ms. Karabatsos made contemporaneous notations that afternoon regarding certain comments made at the meeting. Ms. Karabatsos' notes state, in part,

> [The Appellant] asked about one of the work orders that was done and wanted to know why he [the Appellant] was not aware of the work order. [Mr. Hubert] said to [the Appellant] that one of the residents had stopped him the day before to do some work. [Mr. Hubert] did the work and then requested a work order and that is why [the Appellant] did not know about it. [The Appellant] said that he was supposed to be delegating the work and

6. I note that Ms. Karabatsos' notes report only one (1) instance in which the Appellant left Ms. Karabatsos' office and slammed the door. (Ex. 18)

7. The Appellant's Post-Hearing brief does not deny that he made such statements to Ms. Karabatsos. (Appellant Post-Hearing brief, p. 30)

> that [Mr. Hubert] should not be taking it upon himself to do work orders that [the Appellant] has not seen. [Ms. Karabatsos] stated that [Mr. Hubert] completing the work order was fine and part of his job requirement. [The Appellant] said "how am I supposed to know what's going on if I don't see the work orders"? At that point, [the Appellant] started to get angry and [Mr. Hubert] began to say to [the Appellant] that he doesn't even look at the work orders.... [Mr. Hubert] told [the Appellant] 'you are giving us more and more work but you are not doing any work'.... [Ms. Karabatsos] told [Mr. Hubert] that he should stop talking at this point. [Mr. Murphy] was also present and he asked [the Appellant] 'why the process of doing work orders had changed'.… After some additional exchanges [the Appellant] told [Mr. Hubert] and [Mr. Murphy] 'that he delegates the work and they should not do anything unless [the Appellant] tells them to'. At this point [Mr. Hubert] and [Mr. Murphy] left the office but upon leaving [Mr. Hubert] said to [the Appellant] 'I wish that I could hand in three work orders a day … [Ms. Karabatsos] told [Mr. Hubert] again that he should stop talking and leave—which he did.
>
> [The Appellant] then said to [Ms. Karabatsos] 'do you think it's ok for [Mr. Hubert] to act that way'. [Ms. Karabatsos] said that no he should not be saying those things to you … [Ms. Karabatsos] also told [the Appellant] the [Mr. Hubert] is frustrated. [Mr. Hubert] and [Mr. Murphy] are excellent workers and that [the Appellant] is a working supervisor and it does not appear as though he is doing as much as he should..... [The Appellant said [j]ust because they don't see me they think I am not working. At this point [Ms. Karabatsos] told [the Appellant] that [she did] not think that [the Appellant was] a 'good supervisor'. [She] told him that he has two really good workers and he should be taking advantage of their strengths but he does not do that. [She] then told him that [she] think[s] he is a 'bad supervisor' and that we have had these conversations on numerous occasions. [The Appellant] then told [Ms. Karabatsos] that [she] was a 'bad boss'. [The Appellant] said to me 'do you want to demote me is that what this is all about and if you do that be ready for what happens'. [Ms. Karabatsos] responded by saying to [the Appellant] 'is that a threat'? At that point [Ms. Karabatsos] told [the Appellant] that [she] had to leave and he left the office.
>
> Based on these most recent incidents involving [the Appellant] … [Ms. Karabatsos] did not feel as though the [DHA] is benefiting (sic) from [the Appellant] filling this position. [The Appellant] is unprofessional and insubordinate on a continual basis and should be demoted to the position of a maintenance staff person.

(Ex. 23)

45. On January 9, 2017, the DHA Board approved an "updated" Deputy Director Job Description, adding that the Deputy Director "oversee[s]" Maintenance and administrative staff. (Ex. 46; *cf.* Ex. 55)

46. Also on January 9, 2017, Ms. Karabatsos issued a letter of reprimand to Mr. Hubert for "… insubordinate acts that occurred in my presence towards [the Appellant] on the afternoon of December 20, 2016 … I believe that all public employees should act in a professional manner when engaging with supervisors, residents and the public …." (Ex. 48; Testimony of Karabatsos; *see also* Ex. 23)[8]

47. Further, on January 9, 2017, Ms. Karabatsos issued a letter to the Appellant demoting him, stating, in part,

> This is an official letter of demotion from the position of maintenance supervisor to maintenance laborer. This demotion is based on continuous acts of insubordination, failure to fulfill your position requirements, specifically supervision and leadership, and an incessant display of disgruntlement and discontent in the workplace.
>
> Over the past 14 months you've been reprimanded and reminded to change your behavior and your attitude toward your position, your subordinates, and your supervisors. I have previously given you a letter of reprimand regarding these same issues but your behaviors (sic) have not changed. I came to this decision based on the most recent acts of "insubordination and lack of leadership" that came to a head on December 20, 2016. Due to these incidents I believe that it is in the best interest of the Dracut Housing Authority that effective January 23, 2017 you be demoted to the position of maintenance laborer.

(Ex. 23)

48. At the January 23, 2017 DHA Board Meeting, the Board voted to approve an "updated Deputy Director Job Description", which added, "[o]versee administrative staff and maintenance staff." (Exs. 46 and 52)

49. The Appellant filed the instant appeal at the Commission on February 16, 2017. (Administrative Notice)

Pertinent DHA Policies

50. The Personnel Policy of the DHA dated December 21, 2015, states,

> "IMPORTANT NOTICE
>
> The provisions of this manual or any similar written document developed or disseminated by the [DHA] … are designed and intended to provide guidance and information and not create an employment obligation for the [DHA].

Only the Executive Director of the [DHA] is authorized to create an employment contract and a signed and written agreement is required to do so....."

Article 3, in part,

> "It is the policy of the [DHA] to promote a productive work environment and not to tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment.

8. The Respondent argues that the Appellant could have disciplined the Maintenance Laborers whereas the Appellant alleges that he lacked such authority. The DHA Personnel Manual is unclear about how discipline is authorized. The Maintenance Supervisor job description states that the supervisor has such authority but the Appellant questions the validity of the job description, stating that it is undated and he did not sign it. However, Ms. Karabatsos' job description indicates that she has disciplinary authority, subject to the Board's approval. In addition to issuing discipline to the Appellant, Ms. Karabatsos issued a written reprimand to Mr. Hubert. While there is no indication in the record that the Board explicitly approved the discipline issued by Ms. Karabatsos, presumably it would have taken action if it disapproved the discipline and there is no evidence in the record that it took such action.

> Section 1 … Harassment also refers to behavior, which is personally offensive, impairs morale, and interferes with the work effectiveness of employees.
>
> No form of harassment will be tolerated …
>
> Section 6 … If it is determined that inappropriate conduct has been committed by one of the [DHA's] employees, we will take such action as is appropriate under the circumstances. Such action may range from counseling to termination from employment, and may include such other forms of disciplinary action …. "

Article 4, in part,

> Section 4.1 - General Policy:
>
> "… conduct that interferes with operations, discredit the [DHA], or is offensive to tenants or fellow employees will not be tolerated.
>
> Section 1 Employees are expected at all times to conduct themselves in a positive manner …
>
> (h) Treating all tenants, visitors, and fellow employees in a courteous manner; …
>
> (i) Refraining from behavior of conduct deemed offensive or undesirable …
>
> Section 2 The following conduct is prohibited and will subject the individual involved to discipline action, up to and including termination: …
>
> b) The use of profanity or abusive language …
>
> h) Threatening or intimidating management, supervisors, or fellow workers …
>
> Section 3 The examples in Paragraph (2), above, are illustrative of the type of behavior that will not be permitted ….

Article 17, in part,

> Section 17.2 Employee evaluations will be conducted annually. Maintenance evaluations will take place in March …
>
> Section 17.4 … "progressive discipline chart for major infractions". The chart provides, in part, a first offense for "threatening or intimidating other DHA employees or residents" is subject to termination. A first offense for "Unprofessional conduct\harassment is subject to a three (3)-day suspension and upon a second such offense, an employee may be terminated. For "insubordination by refusing a supervisor's order" a first time offense is subject to a three (3)-day suspension and a five (5)-day suspension for a second offense. For "failure to follow specific direction, on a first offense, the employee will receive a written warning and a second offense is subject to a three (3)-day suspension. For "inability to work harmoniously with all co-workers, is subject to a written warning for a first offense and a three (3)-day offense upon a second offense.
>
> Section 17.6, in part, [a]n employee who gives unsatisfactory service or who has behaved in an unprofessional manner contrary to the interests of the [DHA] may be subject to dismissal by the Executive Director …

(Ex. 2)(emphasis added)

Pertinent Statute

51. Section 7 of G.L. c. 121B provides, in part, that a housing authority may employ an executive director … and such other … employees as it deems necessary or proper, and shall determine their qualifications, duties, and compensation, and may delegate to one or more of its members, agents or employees such powers and duties as it deems necessary or proper …." (*Id*.)

APPLICABLE LAW

The Commission's authority in this matter is drawn from G.L. c. 121B, s. 29, which provides, in relevant part,

> No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter.

Id.

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 actions taken by the appointing authority." *Cambridge* v. *Civil Serv. Comm'n*., 43 Mass. App. Ct. 300, 304 (1997). *See Watertown* v. *Arria*, 16 Mass. App. Ct. 331 (1983). 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 by correct rules of law." *Commissioners of Civ Serv.* v. *Mun. Ct. of the City of Boston*, 359 Mass. 211, 214 (1971). The commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service." *Murray* v. *Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983).

The appointing authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, if the Commission finds by a preponderance of the evidence that there was just cause for 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).

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. It is also a basic tenet of the "merit principle" which governs Civil Service Law that dis-

cipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, s. 1.

ANALYSIS

The preponderance of the evidence does not support the Housing Authority's decision to to demote the Appellant from his position as Maintenance Supervisor, but, rather, supports a five (5)-day suspension While the Respondent has shown that some, but not all of the charges against the Appellant are justified, they fall short of justifying a demotion. Only when the evidence establishes that an employee's behavior or performance cannot be remediated may an employee be removed from his position. For the reasons discussed below, the Respondent has not shown that. Rather, based on the limited charges which have been proven, a short, five (5)-day suspension is justified. My conclusion is based, in part, on my concerns about some of the evidence the Respondent relied on about which the Appellant had inadequate notice. G.L .c. 149, s. 52C request that, "… An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action …." *Id*.

For example, the Respondent relied on Ms. Karabatsos' notes, and other evidence to demote the Appellant, alleging that the Appellant had exhibited misconduct such as regularly arrive late to work, once allegedly called the Laborers "brownnosers", putting in little effort in to his own work on work orders, telling the Laborers to slow down, and allegedly sitting around watching others work. It is clear that the Appellant had **no** knowledge of these allegations at the time and had no opportunity to respond thereto. Further, these assertions appear to constitute "piling on", in an attempt to unfairly bolster the Respondent's position. For these reasons, I find that the Respondent's reliance on such other matters violated basic merit principles and did not support the Respondent's actions.

As referenced above, the preponderance of the evidence did support some instances of misconduct. The Appellant's language and approach as a supervisor were unprofessional on certain occasions. The Appellant challenged the authority of Ms. Karabatsos and Ms. Szymanski. The Appellant's conduct in these regards was inappropriate under the terms of the DHA Personnel Policy noted herein and it undermined Ms. Karabatsos' contractual authority under the DHA Board and her authority pursuant to her job description.

The Appellant was aware of the allegations of inappropriate language (including swears) he used on different occasions and his failure to sign the credit card policy in a timely manner. Although he was not informed that Ms. Karabatsos prepared notes of their interactions leading to his demotion, he was aware of his interactions with her in these regards, as reflected in her notes and in both of their testimonies. Consequently, I find that the Respondent's reliance upon Ms. Karabatsos' notes in support of these incidents was not unfair, nor a violation of basic merit principles.

I also considered the Appellant's argument that attempts to discipline him are the result of the Respondent's one-sided response to problems, wrongly blaming only him for such problems. While it is accurate that Ms. Karabatsos did not provide the Appellant with specific guidance about improving his supervisory functions, she afforded him the opportunity to respond in writing to the 2011 complaint against him. When the Appellant complained of a hostile work environment after an altercation with Mr. Murphy's father at the Lo Kai restaurant, Ms. Karabatsos sought advice from counsel, who reported back to Ms. Karabatsos and Ms. Karabatsos informed the Appellant in writing that his complaint had been reviewed but was denied. When Mr. Hubert spoke inappropriately to the Appellant in front of Ms. Karabatsos, she verbally instructed Mr. Hubert to stop and then issued a letter of reprimand to him. When the Appellant complained to Ms. Karabatsos that Mr. Hubert and Mr. Murphy were not responding to him, Ms. Karabatsos told Mr. Hubert and Mr. Murphy that they were to respond appropriately to the Appellant, whether they liked it or not. As a result, I find that the Appellant's arguments conflict with the preponderance of the evidence and lack merit.

Going forward, however, in order to establish just cause to discipline Mr. Martin for deficiencies as a manager (i.e. to demote him), the Housing Authority must provide him with guidance as to the duties and standards he is expected to meet, document all future incidents that fall below those expectations, promptly notify Mr. Martin of these incidents, and afford him a reasonable opportunity to correct the deficiencies.

CONCLUSION

Accordingly, for the above stated reasons, the Appellant's appeal is allowed in part. The discipline is modified from a demotion to a five (5)-day suspension. The Appellant shall be reinstated to Maintenance Supervisor without any loss of pay or other benefits, except for those associated with the five (5)-day suspension.

* * *

By a 4-1 vote of the C ivil Service Commission (Bowman, Chairman—Yes; Ittleman, Commissioner—Yes; Stein, Commissioner—Yes; Tivnan, Commissioner—Yes; Camuso, Commissioner—No[9]) on April 11, 2019. (Note: This Commission decision was initially issued by the Commission on March 14, 2019. This clarified decision is being voted on and issued on April 11, 2019)

Notice to:

9. Commissioner Camuso voted no as he believes that the appropriate discipline here is a written warning, as opposed to a five (5)-day suspension or demotion.

Brian W. Leahey, Esq.
Law Office of Brian W. Leahey, P.C.
1 Bridgeview Circle, Suite 15
Tyngsborough, MA 01879

Thomas E. Horgan, Esq.
Hanley Law Office, LLC
[No listing]

Keith J. Nicholson, Esq.
Law Office of Keith J. Nicholson
Marina Bay
308 Victory Rd., Floor 3
Quincy, MA 02171

* * * * * *

OMAR MARTINEZ

v.

CITY OF CHELSEA

G1-18-031

April 11, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Chelsea Police Officer-Domestic Violence-Restraining Orders-Driving Record-Fighting-Exchanging Sex for Immigration Help—A dismal candidate for appointment as a Chelsea police officer was properly bypassed by the City for his history of domestic violence and restraining orders, out-of-control driving, fighting, and appalling offers to help his ex-wife with her immigration issues in exchange for sex.

DECISION

On March 1, 2018, the Appellant, Omar Martinez (Mr. Martinez), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), challenging the decision of the Chelsea Police Department (CPD) to bypass him for original appointment to the civil service position of permanent full-time police officer. I held a pre-hearing conference at the offices of the Commission on April 24, 2018, followed by a full hearing on June 12, 2018 at the same location.[1] The full hearing was digitally recorded and both parties received a CD of the proceeding.[2] Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Nineteen (19) exhibits were entered into evidence at the hearing. Following the hearing, at my request, the City of Chelsea produced four additional documents which I marked as post-hearing (PH) Exhibits 1-4. Based on the documents submitted, the testimony of the following witnesses:

Called by the City of Chelsea:

- Sergeant David Flibotte, CPD;
- Detective Rosalba Medina, CPD;
- Captain Thomas Dunn, BPD;

Called by Mr. Martinez:

- LP, Appellant's former wife;
- MC, Mother of Appellant's son;
- Omar Martinez, Appellant;
- RB, Appellant's friend;

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

1. Mr. Martinez is thirty-three (33) years-old. He is divorced, has one child and lives in Chelsea, MA. (Testimony of Mr. Martinez and RB)

2. Mr. Martinez graduated from Chelsea High School in 2002. He received an associates degree in automotive technology from Benjamin Franklin Institute of Technology in Boston, MA in 2007. (Testimony of Mr. Martinez, Exhibit PH 1)

3. Mr. Martinez is currently employed by an auto glass company. (Testimony of Mr. Martinez, Exhibit PH 1)

4. In 2017, Mr. Martinez took the civil service examination for police officer and received a score of 95. (Stipulated Fact)

5. In January 2018, Mr. Martinez's name appeared on Certification No. 05160, ranked first among those willing to accept appointment as a Chelsea Police Officer. (Stipulated Fact and Exhibit 1)

6. The City ultimately appointed three (3) candidates from Certification No. 05160, all of whom were ranked below Mr. Martinez. (Stipulated Fact)

7. On February 13, 2018, the City notified the state's Human Resources Division (HRD) of the reasons for bypassing Mr. Martinez. The reasons for bypass included: a) In 2009-2010, Mr.

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.

Martinez had been subject to three (3) restraining orders; b) In 2010, Mr. Martinez was stopped for speeding where Troopers clocked him at 95 to 100 MPH while it was snowing; c) in 2011, Mr. Matinez was involved in a physical fight; d) involvement in a 2011 motor vehicle stop; e) two (2) physical confrontations in 2014; and f) a statement from his ex-wife that Mr. Martinez offered to continue helping her with immigration-related issues in exchange for sex. (Exhibit 18)

8. HRD approved the reasons for bypass on April 26, 2018. (PH Exhibit 3)

Restraining Orders

9. On May 4, 2009 MC, the mother of Mr. Martinez's son, applied for an Abuse Prevention Order against Mr. Martinez alleging that "On Friday, May 1, 2009, he had called me private threatening me saying that he was gonna fuck me up and cut my throaght [sic] when he saw me." MC further alleged that "He also said that he is going to do everything in his power to make my life a living hell" and that "I am conserned [sic] with my childs safety and mine. He has put his hands on me in the past…" and finally that "I haven't stayed at my home because I am scared." (Exhibit 4)

10. A restraining order issued against Mr. Martinez on May 4, 2009, and on May 18, 2009 the order was vacated at MC's request. (Exhibit 4 and Testimony of MC)

11. At the hearing on the instant matter, Mr. Martinez denied the allegations related to May 4, 2009 Abuse Prevention Order. (Testimony of Mr. Martinez)

12. At the hearing in the instant matter, MC testified that she lied in her affidavit regarding the May 4, 2009 restraining order in an effort to manipulate Mr. Martinez into staying with her. (Testimony of MC)

13. On December 17, 2009, MC applied for an Abuse Prevention Order against Mr. Martinez alleging that "he was in my face calling me names not caring who was around. I don't feel safe around him he scares me to the point where I get very depressed and can't eat or think right" and that "He is to [sic] aggressive with his words and the way he approaches me when we argue" and finally "…he scares me to death and I can't live with the fact that he can do as he pleases and me not be able to do anything about it." A restraining order issued against Mr. Martinez on December 17, 2009 and expired on December 31, 2009. (Exhibit 5 and testimony of MC)

14. Mr. Martinez denies the allegations related to the December 17, 2009 Abuse Prevention Order. At the hearing in the instant matter, MC testified that she lied to obtain the December 17, 2009 restraining order in an effort to manipulate Mr. Martinez into staying with her. (Testimony of Mr. Martinez and MC)

15. On May 14, 2010, MC called Chelsea Police reporting that Mr. Martinez was on his way to her home and had threatened her. According to the police report, Mr. Martinez wanted to continue a telephone argument at her home. At the hearing MC did not recall police officers appearing at her home in response to her call. (Testimony of MC and Exhibits 6 and 7)

16. On May 14, 2010, MC applied for a third Abuse Prevention Order against Mr. Martinez in connection with the same incident as the May 14, 2010 police call. According to her May 14, 2010 application, in response to her telling Mr. Martinez that she would not let him in her home, "he said we will see about that so I told him that if he showed that I would call the cops and he said good, so tell them that when they get there to look for me in the river because that was where he was going to put me after he killed me." MC further alleged that "He scares me to the point that I don't want to be in my home when hes mad because he is unpredictable when he is upset." (Exhibit 6)

17. MC's allegations resulted in a third restraining order issued on May 14, 2010 and extended on May 17, 2010 until May 17, 2011. (Exhibit 6)

18. At the instant hearing, Mr. Martinez denied the allegations related to the May 14, 2010 Abuse Prevention Order; although he was present at the hearing on the extension of the restraining order, he did not then deny the allegations of abuse. (Testimony of Mr. Martinez)

19. At the instant hearing, MC testified that she lied to obtain the May 14, 2010 restraining order and its extension in an effort to keep Mr. Martinez away from her and her new boyfriend. (Testimony of MC)

20. The May 14, 2010 threats also resulted in criminal charges against Mr. Martinez of threat to commit a crime. Mr. Martinez defaulted on one of his court dates for these charges. The criminal charges were dismissed on May 27, 2011 on payment of costs. (Exhibits 7, 6, and 3, and testimony of Sgt. Flibotte)

21. In connection with Mr. Martinez' applications to become a Chelsea police officer, MC provided a statement regarding her 2009 and 2010 restraining orders against Mr. Martinez. In the statement she said that "I write this letter to offer an explanation to the events that occurred with the father of my son, Omar Martinez in 2009 & 2010 that led to me filing for restraining orders….I can now say that we were both at fault for our mistakes, I should never have filed those restraining orders as I too was a contributing factor, but I let my frustration, anger and vindictiveness get the best of me." (Exhibit 8)

2010 Speeding

22. On January 27, 2010, criminal charges of negligent operation of a motor vehicle issued against Mr. Martinez stemming from a January 2, 2010 incident on Route 93 in Woburn. On that date, Martinez was driving over 95 miles per hour in light snow on a wet roadway and changing lanes without signaling in a manner that required other drivers to swerve to avoid a possible crash. The charges were continued without a finding, and Mr. Martinez was required to attend the State Courts Against Road Rage and Brains at Risk programs. (Exhibits 9 and 3, and testimony of Sgt. Flibotte and Mr. Martinez)

2011 Physical Altercation

23. On April 13, 2011 criminal charges of assault and battery with a dangerous weapon, malicious destruction of property, and disorderly conduct issued against Mr. Martinez based on an incident occurring at Kelly's Roast Beef in Revere on February 24, 2011. In his application for the criminal complaint, a State Trooper wrote that "I spoke to each of the witnesses. They all told me the same thing. They state that [private citizen] was standing at the window waiting for food and was attacked. [Witness] further told me that she believed that the two men were looking for 'trouble'. None of the witnesses saw or heard [private citizen] do anything that would have provoked the attack. The witnesses stated that he [private citizen] was punched several times and thrown through the door. Once on the ground he was kicked in the head repeatedly by both men. The witnesses then stated that both men got in the van and drove away." These charges were dismissed on August 9, 2012 on payment of fees. (Exhibit 11 and 3)

24. Mr. Martinez testified that the April 13, 2011 incident at Kelly's Roast Beef was a case of him defending his sister from sexual harassment, and himself from an attack, by an intoxicated patron who would not leave her alone after Martinez repeatedly tried to get him to do so. Mr. Martinez' sister submitted an affidavit the day of the hearing corroborating Mr. Martinez' testimony. Mr. Martinez testified that, when questioned by police soon after this incident, he told an officer that he had been responding to a derogatory comment about his sister and that he did not recall what the comment was. Mr. Martinez admits that he left the person with whom he fought unconscious on the pavement and did not call police. (Testimony of Mr. Martinez and RB and Exhibit A)

2011 Motor Vehicle Stop

25. On June 27, 2011 criminal charges of possession of ammunition without an FID card and possession of cocaine issued against Martinez stemming from an incident on Route 93 in Randolph. In his application for criminal charges State Trooper Scott Walker wrote that he found ammunition and cocaine in a family vehicle driven by Martinez and in which RB was a passenger. At the hearing, RB admitted to having a prior cocaine conviction in which the cocaine was packaged similarly to that in the June 27, 2011 case. The criminal charges against Martinez were dismissed on payment of costs on December 4, 2012. (Exhibits 12

2014 Incident

26. On February 8, 2014 Mr. Martinez suffered a significant facial injury during a fight in which he was not otherwise involved at a club in Chelsea. (Exhibit 14 and testimony of Mr. Martinez)

Allegations by Ex-Wife

27. Mr. Martinez and LP were married in 2010. At this time, LP had a pending application to obtain a Resident Alien Status ("green card"). The matter was still pending in 2016 when Mr. Martinez and LP separated. (Testimony of Mr. Martinez and LP)

28. As part of his investigation, Sgt. Flibotte arranged to interview LP. As Sergeant Flibotte and LP do not share a common language, Det. Medina interviewed her in Spanish on Sgt. Flibotte's behalf. Det. Medina had previously interviewed LP at her workplace in connection with one of Mr. Martinez' previous applications. This time Detective Medina interviewed LP by telephone in February, 2018. Det. Medina verified that she was speaking with LP who recalled their previous meeting. LP told Det. Medina that she and Mr. Martinez have a good relationship and that their divorce was final in June of 2017. During the interview, LP told Detective Medina that Mr. Martinez came to her home in November of 2016 and asked to have sex with her. When she refused, according to Detective Medina, Mr. Martinez told LP that he would stop helping her with her immigration status if she did not have sex with him. Det. Medina further testified that LP told her that she told Mr. Martinez that she would rather not obtain a green card than to comply with his request. Detective Medina took notes of the conversation, immediately typed them, and provided the typed version to Sgt. Flibotte.[3] This document was provided to counsel for Mr. Martinez. (Testimony of Det. Medina)

29. LP testified at the hearing that Mr. Martinez said, in the November 2016 exchange described above, that he wanted to repair their marriage. She denied that he mentioned sex. LP testified that Mr. Martinez told her that if she did not want to "resolve their situation," "save the marriage," or "continue their married relationship" then he would stop helping with her attempt to obtain a green card. LP testified that she told Mr. Martinez that she would rather not have her green card than to have it on the terms Mr. Martinez suggested. LP testified that in relating this incident to Detective Medina, she said that "if I had to be with him for the purpose of my documentation, then I didn't want anything to do with it." (Testimony of LP)

30. Mr. Martinez testified that he and LP did not discuss her appeal of her immigration status in November of 2016, although he admitted to trying to revive their marriage. (Testimony of Mr. Martinez)

Police Department's Review

31. Sergeant Flibotte produced a report on his background investigation for Captains Dunn and Batchelor who, along with Sgt. Flibotte, comprise the Oral Board of Review for candidates for police officer at the Chelsea Police Department. (Testimony of Sgt. Flibotte and Capt. Dunn, Sgt. Flibotte's report)

32. Captain Dunn believed Mr. Martinez's history, known to the Board from previous applications, was problematic due to his history of domestic violence restraining orders, but he was deeply troubled by the exchange reported by Detective Medina between Mr. Martinez and LP. For Captain Dunn this exchange raised the likelihood the Martinez might abuse the position of a police officer in a vulnerable community with many undocumented residents. Captain Dunn was also concerned that this exchange added

3. As a matter of general practice, Det. Medina destroys handwritten notes after writing reports, and the handwritten notes no longer exist.

further weight to previous evidence that Mr. Martinez had a propensity to abuse power over women. (Testimony of Captain Dunn and Exhibit 18)

33. Mr. Martinez was scheduled for an Oral Board of Review with Captains Dunn and Batchelor and Sergeant Flibotte. Upon reviewing Sgt. Flibotte's report on Mr. Martinez's candidacy in preparation for the meeting, Capt. Dunn canceled the Oral Board of Review meeting based on Mr. Martinez's prior conduct and on the exchange between him and LP reported by Detective Medina. Sergeant Flibotte notified Mr. Martinez that he would be bypassed. (Testimony of Capt. Dunn and Sgt. Flibotte)

34. Captain Dunn produced a recommendation for bypass of Mr. Martinez for Chief Brian Kyes of the Chelsea Police Department. Sgt. Flibotte sent this recommendation to the HRD, and the reasons given in it were approved by the HRD, which also sent Captain Dunn's recommendation to Mr. Martinez. (Testimony of Sgt. Flibotte and Capt. Dunn, Exhibit 18, and HRD letter dated April 26, 2018)

35. None of the three applicants hired by the City of Chelsea from certification 05160 has a Board of Probation record. The one 209A domestic violence prevention order issued against one of the three applicants hired from this requisition was issued on February 10, 2006 and was not extended. The application for that order does not involve any threats or physical contact. (209A application and order)

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. at 259, citing *Cambridge* v. *Civil Serv. Comm'n.*, 43 Mass. App. Ct. at 304. "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*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

In *Beverly*, a candidate for police officer was bypassed for appointment because he was terminated from his previous employer for serious misconduct—the unauthorized access of the voicemail accounts of other employees. A three-person majority of the Commission concluded that the City "failed to prove that [the candidate] illegally accessed voicemails of employees …. the reason given for his bypass, and accordingly did not support the reason by the necessary preponderance of the evidence."

That decision was subsequently vacated by the Superior Court. Agreeing with the Superior Court, the Appeals Court stated, "Instead of focusing on whether the city had carried its burden of demonstrating a 'reasonable justification' the commission focused on whether the city had proven that [the candidate] in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither [the candidate] nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired." *Beverly* at 190.

Applied here, the City, by a preponderance of the evidence, provided valid reasons for bypassing Mr. Martinez for appointment as a police officer. In regard to the restraining orders, I gave considerable weight to the fact that one (1) of those orders was extended for one (1) year after a hearing. Further, I did not find MC's testimony before the Commission to be credible. Not only did her testimony contradict her sworn affidavits, signed under the pains and penalties of perjury, but her testimony also differed from the statement she provided to the Department's investigators. Further, standing alone, the testimony at the Commission did not ring true to me, including one part of her testimony where she denied any knowledge of an encounter at her home with Mr. Martinez, even though the incident, including a statement from MC, was memorialized in a police incident report at the time.

The restraining order issued in 2006 against one of the candidates hired instead of Mr. Martinez does not undermine the CPD's reliance on Mr. Martinez' restraining orders. The other candidate's case is distinguishable in several respects. First, the single application includes no allegations of either physical violence or threats.

Unlike the final order against Mr. Martinez, this order was not extended beyond the initial two week period following an ex parte hearing. Finally it occurred over three years before the first order issued against Mr. Martinez with no record of intervening misconduct.

Regarding Mr. Martinez' driving record, the City of Chelsea focused on an incident occurring on January 2, 2010 on Route 93 in Woburn. While Mr. Martinez testified regarding the ultimate disposition of the criminal charges resulting from the arrest and the reasons for his conduct, he did not deny driving close to 100 mph in snowy conditions on a wet road and changing lanes without signaling causing other drivers to swerve to avoid crashing. The City was entitled to consider this in its decision to bypass Mr. Martinez.

In regard to the 2011 fight, Mr. Martinez admitted to leaving the other participant in the fight unconscious on the sidewalk. Mr. Martinez admitted to not calling the police or otherwise reporting either the fight of the other man's conduct toward his sister. Standing alone, Mr. Martinez' conduct in this incident could form a reasonable basis to bypass a candidate for police officer.

Finally, I credit, in its entirety, the testimony of Detective Medina regarding her phone interview with LP. Even, however, if I were to accept the testimony of LP, her version of events supports Captain Dunn's concern that Mr. Martinez has a tendency to abuse power over women.

Given the precedent-setting judicial decisions regarding the "substantial deference" due to Appointing Authorities when making appointments and because of the findings and conclusions above, the City was reasonably justified in bypassing Mr. Martinez for all of the reasons contained in the bypass letter.

CONCLUSION

The CPD's decision to bypass Mr. Martinez is affirmed and Mr. Martinez' appeal under Docket No. G1-18-031 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Michael A. Manzi, Esq.
Rick Seccareccio, Esq.
177 Market Street
Lowell, MA 01852

Strephon Treadway, Esq.
Elizabeth Caiazzi, Esq.
City of Chelsea Law Department
500 Broadway, Rm. 307
Chelsea, MA 02150

* * * * * *

JOSEPH T. McGUNIGLE

v.

HUMAN RESOURCES DIVISION

E-18-153

April 11, 2019
Christopher C. Bowman, Chairman

***HRD-Hiring Preference-Chapter 402B*—**The Commission dismissed an appeal from a candidate for appointment to the Quincy Fire Department seeking a Chapter 402B preference credit as a result of the disability of his father while serving as a Boston police officer. The Appellant was not entitled to the preference because the special act from which he benefited from the preference applied only to his prior appointment as a Quincy police officer, not a firefighter, and also because his father received the customary 72% of his last year salary for retirement—not the enhanced amount.

ORDER OF DISMISSAL

On August 22, 2018, the Appellant, Joseph T. McGunigle (Mr. McGunigle), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD), to deny him "402B Preference" under G.L. c. 31, s. 26 as amended by Chapter 402 of the Acts of 1985.

2. Relevant to this appeal, the preference is given to those persons whose parent "has been retired at a yearly amount of pension equal to the regular rate of compensation which the … police officer … should have been paid had the … police officer … continued in said service at the grade held at the time of retirement, pursuant to a special act of the legislature in which said … police officer … is determined to be permanently or totally disabled; and … in the case of a police officer, such police officer while in the performance of the police officer's duties and as a result of an assault on the police officer's person sustained injuries which resulted in the police officer being permanently and totally disabled.…"

3. The parties agree that no Special Act was ever passed regarding Mr. McGunigle's father, who served as a Boston Police Officer.

4. The parties agree, however, that a Special Act was passed in 1997 (Chapter 64 of the Acts of 1997) stating in relevant part that: "…for the purpose of placement on the eligible list for appointment for the position of police officer in the city of Quincy, Joseph T. McGunigle shall be considered to be the son of a police officer as provided in Section 26 of chapter 31 of the General Laws; provided, however, that he passes the required written and physical examination for entrance to the police service …". (emphasis added)

5. Mr. McGunigle stated at the pre-hearing conference that, subsequent to the passage of the above-referenced Special Act, he was given the 402B preference (statewide) and was appointed as

a Quincy Police Officer. He served as a Quincy police officer for fourteen (14) years and is now collecting a pension.

6. Mr. McGunigle has recently passed the civil service examination for firefighter and has asked HRD to provide him with 402B preference for firefighter, placing him at the top of eligible lists for firefighter.

7. Mr. McGunigle argued that Chapter 402B, coupled with the 1997 Special Act, require HRD to grant him this preference.

8. HRD argued that McGunigle does not meet the requirements of the 402B preference, standing alone, and/or in conjunction with the 1997 Special Act.

9. HRD submitted a Motion for Summary Decision. Mr. McGunigle submitted a reply / opposition.

10. On December 13, 2018, I held a motion hearing and heard oral arguments from both parties.

ANALYSIS

For the reasons stated in HRD's Motion for Summary Decision, Mr. McGunigle does not qualify for 402B preference. It is undisputed that, when Mr. McGunigle's father retired from the Boston Police Department, he received the customary seventy-two (72) percent of his last year salary for retirement as opposed to "a yearly amount of pension equal to the regular rate of compensation which the … police officer … should have been paid had the … police officer … continued in said service at the grade held at the time of retirement." Further, there is no Special Act of the Legislature ordering a retirement benefit at the higher amount. Finally, the Special Act referenced by Mr. McGunigle relates solely to him receiving hiring preference as a *Quincy Police Officer*. He received that benefit and is now retired. Neither the statute or the Special Act provides for any further hiring preferences, including that being requested here.

CONCLUSION

For these reasons, Mr. McGunigle's appeal under Docket No. E-18-153 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Joseph T. McGunigle
[Address redacted]

Mark Detwiler, Esq.
Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

CALEB NELSON

v.

BOSTON POLICE DEPARTMENT

G1-19-001

April 11, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Boston Police Officer-Medical Incapacity-Inability to Carry a Firearm—The Commission granted the Boston Police Department's motion to dismiss an appeal from a candidate for appointment as a police officer whose medical evaluation rendered him ineligible to carry a firearm. The nature of the candidate's medical incapacity is not disclosed.

ORDER OF DISMISSAL

On December 27, 2018, the Appellant, Caleb Nelson (Mr. Nelson), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer.

2. On January 29, 2019, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Nelson, his wife and counsel for the BPD.

3. As part of that pre-hearing, the parties agreed to and signed stipulated facts and provided an overview of their respective arguments.

4. According to the BPD, Mr. Nelson would not be eligible to carry a firearm based on the results of a medical evaluation. At the pre-hearing conference, Mr. Nelson did not dispute this argument by the BPD.

5. I provided Mr. Nelson with a week to determine whether he wanted to pursue his appeal at the Commission.

6. Subsequent to the pre-hearing, Mr. Nelson indicated that he wanted to go forward with his appeal.

7. The BPD subsequently submitted a Motion to Dismiss, which I have deemed a Motion for Summary Decision, and Mr. Nelson submitted a reply.

CONCLUSION

For all the reasons stated in the BPD's Motion for Summary Decision, the Appellant's appeal under Docket No. G1-19-001 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Caleb Nelson
[Address redacted]

Kate M. Kleimola, Esq.
City of Boston
Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

* * * * * *

JAMES D. PACHECO

v.

CITY OF NEW BEDFORD

G1-18-010

April 11, 2019
Paul M. Stein, Commissioner

***Bypass Appeal-Original Appointment as a Firefighter-Social Media-Intemperate Facebook Postings-Lying on Application About Address*—**Although the New Bedford Fire Department could not rely on a 2005 felony case against the Appellant to support his bypass since the case had been dismissed, it could justifiably bypass him based on three-year old social media posts that showed a level of indiscretion and offensive behavior incompatible with a firefighter's responsibilities.

DECISION

The Appellant, James Pacheco, appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, §2(b), to contest his bypass for appointment as a Firefighter with the New Bedford Fire Department (NBFD).[1] A pre-hearing conference was held on February 13, 2018, and a full hearing, which was digitally recorded,[2] was held on June 8, 2018, both at the UMass School of Law in Dartmouth. Eight exhibits (Exh.1 through Exh.8) were received in evidence. The Commission received post-hearing submissions from the Appellant by e-mail on June 21, 2018 and October 1, 2018 and received a Proposed Decision on behalf of the NBFD on October 1, 2018.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- NBFD Chief Michael Gomes
- NBFD District Chief Scott Kruger
- NBFD Captain Brandon Silva
- NBFD Captain Gary Raposa
- NBFD Lieutenant Stephen Peixoto

Called by the Appellant:

- James Pacheco, 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, James D. Pacheco is a life-long resident of New Bedford who graduated from New Bedford Regional Vocational Technical High School. He is employed as machinist/welder operating and repairing hydraulic motors, pumps, valves and cylinders. He is a decorated veteran who has been deployed to Iraq and Afghanistan as an infantryman with the Massachusetts Army National Guard, where he has served since 2005 and currently holds the rank of Sergeant (E-5). (*Exhs. 5 & 6; Testimony of Appellant*)

2. Mr. Pacheco took and passed the civil service Firefighters' examination administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the eligible list established on November 4, 2016 and which expired on November 30, 2018. (*Exh.3; Testimony of Appellant*)

3. On August 1, 2017, HRD issued Certification #04863 authorizing New Bedford to hire five (5) permanent full-time firefighters for the NBFD. Mr. Pacheco's name appeared in the 8thranking on the certification. (*Exh.3*)

4. Mr. Pacheco signed Certification #04863 as willing to accept appointment and duly submitted an Application for Appointment on August 2, 2017. (*Exh.6*)[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. 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 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.

3. At the time of the 2017 hiring cycle, the NBFD used a standard four (4) page application form, which the applicant signed to be "true and complete", that contained six sections: Residence and Personal Data; Education; Employment History, Military History; Special Training and Skills and Additional Comments and Work Experience. The applicant also executed release forms authorizing the NBFD to conduct a CORI (criminal records) check, RMV check and a general release to obtain "information pertaining to me" from any other person or entity. (*Exhs. 5 & 6*)

5. The 2017 application was the second time Mr. Pacheco had applied for appointment as an NBFD Firefighter. His first application was submitted on September 8, 2016, pursuant to a certification from the prior eligible list. (*Exh.5; Testimony of Appellant*)

6. During the prior 2016 hiring cycle, NBFD District Chief Scott Kruger, the supervisor of background investigations for the NBFD, conducted a full background investigation into Mr. Pacheco's application, assisted by NBFD Captain Brandon Silva. On September 27, 2016, Deputy Chief Kruger submitted a report of his findings to NBFD Fire Chief Michael Gomes. (*Exh.4; Testimony of Chief Gomes, Dep. Chief Kruger & Capt. Silva*)

7. Deputy Chief Kruger's report found three problematic circumstances involving Mr. Pacheco's background and application.

- Mr. Pacheco listed his current "Address" as [# redacted] Arnold Street in New Bedford, and stated he had "lived" at that address for 22 years. The residence turned out to be the home of Mr. Pacheco's father, who said that his son had not lived with him for several years, but now lived with his girlfriend somewhere on Fair Street. After some further investigation, Mr. Pacheco's actual Fair Street residence was located. Dep. Chief Kruger attached a photograph of the mailbox on the porch showing Mr. Pacheco's name.

- A search of public postings on social media turned up three postings by Mr. Pacheco in August and September 2013 which contained rants, peppered with obscenities, about the difficulties he had getting a job after military service, disparaging remarks about an "over privileged" kid "who drives his moms Mercedes", referring to another military person as a "f---ing POG"[person other than a grunt, i.e. a paper-pusher vs, an infantryman] and to the "f---ing crooked civil service/affirmative action bulls--t", and even one threatening remark: "Be thankful I didn't smash your face into a cupholder . . . ."

- A visit to the New Bedford District Court turned up a record of what appeared to be a 2005 felony conviction for larceny over $250.

(*Exhs.4 & 8; Testimony of Dep. Chief Kruger*)

8. Despite the negative aspects contained in his background investigation report, Chief Gomes scheduled Mr. Pacheco to meet on October 5, 2017 with the interview panel of three NBFD officers: Chief Gomes, another superior officer (Capt. Gary Raposa), and an officer representing the firefighters' union, Local 841, I.A.F.F. (Lt. Stephen Peixoto). (*Exh.7A-7C; Testimony of Chief Gomes, Capt. Raposa & Lt. Peixoto*)

9. The interview was conducted in a semi-structured form, with all candidates being asked the same questions designed by Chief Gomes, with each panel member provided a score sheet to take notes and score the candidate's performance on each question as well as on six overall characteristics (1-Below our Standards; 2-Good; 3-Excellent). Save for the answers to the final two questions described more specifically below, the three interview panelists scored Mr. Pacheco "Good" or "Excellent" in nearly every other answer and category. (*Exh.7A-7C; Testimony of Chief Gomes, Capt. Raposa & Lt. Peixoto*)

10. The final interview questions were more open-ended, designed to draw out information (positive or negative) specific to the particular candidate. In particular, Q.11 asked:

> "As you know, there will be a background check. Is there anything you would like to contribute or that we may discover as the process moves forward?"

In response to Q.11, Mr. Pacheco initially answered: "No sir". At that point Chief Gomes brought up the three negative issues generated by the (already completed) background investigation.

- As to the residence discrepancy, Mr. Pacheco explained that he used his father's address because Fair Street was not a "good neighborhood" and he was uncomfortable using that address because he was concerned that the mail would not get to him there. Chief Gomes found this explanation unsatisfactory, noting that the application specifically asked for the address where the applicant "lived", not a mailing address.

- As to the Facebook postings, Mr. Pacheco was forthcoming, admitting that he had made the postings and that it was not "his finest hour" and he did not currently post on social media, was a different person now, having settled down, married and started a family. He also stated that he no longer maintained those social media accounts or posted online the way he had in the past. The postings still troubled all the interview panelists because there were multiple postings, they had occurred less than three years ago, and (although the accounts may have been deleted) the postings remained on-line and were available for public access.

- As to the felony conviction, Mr. Pacheco stated that he pleaded guilty initially because he was about to be activated and fighting the charges would have prevented him from doing so. He said that, later, the case was "revised and revoked" and all charges dismissed. He stated that his attorney said something to the effect that would mean there would be nothing on his record.[4]

- All interview panelists were troubled by what they called a "lack of candor" on Mr. Pacheco's part for failing to raise these issues of concern before he was confronted with them.

(*Exhs.7A-7C & 8; Appellant's Post-Hearing Submission dated June 21, 2018; Testimony of Appellant; Chief Gomes, Capt. Raposa & Lt. Peixoto*)

11. Based on the three negative issues discovered during the background investigation, as well as Mr. Pacheco's lack of candor in addressing those issues during his interview, Chief Gomes decided that Mr. Pacheco would be bypassed. Mr. Pacheco did not appeal that decision. (*Testimony of Appellant & Chief Gomes*)

12. When Mr. Pacheco submitted his 2017 application, he changed the answer about his "Address", giving the Fair Street address as his "current" residence for the past three years. (*Exh.6*)

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4. The criminal docket does appear to indicate that the court did allow a motion to "revise and revoke" the original disposition, but does not fully explain exactly what happened to result in the charges being "dismissed". At the Commission hearing, Mr. Pacheco noted that he held an unrestricted Class A firearms license, issued by the New Bedford Police Chief, which I infer he would not have received had there been a felony conviction on his record. (*Exh.8; Testimony of Appellant; Appellant's Post-Hearing Submission dated June 21, 2018*)

13. Mr. Pacheco's corrected (truthful) 2017 application, however, did not change Chief Gomes conclusion that Mr. Pacheco had been untruthful on his 2016 application, and that, while his past actions were not a "forever" bar to possible future appointment, too little time had passed to give him further consideration for hiring in the current cycle. Accordingly, Chief Gomes decided that Mr. Pacheco did not need to be given another inteview and would be bypassed again. (*Testimony of Chief Gomes*)

14. By letter dated November 30, 2017, Chief Gomes informed Mr. Pacheco that he had been bypassed. The letter noted Mr. Pacheco's "good references" and "good prior military record", but stated, as reasons for the bypass: (1) the 2016 false statement about his residence; (2) the 2013 Facebook postings; (3) the 2005 felony conviction: and (4) failure to be forthcoming about those issues until the results of the NBFD's background investigation were disclosed. (*Exh.2*)

15. This appeal duly ensued. (*Claim of Appeal*)

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, by a preponderance of evidence, the appointing authority had "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of a candidate's background and qualifications sufficient to form a "credible basis" to believe allegations of misconduct or other facts that present "legitimate doubts" about the candidate's present fitness to perform the duties of the position. *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*.

ANALYSIS

New Bedford has established by a preponderance of the evidence that its decision to bypass the Appellant was reasonably justified after an impartial and reasonably thorough review disclosed a "credible basis" for "legitimate doubts" about his present suitability to serve as an NBFD firefighter. Although the NBFD's conclusion about Mr. Pacheco's felony conviction, which the evidence discloses to be mistaken, would not be a proper basis for bypass, the other reasons stated are sufficient to justify the November 2017 decision to bypass him.

First, the NBFD was fully warranted to conclude that the 2013 Facebook postings demonstrated a level of indiscretion and offensive behavior that is incompatible with the high standards of professionalism, sound judgment and integrity that the NBFD may reasonably expect of those in whom it entrusts with the duty to serve the public in the fire service. Mr. Pacheco asked that this behavior be discounted as uncharacteristic of the individual that he has become. If that is, indeed true, bypassing him for past behavior that is not indicative of present suitability would not be sufficient to support "reasonable justification". That determination, however, is one to be made by the NBFD and the Commission's role does not permit it to substitute its own judgment in such matters for the judgement of the NBFD made in the reasonable exercise of its discretion where, as here, that judgment call has been made after a reasonably thorough review free of any personal or political bias.

Several facts support the reasonableness of the NBFD's conclusion that Mr. Pacheco's 2013 behavior gave them "legitimate

doubts" about his present suitability for appointment. The events, which occurred in 2013, when he was in his late 20's, cannot be said to be so far removed from the present for their consideration to be unreasonable. Moreover, Mr. Pacheco had the opportunity to clear his record on this subject during the interview but failed to do so. Whether he "forgot" about the postings or not, his failure to be forthcoming about this serious lapse in judgment is also a factor that the NBFD could properly weigh in assessing the risk that this prior behavior presented. How long the NBFD may reasonably rely on this deficiency in making a future hiring decision is not a question that the Commission need answer at this time.

Second, whether Mr. Pacheco's mistaken use of a former residence as his "current" address is a reasonable justification to bypass him for making a "false" statement on his 2016 application is a closer call. The NBFD points out that the application clearly asks how long the applicant has "lived" at the address he provides, so there is little room for ambiguity in what address was being requested. Chief Gomes acknowledged that, while such a mistake is considered a "red flag", and would be automatically disqualifying when the misrepresentation related to a false claim to residency preference, he could point to no ulterior or underlying fact that Mr. Pacheco was trying to conceal. I found Mr. Pacheco's explanation credible—he was not attempting to conceal anything that reflected negatively on himself. Nevertheless, I also cannot discount the fact that the application is clear and Mr. Pacheco knew or should have known that he did not answer the question as required. He did provide his correct residence on his 2017 application and, had that been the only continuing issue from 2016 (which it was not, as noted above), it would probably not have been enough to have justified this bypass.

Third, Mr. Pacheco presented credible evidence that the NBFD misread the docket on the 2005 criminal case and, in fact, he does not have a felony conviction on his record. The fact that he holds an unrestricted Class A firearms license issued by the New Bedford Police Chief, support that conclusion by a preponderance of the evidence. While the docket sheet itself is open to some interpretation, on its face, without further investigation, it does not, and would not in the future, support a bypass on the grounds of a felony conviction. Nor would Mr. Pacheco's failure to volunteer information about this criminal case, which he reasonably believed had been "revised and revoked", i.e., dismissed, be reasonable justification for a bypass. Once asked about it for the first time at the 2016 interviews (no questions about criminal record appeared on the application itself), he was fully "forthcoming" and truthful about the case.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, James D. Pacheco, is ***denied.***

Civil Service Commission

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

James D. Pacheco
[Address redacted]

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
New Bedford Law Department
133 William Street
New Bedford, MA 02740

Melissa A. Thomson, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

VINCENT PETERS

v.

CITY OF NEW BEDFORD

G1-18-124

April 11, 2019
Paul M. Stein, Commissioner

Bypass Appeal-Original Appointment as a New Bedford Police Officer-Dismissal-Mootness-Offer of Employment Extended—The Commission dismissed an appeal from a bypassed candidate for original appointment to the New Bedford Police Department on the grounds of mootness since the Department had subsequently made him an offer of employment.

ORDER OF DISMISSAL

The Appellant, Vincent Peters, appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c. 31, §2(b), to contest his bypass by the City of New Bedford (New Bedford) for appointment as a full-time permanent Police Officer with the New Bedford Police Department (NBPD). On January 16, 2019, the parties submitted a "Joint Petition for 310 Relief" which stated, in part: "On September 25, 2018, after reviewing Mr. Peters' new employment application and interviewing him, the New Bedford Police Department made a conditional offer of employment to him for the position of police officer." The Joint Petition, however, does not represent that Mr. Peters' civil service rights were violated through no fault of his own, which is a predicate to the Commission's granting relief under Chapter 310 in this matter. Rather, the Joint Petition expressly states that the parties consider this action as "a settlement and a compromise

of a disputed claim and said settlement is not to be construed as an admission of liability or of the truth of any of the allegations [made by Mr. Peters in his bypass appeal]".

Accordingly, the Commission ORDERS: the appeal of the Appellant, Vincent Peters, in CSC Docket No. G1-18-124 is ***dismissed as moot***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Jared S. Burke, Esq.
Law Offices of Timothy M. Burke
160 Gould Street, Suite 100
Needham, MA 02494

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02740

Mark Detweiler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

KENDRIC REESE

v.

HUMAN RESOURCES DIVISION

B2-19-046

April 11, 2019
Christopher C. Bowman, Chairman

Examination Appeal-Fire Lieutenant Promotional Exam-E&E Credits-Failure to Submit the E&E Module On Line—An appeal from a Pittsfield firefighter denied E&E credits on the lieutenant promotional exam was dismissed because he was unable to show that he had transmitted the E&E module on-line to HRD or received a confirmation receipt.

ORDER OF DISMISSAL

On February 27, 2019, the Appellant, Kendric (Mr. Reese), a firefighter with the City of Pittsfield (City)'s Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny him any points for the Education and Experience (E&E) exam component on the November 17, 2018 Fire Lieutenant promotional examination.

On March 27, 2019, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Mr. Reese and counsel for HRD (via phone).

APPLICABLE 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 Mr. Reese sat for the written component of the Fire Lieutenant examination on November 17, 2018. He had until November 24, 2018 to complete the online E&E component of the examination. According to Mr. Reese, on November 24, 2018, he logged into his online account via his phone; completed the E&E module and submitted it electronically. Mr. Reese acknowledges, however, that he never received a confirmation email from HRD stating that the E&E examination component was completed. HRD has no record of Mr. Reese completing the E&E component and/or submitting the supporting documentation, which can be done while completing the E&E component online or by sending an email to HRD.

While I am not unsympathetic to Mr. Reese's plight here, it is undisputed that: 1) HRD has no record showing that Mr. Reese completed the E&E component of the examination; 2) Mr. Reese never received 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.

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, Mr. Reese's appeal under Docket No. B2-19-046 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

Kendric Reese
[Address redacted]

Mark Detwiler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

DAVID J. SINOPOLI

v.

HUMAN RESOURCES DIVISION

B2-19-044

April 11, 2019
Christopher C. Bowman, Chairman

Examination Appeal-Fire Lieutenant Promotional Exam-E&E Credits-Failure to Submit the E&E Module On Line—This is an appeal from yet another Pittsfield firefighter denied E&E credits on the lieutenant promotional exam that was dismissed by the Commission because he was unable to show that he had transmitted the E&E module on-line to HRD or received a confirmation receipt.

ORDER OF DISMISSAL

On February 23, 2019, the Appellant, David Sinopoli (Mr. Sinopoli), a firefighter with the City of Pittsfield (City)'s Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny him any points for the Education and Experience (E&E) exam component on the November 17, 2018 Fire Lieutenant promotional examination.

On March 27, 2019, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Mr. Sinopoli and counsel for HRD (via phone).

APPLICABLE 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 Mr. Sinopoli sat for the written component of the Fire Lieutenant examination on November 17, 2018. He had until November 24, 2018 to complete the online E&E component of the examination. According to Mr. Sinopoli, on November 20, 2018, he logged into his online account via his desktop computer at home; completed the E&E module and submitted it electronically. Mr. Sinopoli acknowledges, however, that he never received a confirmation email from HRD stating that the E&E examination component was completed. HRD has no record of Mr. Sinopoli completing the E&E component and/or submitting the supporting documentation, which can be done while completing the E&E component online or by sending an email to HRD.

While I am not unsympathetic to Mr. Sinopoli's plight here, it is undisputed that: 1) HRD has no record showing that Mr. Sinopoli completed the E&E component of the examination; 2) Mr. Sinopoli never received 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.

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, Mr. Sinopoli's appeal under Docket No. B2-19-044 is ***dismissed.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 11, 2019.

Notice to:

David Sinopoli
[Address redacted]

Mark Detwiler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

MICHAEL CALCASOLA

v.

TOWN OF EAST LONGMEADOW

D1-17-258

April 25, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Discharge of East Longmeadow Police Officer-Lying About Confrontation with Security Guard-Bias—The Commission unanimously reversed the discharge of a previously undisciplined East Longmeadow police officer who lost his position for purportedly lying about a minor altercation with a security guard in the context of responding to a choking incident at a local business. Hearing Commissioner Cynthia A. Ittleman found that the Appellant had not been shown to be untruthful and that the video evidence of this altercation was not probative. There is a suggestion of bias influencing the actions of Longmeadow officials in this case arising from a poor relationship between the Appellant and his superior, who also happens to be the Police Chief's son.

DECISION

The Appellant, Michael Calcasola (hereinafter "Mr. Calcasola" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on December 20, 2017, under both G.L. c. 31, ss. 42 and 43, appealing the decision of the Town of East Longmeadow (hereafter "Town" or "Respondent") to terminate the Appellant from his position as a tenured, permanent police officer. A prehearing conference was held in this case on January 24, 2018 at the State Office Building in Springfield.[1] A full hearing was held on the appeal on April 11, 2018, at the same location. At the Appellant's written request, the hearing was declared open to the public. The hearing was digitally recorded and copies of the digital recording were sent to the par-

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

ties.[2] All witnesses, with the exception of the Appellant and, by agreement, the Appellant's technical expert witness, were sequestered. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT

Twenty-seven (27) Exhibits were entered into evidence at the hearing (Joint Exhibits J-A through J-L; Appellant Exhibits 1, 4 - 18).[3] Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Denise Menard, East Longmeadow Town Manager
- Mr. B (former private security guard for company A)
- Police Sergeant Joseph Dalessio
- Police Officer Edward Rice
- Detective Sergeant Steven Manning
- Police Chief Jeffrey Dalessio

Called by the Appellant:

- James Oulundsen
- Police Officer Michael Calcasola (Appellant)

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

1. The Appellant began employment as a Police Officer with the East Longmeadow Police Department ("ELPD") in or about July 2015, and was a tenured civil service employee at the time of his termination. At all pertinent times, the Appellant worked the 3pm to 11pm shift. (Stipulated Fact; Testimony of Appellant)

2. The Appellant earned a Bachelor's Degree in Criminal Justice from Westfield State University. (Testimony of Appellant)

3. The Appellant had not received any prior discipline or negative employment actions during his employment as an East Longmeadow Police Officer, and his record demonstrates that he had been an active and dutiful police officer. (Testimony of Appellant; Appellant's Exhibit A (Ex. A-)13)

4. The ELPD has a Police Chief, Jeffrey Dalessio, no Lieutenants or Captains, six (6) Sergeants, and a number of Patrol Officers. One of the Sergeants is Joseph Dalessio, Chief Dalessio's son. (Testimony of Sgt. Dalessio) Chief Dalessio began working in the ELPD decades ago. At the time of the Commission hearing, Chief Dalessio had been Chief for two (2) years. (Testimony of Chief Dalessio)

5. There is some tension between the Appellant and Sgt. Dalessio. Specifically, Sgt. Dalessio has tried to irritate the Appellant and, when the Appellant does not respond, Sgt. Dalessio reports it to his father, the Police Chief. (Testimony of Appellant) For example, problems have arisen between them when the Appellant was processing civilian fingerprints and in regard to the service of restraining orders. (Testimony of Appellant and Sgt. Dalessio) In addition, the Appellant alleges that, in front of other officers, Sgt. Dalessio has made multiple disparaging statements and comments in poor taste when the Appellant's wife was pregnant. (Testimony of Appellant)

6. On August 10, 2017, the Appellant was working on patrol in his capacity as an East Longmeadow Police Officer. (Testimony of Appellant)

7. At approximately 9:00 p.m. that evening, the Appellant was monitoring traffic on Shaker Road in East Longmeadow when an ambulance pulled over. The EMTs/paramedics asked the Appellant if he was responding to an incident involving someone who was choking at company A, which is a large facility with multiple parking areas. (Testimony of Appellant; Joint Exhibit (Ex. J)-A)

8. The Appellant had not been notified by the ELPD dispatcher of the incident but, in view of the emergency, the Appellant advised the EMTs/paramedics that he would follow them to company A. The Appellant informed the ELPD dispatcher about the choking victim. The Appellant activated his rear emergency lights and followed the ambulance to the company A premises. (Testimony of Appellant)

9. Upon arrival at the company A parking lot, the Appellant and the ambulance waited for the private on-site security guard, Mr. B, to lead them to the victim. (Testimony of Appellant) At the time of this incident, Mr. B was in the second week of a one-month security company training program at company A and attending college. Shortly thereafter, he began working at a company in Connecticut. (Testimony of B)

10. Mr. B arrived in his vehicle at the parking lot where the Appellant and the ambulance were located but he did not immediately lead the ambulance and the Appellant to the choking vic-

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. Included in the record is a USB flash drive from Mr. Oulundsen, the Appellant's expert witness, containing recordings and photographs he reviewed and/or prepared in this case, as well as a document in support of Mr. Oulundsen's testimony entitled, "Comparing Frame Rates for Video Surveillance," by Nedap Security Management, self-described as " … a leader in the design and manufacture of electronic access control systems …." (www.nedapsecurity.com)

Also included in the record is a transcript of the recorded hearing provided by the Respondent.

Neither party offered documents of any pertinent ELPD rules or regulations. There is no allegation that the Appellant violated a specific ELPD rule.

tim. Instead, the Appellant observed Mr. B using his phone and he did not seem to be aware of the seriousness of the situation. The Appellant gestured to Mr. B and urged him to hurry up. Thereafter, Mr. B led the Appellant and the ambulance indoors to the victim. At or around that time, the Appellant received a call from the ELPD dispatcher indicating that the blockage in the victim's throat had been dislodged. (Testimony of Appellant; Ex. J-A)

11. Upon entering the building, another security guard driving a golf cart appeared and brought the ambulance personnel to the victim. The ambulance subsequently transported the victim to an area hospital. (Testimony of Appellant; Ex. J-A)

12. At or about this time, the Appellant notified his supervisor on duty, Sgt. Dalessio, of the incident by radio. Sgt. Dalessio told the Appellant to find out why the security personnel contacted the ambulance before informing ELPD since security was supposed to call ELPD (at 911) first in such situations. (Testimony of Appellant and Sgt. Dalessio) When the Appellant contacted Sgt. Dalessio, he was on duty but at the home of his father, Chief Dalessio, where they were having dinner and watching television.[4] Other members of the ELPD also occasionally visit Chief Dalessio at home. (Testimony of Chief and Sgt. Dalessio)

13. The Appellant approached Mr. B in the area of the security office and asked him why security called the ambulance without first calling 911 and said that his Sergeant was on the way. The Appellant found Mr. B to be "defensive", "angry" and "confrontational". (Testimony of Appellant; Ex. J-A)

14. The Appellant and Mr. B entered the company A building interior security office where there was limited space for two (2) people to pass one another near the door. The security office had windows to the adjacent foyer. A security camera was affixed near the ceiling of the foyer, diagonally across from the entry to the security office and a couple of windows that were each separated by columns. (Exs. A-16 and 17) In the office, the Appellant asked Mr. B his name. In his recorded interview, Mr. B stated that he said to the Appellant, "no, what's YOUR name because you're in MY territory and you're telling me to hurry up outside … I didn't come to you disrespectfully ." (Ex. J-L)(emphasis in audio/visual recorded interview) The Appellant gave Mr. B his name. (Testimony of Appellant)

15. At one point during the verbal altercation between the Appellant and Mr. B, Mr. B moved around from behind the desk or counter in order to leave the office, in the process passing the Appellant, who stood on the other side of the desk or counter, facing Mr. B. As Mr. B turned the corner of the desk or counter, he was in close proximity to the Appellant, his left arm was bent and his pointer finger was extended, pointing at the Appellant's mid-to-lower chest. By this time, Officer Rice was near the security office door and Mr. B appeared to be heading toward Officer Rice and calling out to him. (Exs. J-G and A-17)

16. Although the security camera video recording (which does not record audio) shows some of what was going on in the security office between the Appellant and Mr. B through the office windows, the recording does not show whether or not Mr. B touched the Appellant with his extended pointer finger before the Appellant pushed Mr. B because, as the local hearing officer indicated, Mr. B's actions were obstructed by a window column.[5] As Mr. B walked by the Appellant, there was limited room for Mr. B to pass the Appellant without coming into contact with him. (Exs. J-A, J-B, J-C, J-E, J-G, J-J, A-17)

17. Officer Rice was walking through the foyer next to the security office while the Appellant and Mr. B were arguing. He was heading toward the glass doors, looking straight ahead while passing the security office windows (on his right side) through which the Appellant and Mr. B can be seen arguing. He looked for an instant through one of the windows into the security office but that was prior to any contact between the Appellant and Mr. B. He did not look to his right side again until he passed the windows and had nearly passed the security office doorway. At or about that time, the Appellant had put his left hand on Mr. B's left shoulder and pushed him somewhat. (Exs. J-D, J-E, J-G, and J-J) However, Officer Rice later told investigator Sgt. Manning that "… from his [Officer Rice's] angle he did not see [Mr. B] assault [the Appellant]". (Ex. J-E) Mr. Rice did not see the security camera recording. (Testimony of Rice) I find that Officer Rice could not have seen whether or not Mr. B touched the Appellant before the Appellant put his hand on Mr. B's shoulder because Officer Rice did not previously look in that direction. Even if Officer Rice had looked in that direction sooner, it is unlikely he could have seen Mr. B's actions since Mr. B was behind the Appellant. (Ex. J-G)

18. Sgt. Dalessio arrived at company A and spoke to Mr. B. Mr. B "admitted there was a delay in leading Officer Calcasola and [the ambulance] into the building because he went to the wrong door, which he stated was his fault because he was new and didn't know his way around the facility yet." (Ex. J-C). Mr. B was not injured. Sgt. Dalessio asked Mr. B if he wanted to file a complaint against the Appellant and he said yes. Mr. B filled out the one (1) page complaint after viewing the security camera recording with Sgt. Dalessio. (Testimony of Mr. B) The complaint contains two different styles of handwriting with the first part of each of the two (2) paragraphs on the complaint in one (1) style and the end of the two (2) paragraphs written in another style.[6] (Ex. J-B) The complaint states that the Appellant had told him to hurry up when they first met in one (1) of the parking areas, the Appellant was "rude" when he asked Mr. B why security called the ambulance before calling 911, he asked for the Appellant's name when they were in the security office, he walked past the Appellant in the security office to

4. It is unknown if Sgt. Dalessio was on a break at his father's house.

5. Sgt. Manning's investigation report and the hearing officer's report similarly found that the security camera view was blocked by a window column at this point. (Exs. J-E and J-J)

6. There was insufficient evidence in the record to conclude who else's handwriting is in the complaint in addition to that of Mr. B. The existence of two (2) handwriting styles in the complaint undermines its reliability.

speak to Officer Rice but denied that he touched the Appellant, and the Appellant pushed him. (Exs. J-B and J-C; Testimony of Mr. B) Sgt. Dalessio suggested that Mr. B white-out a portion of the complaint (and provided the white-out to Mr. B), insert that the Appellant was "rude and sarcastic", and insert "my arm was up but I didn't make any contact". (Testimony of Mr. B) Asked why there are two (2) different types of handwriting on the complaint, Mr. B indicated that it was because Sgt. Dalessio helped him fill out the complaint form. (Testimony of Mr. B) Sgt. Dalessio denied helping Mr. B fill out the complaint form stating that he did not "recall" the use of white-out on the complaint and he did not "recall" that he suggested that Mr. B use any particular words in the complaint. (Testimony of Sgt. Dalessio) There is no evidence in the record that there was anyone else with Mr. B and Sgt. Dalessio when Mr. B drafted the complaint. (Administrative Notice) Given the specificity of Mr. B's description of how Sgt. Dalessio helped him fill out the complaint and Sgt. Dalessio's lack of recollection, I credit Mr. B's testimony that Sgt. Dalessio assisted him in filling out the complaint in the manner described by Mr. B.[7]

19. While he was at company A, Sgt. Dalessio also spoke with the Appellant. The Appellant reported to Sgt. Dalessio that Mr. B pushed him and that he pushed Mr. B back. Sgt. Dalessio asked the Appellant if Mr. B had assaulted him, why the Appellant hadn't arrested Mr. B. In his August 14, 2017 report on the incident, Sgt. Dalessio wrote that the Appellant had no answer to this question. However, at the Commission hearing, Sgt. Dalessio agreed that such arrests are discretionary. (Ex. J-C; Testimony of Sgt. Dalessio)

20. When the Appellant returned to the police station near the end of his shift, Sgt. Dalessio ordered the Appellant to write his report regarding the incident, per Chief Dalessio's order. The Appellant told Sgt. Dalessio that he wanted to prepare it the next day because he wanted time to think about it and to talk to his union representative. Sgt. Dalessio denied the Appellant's request. (Testimony of Appellant) At the Commission hearing, Sgt. Dalessio stated that he could not "recall" telling the Appellant to write the report that night as required by the Chief. (Testimony of Sgt. Dalessio)

21. Notwithstanding his concerns, the Appellant submitted his report on the night of the incident at company A. He wrote, in pertinent part,

> … I arrived at [company A] with [the ambulance] on the [street name redacted] side of the building.
>
> At this point … we still did not know where the victim was in the building nor did the security guard because we were driving around the parking lot. [The ambulance] said the security guard in the van would lead the way. [The ambulance pulled up and the security guard stayed in his vehicle and appeared to be on his phone looking at it. I drove beside him and told him 'come on man we are waiting on you someone is choking, lets go'. At this point he still appeared to be unaware of the seriousness of this call. He ended up leading myself, and [the ambulance] back to the main entrance.
>
> As soon as we got there I got the doors dor (sic) [the ambulance] and followed them inside … where another security guard was waiting in a golf cart. … prior to this dispatch said what ever the victim had lodged in her throat was cleared. Sergeant Dalessio said he was in route … I was going to wait for him at the front security entrance. Sergeant Dalessio wanted to know why the security guards didn't call 911 first. I said I would find out.
>
> I then went to the security guard office area … to speak with the guard. I said my sergeant is on his way, and asked him if he could show my sergeant where we would be. He said the Sergeant is from your department right or from somewhere else? I said what department would you think he would be from? He said that I gave him an attitude when he was on his phone in the side lot. He said I was rude and that I was sarcastic to him. I informed him that someone was choking at that time and the one person that was supposed to lead myself and [the ambulance] to the victim was using his phone parked in his vehicle. … I asked him why he did not call 911 and then he became upset and said 'Nah whats (sic) your name, you know what im taking your name. Im (sic) not going to sit here and take this from you after you talked to me rude and being sarcastic.' I then asked him for his name. … I stood in a small hallway while I was speaking with him. He began to yell at me. He was walking towards me and then touched me in the chest area. At this point I created distance by using my hands to separate myself from him. At this point I asked for Sergeant Dalessio to meet me at the front counter where this was taking place. Officer Rice was also present …

(Ex. J-A)(emphasis)(sic)

22. On August 17, 2017, Sgt. Steven Manning was informed by Chief Dalessio that Mr. B filed a verbal complaint (i.e., to Sgt. Dalessio on August 10, 2017, the date of the incident) alleging that the Appellant assaulted him while on duty on August 10, 2017. Chief Dalessio ordered Sgt. Manning to conduct an investigation into the incident. Sgt. Manning informed Chief Dalessio of a possible conflict of interest because he was the Union President and, after a brief discussion, they agreed that Sgt. Manning could fairly and objectively conduct an investigation into a fellow-union member. (Testimony of Manning; Ex. J-E)

23. Sgt. Manning reviewed the security camera recording and the reports of the Appellant, Sgt. Dalessio and Officer Rice. He conducted a recorded interview of Mr. B on August 31, 2017.[8] On August 24 and 27, 2017, Sgt. Manning interviewed the two (2) ambulance personnel. On October 20, 2017, Sgt. Manning interviewed Officer Rice and on October 24 he interviewed the Appellant (who was accompanied by a union attorney and union representative). Sgt. Manning submitted his investigative report on October 25, 2017. (Testimony of Manning; Ex. J-E) The report summarizes each report and interview but makes no recommendations. (Ex. J-E)

24. For his investigation, Sgt. Manning reviewed the August 30, 2017 report of Officer Rice. Office Rice's report states, in part, that

7. I make no finding whether the statements in the lower part of the complaint in a different handwriting style is that of Sgt. Dalessio as there is insufficient evidence in the record in that regard.

8. Sgt. Manning also recorded interviews of the two (2) ambulance personnel but their interviews provided little information. Copies of the two (2) recordings are in the record.

he observed when Mr. B was exiting the security office where he had been arguing with the Appellant and that, " … [Mr. B] wanted to speak to me and he moved behind Officer Calcasola and at the time Officer Calcasola pushed [Mr. B] backwards away from him and he yelled at [Mr. B] not to ever touch or place your hands on a police officer and at this time [Mr. B] then pushed Officer Calcasola back." (Ex. J-D)(emphasis added); *see also* Exs. J-A, J-D, J-J, and A-17) Officer Rice's report did not say whether or not Mr. B touched the Appellant prior to the Appellant touching him. Further, Officer Rice's report states that Mr. B told him the reason he did not use the 911 system was that "[Mr. B] was new on the job and he called the ambulance by the telephone number that was listed in the book." (Ex. J-D) However, in Mr. B's audio-video recorded interview, Mr. B stated that it was his security guard colleague who called the ambulance first instead of 911, not him. (Ex. J-L) Officer Rice's written report also states that when he saw the Appellant and Mr. B arguing, he "stepped between" them. However, the security camera recording and Sgt. Manning's investigation report indicate that Officer Rice did not step between them; rather, he was talking to them from the foyer nearby. (Exs. J-D, J-E and J-G)

25. In addition to filing a complaint about the Appellant, Mr. B agreed to an audio-video recorded interview with Sgt. Manning and another officer.[9] In his interview, Mr. B asserted that he "ignored" the Appellant because he was "rude", "sarcastic" and had "pushed" him. (Exs. J-B, J-C and J-L) Further, Mr. B denied touching the Appellant before the Appellant touched him and said that the Appellant's action was unprovoked. (Exs. J-B and J-L) However, the security camera recording clearly shows both Mr. B and the Appellant actively arguing, as the Respondent's hearing officer found. (Exs. J-J and J-L) In addition, in his recorded interview, Mr. B added, in part, "I did get in his face a little bit [Mr. B illustrated by raising his left arm and pointing his pointer finger back and forth] …." (Ex. J-L) Mr. B also stated twice in his recorded interview that as he walked around the desk toward the Appellant, his hands were up near his shoulder, demonstrating the action by putting both hands near his right shoulder, allegedly to avoid touching the Appellant. However, the security camera recording does not show Mr. B putting both of his hands near his right shoulder. (Exs. J-G and J-L). [10] If Mr. B raised his hands when he walked around the Appellant, it was not visible in the security camera recording. When asked again to describe how the Appellant touched him, Mr. B told the interviewers, "I said listen, you don't touch me", adding that he did put his finger in the Appellant's face when he said that. (Ex. J-L) Further, at the Commission hearing, Mr. B testified that the Appellant shoved him with two (2) hands on his upper chest, even though Mr. B's complaint states that the Appellant pushed him and the security camera recording shows the Appellant pushing Mr. B by putting his hand on Mr. B's left shoulder, not putting both hands on Mr. B's chest. (Testimony of Mr. B)

26. In his report, Sgt. Dalessio wrote, in part,

> "… Officer Calcasola stated that he was having an issue with Mr. [B] and a physical altercation had occurred in which Officer Calcasola stated to me that Mr. [B] pushed him after being argumentative, therefore he pushed him back. He stated that the security guard had been on his phone when he was supposed to be showing Officer Calcasola and [the ambulance] personnel the entrance into the building and felt he was being disrespectful. Mr. [B] admitted there was a delay …. because he went to the wrong door …
>
> … As [Mr. B] went around [the Appellant], he alleged that Officer Calcasola then reached out and struck him with his hand, claiming that [Mr. B] struck him. [Mr. B] decided (sic) ever making contract with Officer Calcasola …." (Ex. J-C)(emphasis added)

However, Officer Rice's written report states that the Appellant "pushed" Mr. B first, not that he "struck" him. (Exs. J-C and J-D) At the Commission hearing, Sgt. Dalessio conceded that the contact between the Appellant and Mr. B was "between a brushing and a pushing". (Testimony of Sgt. Dalessio) Finally, Sgt. Manning's investigation report did not find that the Appellant "struck" Mr. B. (Ex. J-E)

27. A month after Sgt. Manning completed his report, specifically on November 29, 2017, Chief Dalessio called the Appellant and ordered him to report to the office of the Town Manager, Denise Menard, on December 1, 2017, at 11:30 a.m.[11] Chief Dalessio did not inform the Appellant of the purpose of the meeting, nor did he provide any written notice or documents to the Appellant regarding the purpose of the meeting. When the Appellant asked what the meeting was about, Chief Dalessio responded, "the [company A] incident." Chief Dalessio did not advise the Appellant that the meeting would involve the Appellant's truthfulness regarding the incident. (Testimony of Appellant; Testimony of Chief Dalessio)

28. On December 1, 2017, the Appellant reported to the Town Manager's office, where he was met by Chief Dalessio and Denise Menard. Ms. Menard handed the Appellant a letter (Testimony of Appellant) which stated, in part,

> For the reasons set forth below, acting as the "Appointing Authority" referenced in Mass. Gen. Laws c. 31, § 41 and consistent with the recommendation of Chief of Police Jeffrey Dalessio, **I intend to discharge you from your employment** …
>
> You were involved on duty in an incident on August 10, 2017, at or about 9:00 p.m. in which there was physical contact between you and a private security guard, [redacted], at [company A] … Following the incident, **you informed [Sgt. Dalessio] that the physical contact occurred when [Mr. B] pushed you after being argumentative, and that you pushed back**. You also gave

9. Mr. B did not file a report about the August 10, 2017 incident at company A. (Testimony of Mr. B)

10. Instead, the recording shows that as he passed the Appellant, at least his left arm was lower, near his mid-section on his left side, where visible. (Exs. J-G and J-L).

11. This was the first time Ms. Menard had been a town manager for a Massachusetts civil service community. Previously, she was a town manager in Connecticut. (Testimony of Menard)

> that version of events in a text message or messages to a member of the [ambulance] crew you had accompanied to [company A].
>
> **You repeated a similar version of events in an incident report prepared by you on August 10-11, 2017, in which you stated:**
>
> **'He was walking towards me and then touched me in the chest area. At this point, I created distance by using my hands to separate myself from him**.'
>
> Your statements are inconsistent with the observations and recollection of Mr. Brown and of Officer Ed Rice, who was present during the altercation. They are also inconsistent with the video of the incident captured by [company A]'s video security system, which you are able to review if you wish. The Chief of Police and I have determined that your statements were untruthful and you were dishonest in making them. …
>
> If necessary, a hearing concerning the reasons for discharge will be conducted on Tuesday, December 5, 2017, at 2:00 P.M. in the Office of Town Manager. As Appointing Authority, I will preside. You are invited to attend and bring whatever legal/union representation you wish...

(Ex. J-I)(attaching G.L. c. 31, ss. 41-15)(emphasis added)[12]

I take administrative notice that this letter states that the reason for discipline of the Appellant is only for his alleged untruthfulness after the incident on August 10, 2017, not for his conduct during the incident. (Administrative Notice)

29. At the meeting on December 1, 2017, the Appellant objected to the first paragraph of the December 1st letter and stated that he was uncomfortable with the process at this point. Although the Appellant had been working since the date of the incident, Ms. Menard immediately suspended the Appellant for three (3) days without providing any prior written notice. (Testimony of Menard and Chief Dalessio) Ms. Menard did not want the Appellant acting as a police officer after she handed him the December 1, 2017 letter. (Testimony of Menard)

30. On December 5, 2017, the Appellant and his counsel hand delivered a letter to Town counsel asking the Town Manager to recuse herself. (Testimony of Appellant)

31. The disciplinary hearing was continued to December 13, 2017 and Attorney Robert Sacco was designated as the hearing officer by the Town Manager. (Ex. J-J) At the hearing, the witnesses were Chief Dalessio, Sgt. Manning and the Appellant. The Appellant testified and was represented by counsel and his union representative. (Ex. J-J) In his testimony at the local hearing and at the Commission hearing, the Appellant added that Mr. B touched him three (3) times. (Id.; Testimony of Appellant)[13] The evidence included the various officers' reports (including that of Sgt. Dalessio), Mr. B's written complaint, the security camera recording, slower versions of the recording and photos from the recording. The Respondent did not call Mr. B to testify at that hearing and Mr. B's recorded interview was not included in the record there. (Ex. J-J; Administrative Notice)

32. In his December 18, 2017 report, Attorney Sacco wrote, in part,

> " … Officer Calcasola made three statements to superiors: He put in his report '[Mr. B] was walking towards me and then touched me in the chest area. At this point I created distance by using my hands to separate myself from him'; He (sic) told Sergeant Dalessio that [Mr. B] had pushed him so he pushed [Mr. B] back; and he reenacted the incident for Detective Sergeant Manning by showing that [Mr. B] was coming towards him when [Mr. B] brushing (sic) up against him and put a finger to his chest. Officer Calcasola did not deny making any of these three statements. …
>
> I find in reviewing the several versions of the tapes that Officer Calcasola' (sic) statement that [Mr. B] pushed him or poked him was not accurate. …
>
> The second claimed point of contact was as [Mr. B] passed Officer Calcasola in the narrow area near the exit to the room. … There is no indication of a push or poke or arm movement by [Mr. B] consistent with a poke or shove. … At most the two men may have slightly grazed one another because of the narrow space. …
>
> I conclude that Officer Calcasola's statements regarding the incident on August 10, 2017 were untruthful and he was dishonest in making them and therefore affirm the Appointing Authority's termination of Officer Calcasola's employment …." (Ex. J-J)

33. By letter dated December 19, 2017, Ms. Menard sent the Appellant a copy of Attorney Sacco's report and terminated the Appellant's employment. (Ex. J-K)

34. In deciding to terminate the Appellant, Chief Dalessio consulted the Massachusetts Chiefs of Police Association attorney who recommended terminating the Appellant's employment and sent Chief Dalessio a document entitled, "Chiefs' Legal Interest Column, A Legal Bulletin for Massachusetts Chiefs of Police, dated April 4, 2016. (Testimony of Chief Dalessio; Ex. J-H) This article states, in part,

> Some Chiefs may find it easier to think of untruthfulness like a continuum or spectrum. On one end of the continuum is intentional, malicious, deceptive conduct that will take one of three forms:
>
> > Deceptive action in a formal setting, such as testifying in court or during an internal affairs investigation
> >
> > Failure to bring forward information involving criminal action by other officers, also known as observing the so-called 'code of silence'
> >
> > Creation of false evidence that tends to implicate another in a criminal act
>
> Naturally, any officer engaging in such untruthfulness should be terminated or permanently removed from any possible activity

12. There was no text message in the record as it could not be found. (Ex. J-E)

13. Specifically, at the Commission hearing, the Appellant stated, "[Mr. B's] left hand was up like that, I remember. I remember him brushing up against me. And I remember his right hand - I felt the poking, three - three times …." Transcript April 11, 2017, Vol. II, p. 346.

> where the officer could be called upon to be a witness to any action.
>
> At the other end of the continuum, however, are white lies, humorous lies and lies justified by investigative necessity. Officers engaging in such behavior are not usually subject to discipline and are excusable, if not acceptable.
>
> In some instances, however, an officer's conduct may not be clearly on one end of the continuum or the other …

(Ex. J-H)

However, Chief Dalessio did not indicate what part of this article he relied on.

(Administrative Notice) Chief Dalessio also called a District Attorney for information about concerns they may have in this regard but Chief Dalessio did not indicate whom he spoke with, nor did he provide any details of any such conversation. (Testimony of Chief Dalessio; Administrative Notice)

Appellant's Expert

35. The Appellant's expert, James Oulundsen, reviewed and analyzed the security camera recording. Mr. Oulundsen is a principle at Investigative Services (IRIS) in Connecticut, which has a digital forensic lab. He has been a registered private investigator in Connecticut "specializing in criminal defense and civil matters who has conducted computer and cell phone forensic acquisitions and investigations since 2004 …" (Ex. A-18) He has received a number of pertinent certifications over the years, taught best investigative practices to Connecticut attorney associations, and he has most often been involved in criminal and civil cases in favor of the defense. His certifications are in computer forensics, advanced computer forensics, mobile forensics, and physical (of retrieved data, for example). Mr. Oulundsen is not certified in video forensics. Mr. Oulundsen was recognized at the hearing as an expert digital investigator. In this case, Mr. Oulundsen tried to enhance the security camera recording in order to see greater detail in it. The standard speed of such a recording is thirty (30) frames per second. The speed of the security camera recording in this case is fifteen (15) frames per second, which provides less clarity in the recording than a recording with thirty (30) frames per second. In order to enhance the details of the security camera recording, Mr. Oulundsen copied the recording and made copies of the copies in order to create versions of the recording slowing the replay down to 10, 25 and 50 percent of the original speed. He did so applying the scientific working group investigative standards used in criminal cases in Connecticut. In addition, Mr. Oulundsen printed copies of frames in the security camera recording to show the limited information that was visible from even the slowed recordings. (Testimony of Oulundsen; Exs. A-16, 17 and 18; Ex. J-G) The reduced speed versions of the security camera recording show that Mr. B's left arm was bent and his pointer finger was extended, pointing at the Appellant's mid-to-lower chest immediately prior to when he walked past the Appellant. (*Id*.) However, due to the columns between the security office windows, which partly blocked the security camera recording, and the passage of Mr. B behind the Appellant, the slowed recordings could not show whether or not Mr. B touched the Appellant when he passed the Appellant. (*Id*.)

Applicable Law

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. Under G.L. c. 31, s. 42, a civil service employee alleging that the appointing authority did not follow the requirements of section 41 in a disciplinary matter can file an appeal at the Commission within ten (10) days. Section 42 further states, "[i]f 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." *Id*.

An employee aggrieved by an appointing authority's disciplinary decision may appeal to the Commission. G.L. c. 31, s. 43. Under section 43, the appointing authority carries burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. *Id*.; *see e.g., Falmouth* v. *Civil Serv. Comm'n*., 447 Mass. 814, 823 (2006); *Police Dep't. of Boston* v. *Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000).

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). 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); *Cambridge* v. *Civil Service Common*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102, (1997); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477 (1928).

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 264-65 (2001).

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. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, §1.

It is well-established that law enforcement personnel are held to a higher standard and are expected to be truthful. The corollary, however, to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged. *See, e.g.*, *DeTerra* v. *New Bedford Police Dep't.*, 29 MCSR 502 (2016) (forgetting a 20-year-old license suspension); *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.*, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); *Michaud* v. *Saugus Police Dep't.*, 28 MSCR 534 (2015) (immaterial omissions of information applicant could not obtain and/or was covered elsewhere in application); and *Lucas* v. *Boston Police Dep't.*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history). An officer's demonstrated record of untruthfulness *may* compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. *Gallo* v. *City of Lynn*, 23 MCSR 348 (2010). *See generally*, *United States* v. *Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *See also Kyles* v. *Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995); *United States* v. *Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). However, the standard established in the *Brady* case may not necessarily apply in each case.[14]

ANALYSIS

The Respondent has not established by a preponderance of the evidence that it had just cause to discipline the Appellant for being untruthful. In addition to asserting that there was no just cause to discipline the Appellant, the Appellant asserts that the Respondent failed to follow the procedural requirements of G.L. c. 31, s. 41 in so doing. As noted above, section 42 provides that if an appointing authority has failed to follow the procedural requirements of section 41 and the rights of the civil service employee have been prejudiced thereby, the Commission is to order the appointing authority to restore such employee to his employment immediately "without loss of compensation or other rights." *Id*. The Appellant avers that the Respondent's procedure was flawed because the Town Manager's letter notifying him of a hearing, "if necessary", indicated that the Town Manager had already decided to terminate him ("I intend to discharge you from your employment"). While sections 41 and 42 do not require that a local hearing be conducted by an impartial person, the Town Manager assigned private counsel who conducted the hearing and wrote a report on which the Town Manager relied to terminate the Appellant. Although the Appellant alleged that the private counsel was connected to the city and, therefore, was biased against him, there is insufficient evidence in the record to support such allegations. Therefore, the Respondent has not failed to follow the procedural requirements of section 41 and the Appellant's civil service rights have not been prejudiced. That said, I note that the Town Manager's letter notifying the Appellant of disciplinary action was inaccurate in stating that a hearing would be held "if necessary" since civil service law requires a hearing when a civil service employee is terminated. Further, it was inappropriate for the letter to state that the Respondent intended to discharge the Appellant when the purpose of such a letter is to notify the employee that a hearing would be held to determine whether he should be disciplined. I also note that the Respondent suspended the Appellant for three (3) days without written notice. The Town Manager said this was done because they did not want the Appellant acting as an officer pending the local hearing. It is hard to understand what concern the Respondent suddenly had about the Appellant working on the force in December since the incident with Mr. B occurred in August and the investigation was completed in November. Nonetheless, the Appellant was afforded a hearing and his civil service rights were not prejudiced.

The Respondent argues that the Appellant was untruthful when he told Sgt. Dalessio that Mr. B touched him before the Appellant touched him and when the Appellant reported the same thereafter.[15] I find that the Appellant was truthful for a number of reasons. Although the security camera recording (which does not include audio) at the critical time was blocked by a window column, as the local hearing officer report acknowledges, the Appellant testified that, at or about the time that Mr. B touched the Appellant, he yelled words to the effect "don't touch a police officer!". Officer Rice, a percipient witness, confirmed in his testimony and written report that the Appellant yelled that statement at or about the time that Mr. B touched him, while acknowledging that he did not see the Appellant and Mr. B prior to the time that the Appellant put his left hand on Mr. B's shoulder because of the "angle" of his view as he walked past the security office in which the Appellant and Mr. B were arguing. Although the Commission is exempt from G.L. c. 30A regarding adjudicatory agencies, I take guidance from the statute where appropriate. Specifically, G.L. c. 30A, s. 11(2) states that agencies are not required to follow the rules of evidence, with the exception being the rules of privilege, but it also states, in part, that "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." I find that the Appellant's yelled statement not to touch a police officer at or about the time that Mr. B touched him to be the kind of evidence on which to rely here. In addition, I find that the Appellant's

14. Massachusetts jurisprudence takes a somewhat different path when ordering exculpatory evidence disclosed in criminal prosecutions. In particular, evidence "beyond information held by agents of the prosecution team", including, in particular, internal affairs investigatory material, does not generally come within the sweep of the "Brady" test, but is subject to other, stricter rules. *See, e.g.*, MASS.R.CRIM.P. 14(a)(1)(A); *Commonwealth* v. *Laguer*, 448 Mass. 585 (2007); *Commonwealth* v. *Tucceri*, 412 Mass. 401 (1992); *Commonwealth* v. *Daye*, 411 Mass. 719 (1992); *Commonwealth* v. *Gallerelli*, 399 Mass. 17 (1987); *Commonwealth* v. *Wilson*, 381 Mass. 90 (1980).

15. The Town Manager's letter notifying the Appellant that a hearing would be held because he was untruthful on two (2) occasions: when the Appellant told Sgt. Dalessio about the incident and when the Appellant wrote in his report about the incident. The local hearing officer's report adds a third allegation of untruthfulness, alleging that the Appellant was also untruthful when Sgt. Manning interviewed him during Sgt. Manning's investigation about the incident.

yelled statement is reliable for reasons that the rules of evidence in court determine, in appropriate circumstances, to admit an excited utterance that would otherwise be inadmissible hearsay. *See* Massachusetts Guide to Evidence ["Guide"], § 803 (2), https://www.mass.gov/guide-to-evidence . The Notes following section 803 of the Guide offer parameters for determining whether there is sufficient reliability, stating, in part,

> "In determining whether a statement qualifies under this exception, the trial judge should consider whether the statement was made 'under the stress of an exciting event and before the declarant has had time to contrive or fabricate the remark' (citations omitted). *Commonwealth* v. *Baldwin*, 476 Mass. 1041, 1042 (2017). The judge should consider such factors as whether the statement was made in the same location as the precipitating event, the temporal proximity to the event, and the age, spontaneity, and degree of excitement of the declarant. *Id.* 'The statement itself may be taken as proof of the exiting event.' *Commonwealth* v. *Nunes*, 430 Mass. 1, 4 (1999). … 'There can be no definite and fixed limit of time [between the incident and the statement]. Each case must depend upon its own circumstances.' *Commonwealth* v. *McLaughlin*, 364 Mass. 211, 223, quoting *Rocco* v. *Boston-Leader*, 340 Mass. 195, 196-197 (1960)."

Guide, at Note, p. 217.

Although the question of admissibility is not at issue here, I find that the Appellant's yelled statement has the reliability of an excited utterance because it was made at or about the time that the Appellant and Mr. B were having a loud, vigorous argument, the Appellant did not expect Mr. B to approach him so closely and so quickly, and, at or about the time that Mr. B touched the Appellant, and the Appellant yelled words to the effect "don't touch a police officer!" The Appellant further reacted to Mr. B touching him by pushing Mr. B with one (1) hand to create distance from Mr. B, as the Appellant was trained to do. The Appellant did not have time to "contrive" or "fabricate" his reaction during the few seconds of this event. As a result, I find that the Appellant was truthful when he said that Mr. B touched him first.

Further, I find that the Appellant was not untruthful because he told Sgt. Dalessio minutes after the incident that Mr. B touched him first, the Appellant wrote in his report on the same day that Mr. B touched him first, the Appellant told Sgt. Manning when Sgt. Manning interviewed him two and a half months after the incident that Mr. B touched him first, the Appellant testified at the local hearing and at the Commission hearing that Mr. B touched him first.

In addition, the local hearing officer did not have the testimony of Mr. B or his recorded interview in the record in support of the Respondent's allegation that the Appellant was untruthful. Mr. B testified at the Commission that Sgt. Dalessio helped him fill out the complaint form, noting specific words that Sgt. Dalessio told him to include. The complaint contains two (2) different handwriting styles, of which the local hearing officer took no notice. Although Sgt. Dalessio denied when he testified at the Commission hearing that he assisted Mr. B in filling out the complaint, there is no evidence in the record indicating that there was anyone else with Mr. B when he prepared the complaint, rendering the complaint questionable. Further, at his recorded interview, Mr. B made a number of statements that are inconsistent with his testimony here. For example, he repeatedly stated that he "ignored" the Appellant during their argument and that the Appellant's conduct was "unprovoked" but the security camera recording shows Mr. B and the Appellant both actively engaged in arguing. In fact, as Mr. B's recorded interview shows, Mr. B took great offense when the Appellant asked him his name during the incident and Mr. B said words to the effect "you're in MY territory and what's YOUR name"! (emphasis in recording). Thus, it was inaccurate of Mr. B to assert in the complaint form that the Appellant's actions were "unprovoked". On the recorded interview, Mr. B also asserts (and demonstrates) that he repeatedly extended his arm, with his finger jutting or jabbing at the Appellant as they argued. During his interview, Mr. B even felt it necessary to assert that although it looked on the security camera recording like he was touching the Appellant that he was not. At the local hearing and the Commission hearing, the Appellant stated that Mr. B touched or poked him three times. At the Commission hearing, the Appellant specified that Mr. B had touched or poke him with his right hand, which is consistent with Mr. B's recorded interview. Mr. B also stated (and demonstrated) twice in his recorded interview that he put both of his hands near his right shoulder as he passed the Appellant in the security office in order to avoid even unintentionally touching the Appellant. The security camera recording does not show Mr. B's hands were near his right shoulder at that time. At the Commission hearing, Mr. B testified that the Appellant shoved him with two (2) hands on his upper chest during the incident even though Mr. B's complaint states that the Appellant pushed him and the security camera recording shows the Appellant pushing Mr. B by putting his hand on Mr. B's left shoulder. Finally, Mr. B told Officer Rice that he (Mr. B) was the one who called the ambulance first instead of dialing 911 because he found the number at his desk but Mr. B told the interviewers that it was his security guard colleague who called the ambulance first, not him. In view of the many inconsistencies in Mr. B's statements, I find that his assertions that the Appellant touched him first are unreliable and that the Appellant was not untruthful.

Finally, there are additional factors belying the Respondent's allegation that the Appellant was untruthful. First, the Respondent has not cited any ELPD rules that the Appellant's conduct purportedly violated. Second, there was an on-going tension between the Appellant and Sgt. Dalessio, whose father is the Police Chief. Third, the Appellant has no record of discipline. Fourth, Chief Dalessio was not aware of anyone else at the ELPD who had been terminated for untruthfulness.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. Calcasola, Docket No. D1-17-258, is hereby ***allowed***.

CONCURRING OPINION OF COMMISSIONER BOWMAN

The Appellant claims that the security guard poked him four (4) times, including three (3) times while the security guard walked by him; and one (1) time after the security guard

walked by him. I don't believe that happened, in part because the Appellant's oral and written statements during the investigation don't mention that; and, in part, because, in my view, the video evidence does not support the Appellant's claim. To me, it appears that the Appellant has fudged the truth regarding a material issue in an attempt to justify his admitted pushing of the security guard and to avoid discipline for his actions.

Ultimately, however, those findings rest with the hearing officer who has the responsibility, among other things, to assess the credibility of the witnesses. That is particularly important when, as here, divergent testimony has been offered by multiple witnesses and the video evidence is hampered by an obstructed view.

Deferring to the thoughtful, well-reasoned findings of Commissioner Ittleman, which are explained in detail in her analysis, I join the majority in voting to allow the Appellant's appeal.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 25, 2019.

Notice to:

Thomas J. Rooke, Esq.
73 Chestnut Street
Springfield, MA 01103

Kevin C. Maynard, Esq.
Buckley, Richardson & Gelinas, LLP
1500 Main Street, Suite 2700
Springfield, MA 01115

* * * * * *

KIMBERLYN LYDON

v.

TOWN OF STOUGHTON

D1-18-115

April 25, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge/Resignation of Stoughton Police Officer-Probationary Period-Full Police Powers—An appeal from a discharged Stoughton police officer was dismissed for lack of jurisdiction where she was terminated within one year from the date that she took the Stoughton police officer oath and began assuming full police powers. The Appellant had argued that her one-year probationary period began upon graduation from the police academy and that the year should be measured as including only 360 days in light of the fact that she resigned on the 364th day of her one-year probationary period.

DECISION

On June 26, 2018, the Appellant, Kimberlyn Lydon (Ms. Lydon), pursuant to the provisions of G.L. c. 31, § 42, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Stoughton (Town) to terminate her employment without first affording her due process requirements provided to tenured employees by G.L. c. 31, § 41. On July 31, 2018, the Town filed a Motion to Dismiss arguing that Ms. Lydon was terminated before the expiration of her probationary period and that the Commission therefore lacked jurisdiction to entertain an appeal pursuant to G.L. c. 31, § 41-45. In the alternative, the Town argued that Ms. Lydon resigned her position as a Stoughton Police Officer. On August 14, 2018, Ms. Lydon filed an opposition to the Town's motion to dismiss, arguing that, at the time of her termination, she had completed her probationary period, and thus, was a permanent, tenured civil service police officer. Since there were factual disputes regarding various issues, I scheduled a full evidentiary hearing, which I held at the offices of the Commission on September 5, 2018.[1] At the commencement of the hearing, I denied the Town's motion pending the evidence to be produced and the arguments to be raised. The hearing was digitally recorded and both parties were provided with a CD of the recording.[2] Both parties submitted post-hearing briefs on October 5, 2018.

FINDINGS OF FACT

Based on the stipulations of the parties, the exhibits entered into evidence (Attachments A through H from the Town's Motion to Dismiss, Attachment A from the Appellant's Opposition to

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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, these CDs should be used to transcribe the hearing.

Respondent's Motion to Dismiss), the Affidavit of Stoughton Police Chief Donna McNamara, and the testimony of:

Called by the Town:

- James Blake, Boston Police Sergeant and Registrar, Boston Police Academy;
- Donna McNamara, Police Chief, Town of Stoughton;

Called by Ms. Lydon:

- Kimberlyn Lydon, 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. By letter dated November 7, 2016, the Town appointed Ms. Lydon as a Student Officer, effective December 5, 2016. (Attachment A to Appellant's Opposition to Motion to Dismiss)

2. The November 7, 2016 letter stated, in relevant part:

> "Dear Ms. Lydon:
>
> As you are aware, the Town of Stoughton ('Town') extended a conditional offer of employment to you as a full-time permanent Police Officer, subject to you satisfactorily completing a pre-employment physical and psychological fitness for duty evaluation, physical abilities test, as well as a complete background investigation. I am pleased to inform you that those conditions have now been met and the Town is prepared to appoint you as a Police Recruit effective December 5, 2016. As a student officer, you will be required to attend and successfully complete the basic police academy offered by the Town. You will be a probationary employee for one year from the date of graduation from the police academy. Further information regarding these benefits will be provided to you prior to reporting for your first day of employment." (Id.)

3. The November 7, 2016 letter was signed by the then-Town Manager, who is the Appointing Authority. (Id.)

4. The Boston Police Academy (BPA) provides training for new Boston Police recruits. Where space permits, the Academy allows other communities to send their recruits, for a fee, to attend. The BPA's Massachusetts Criminal Justice Training Council-approved program is about 30 weeks in length and divided into two sections: curriculum and practicum. [Blake]. The curriculum or written portion involves training in laws, rules, and tactics, and evaluations by examinations. The second part, which occurs about 2.5 months after the start of the Academy program, is practical or hands-on training. (Testimony of Sgt. Blake)

5. In this particular class, there were approximately forty (40) Boston police recruits and approximately fourteen (14) to fifteen (15) recruits, including Ms. Lydon, from "outside agencies". (Testimony of Sgt. Blake)

6. Ms. Lydon began her required training at the Boston Police Academy on December 5, 2016 (Stipulated)

7. At some point during her Academy training, the Town issued Ms. Lydon and each of the other Stoughton recruits guns in order to participate in firearms training. The guns were never retrieved by the Town. (Testimony of Lydon)

8. The last day of training was June 16, 2017. (Testimony of Lydon and Sgt. Blake) On that day, the Boston Police Commissioner came to the Boston Baptist Academy, a facility being used that day for training, and swore in the Boston student officers as Boston police officers. After being sworn in, the Boston recruits were issued a badge and a gun. The reason for swearing in the Boston recruits that day was so Boston recruits could serve as full sworn Boston Police officers during the "Sail Boston" event that was scheduled to occur that weekend. (Testimony of Sgt. Blake)

9. On June 21, 2017, a graduation ceremony was held at the IBEW Union Hall in Boston. (Testimony of Sgt. Blake, Appellant and Chief McNamara)

10. The Town supplied a badge to Ms. Lydon a few days before her graduation from the Academy for purposes of photographs and rehearsal. (Testimony of Chief McNamara and Appellant).

11. During the graduation ceremony, the Boston Police Commissioner administered an oath of office referencing the Boston Police Department. (Attachment B to Town's Motion to Dismiss)

12. With respect to student officers from jurisdictions other than Boston, the administration of the oath of office is ceremonial. (Testimony of Sgt. Blake)

13. The Town has a policy requiring that police officers take and subscribe the Stoughton Oath of Office before beginning to carry out their duties.(Attachment C to Town's Motion to Dismiss and Testimony of Chief McNamara)

14. The Town's Policy, issued on October 13, 2011 and reviewed on October 13, 2014, states in relevant part:

> "Before beginning to carry out their duties, a person appointed as a police officer of the Stoughton Police Department will take an subscribe to the following Oath of Office. Officers will be required to take and abide by the oath of office prior to assuming sworn status as an Officer as directed by the appointing authority and performed by the Town Clerk.
>
> This will be recorded on the Clerk's register to include the date, sworn Officer's name, and signature. A signed Oath of Office form will be filed in the personnel file of newly-hired officers." (Attachment C to Town's Motion to Dismiss)

15. Attached to the Town's above-referenced police is a "Stoughton Police Department Oath of Office." (Attachment D to Town's Motion to Dismiss)

16. On June 22, 2017, Ms. Lydon took and subscribed to the Stoughton Oath of Office (Attachment E to Town's Motion to Dismiss and Testimony of Chief McNamara)

17. Ms. Lydon was not eligible for details, shifts or other police duties until she took the Stoughton Police Department Oath of Office. (Testimony of Chief McNamara).

18. There was no extension of the statutorily-required twelve month probationary period (Stipulated)

19. After Chief McNamara shared some concerns about the conduct of Lydon during her probationary period, the Interim Town Manager decided to terminate Ms. Lydon's employment and prepared a letter. (Attachment F to Town's Motion to Dismiss) to that effect (Testimony of Chief McNamara).

20. On June 21, 2018, the Interim Town Manager and Chief McNamara met with Ms. Lydon and her union president and delivered the termination letter to Ms. Lydon .(Testimony of Chief McNamara).

21. The termination letter was delivered in hand to Lydon at approximately 10:00 a.m. on June 21, 2018. (Testimony of Chief McNamara).

22. Shortly after delivery of the letter to Ms. Lydon, the union president returned to the Interim Town Manager's office and was advised that Ms. Lydon's resignation would be accepted by the Town if she chose to resign (Testimony of Chief McNamara).

23. A few minutes later, the union president returned once again and presented a letter (Attachment G to Town's Motion to Dismiss) signed by Ms. Lydon stating that she was resigning her position as a police officer "immediately". (Testimony of Chief McNamara).

24. Later that day, at about 2 p.m., Ms. Lydon emailed the Interim Town Manager seeking to rescind her resignation. (Testimony of Chief McNamara)

APPLICABLE LAW

G.L. c. 31, §41 provides:

> "Except for just cause and except in accordance with the provisions of this paragraph, *a tenured employee* shall not be discharged, removed, suspended for a period of more than five days …. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action …, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof …" (emphasis added)

G.L. c. 31, §61 states:

> "Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a 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 shall be considered a full-time tenured employee in such position*, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters." (emphasis added)

ANALYSIS

The parties agree that if Ms. Lydon was within the probationary period at the time of her termination, the Commission lacks jurisdiction to conduct an appeal pursuant to G.L. c.31 §§ 41-45. *See Board of Selectmen of Brookline* v. *Smith*, 58 Mass. App. Ct. 813 (2003); *Patterson* v. *Town of Plymouth*, 21 MCSR 650 (2008); *Peterson* v. *Town of North Attleborough*, 16 MCSR 44 (2003). The Town concedes that in reliance on its understanding that Ms. Lydon was still within her probationary period, the Town did not attempt to meet the "just cause" standard nor did it comply with the procedures required by G.L. c.31, §41 for the termination of a "tenured" Civil Service Employee.

In *Board of Selectmen of Brookline* v. *Smith*, Smith was assigned to the Norwood Police Academy on April 13, 1998, and graduated on February 12, 1999. He was appointed to the position of police officer in the Brookline Police Department effective February 23, 1999, and was sworn in on the same day. *Id*. Smith was placed on administrative leave on December 8, 1999 and served a notice of his termination on February 2, 2000. *Id*. The court here addressed the issue of whether the applicant's probationary period began on (1) the date of his assignment to the academy, or whether it began (2) on the date of his appointment 'as a Police Officer' and his taking the oath of office. *Id* at 815. The court, in agreement with the Appointing Authority, held that Smith's probationary period began when he was appointed a police officer. *Id*. Pursuant to G.L. c.31 § 34, "'actual performance of the duties of such position' refers to the *graduated* officer with the authority to exercise police powers, as distinct from the student officer, who is in the process of learning to exercise such powers properly." *Id* at 817 (emphasis added). Thus, the 'actual performance' standard requires that an officer successfully graduate the academy *and* be sworn-in, in order to commence the one-year probationary period. *Patterson*.

In *Patterson*, Patterson graduated the Academy on Friday, August 11, 2006 *and was sworn in that same day*. In holding that Patterson possessed authority to exercise police powers at that moment, the Commission noted that Plymouth officers were allowed to begin covering shifts and working details immediately upon graduation and taking the oath of office.

In regard to the instant appeal, Stoughton recruits are not authorized to cover shifts or details or engage in any police work, apart from additional training *until they are administered the Stoughton Police Department Oath of Office*, which did not occur until June 22, 2017. Sgt. Blake testified credibly that the Boston oath, administered by the Boston Police Commissioner at the graduation ceremony a day earlier, was intended to be ceremonial in nature as to student officers from other jurisdictions. Further, the formal swearing in by the Boston Police Commissioner days earlier was limited to Boston Police recruits only so they could perform police duties at the Sail Boston event scheduled for that weekend.

I considered each of the arguments raised by Ms. Lydon. First, Ms. Lydon argues that "twelve months" should be defined as 360 days, with each month equal to thirty (30) days. No prior Commission decision on this issue supports this novel argument. Rather, prior Commission decisions regarding probationary periods appear, when relevant, to have adopted the formula used here (i.e. - one month after January 1st is February 1st).

Second, the Appellant reads *Patterson* to support her argument that her probationary period began upon graduation. It does not. As noted above, Patterson's graduation and taking of the oath of office for Plymouth Police Officer occurred on the same day. Here, Ms. Lydon's oath of office as a Stoughton Police Officer did not occur until one day later, leaving her one (1) day short of completing her twelve (12)-month probationary period.

Third, the Appellant cites to *Cardarelli* v. *City of Medford*, 28 MCSR 22 (2015), to argue that the Commission has concluded that a recruit may perform the duties and responsibilities of a police officer upon graduation. That argument is not persuasive as the Commission, in *Cardarelli*, never addressed whether the oath of office and graduation occurred on the same day.

Fourth, the Appellant argues that, since she was issued a badge and a gun, that argues in favor of a conclusion that she was able to perform the duties and responsibilities of a police officer at least as of June 21, 2017. I don't agree. The gun was issued to recruits mid-way through the Academy *to participate in firearms training*. Although it is shocking that Stoughton allows recruits to maintain their firearms months prior to being sworn in as police officers, this questionable practice does not, as argued by the Appellant, bestow a recruit with the authority to perform the duties and responsibilities of a police officer. Nor does the Town's decision to allow recruits to be issued badges for picture-taking purposes equate to being a sworn police officer.

Finally, the Appellant references the November 7, 2016 letter she received stating that the probationary period would conclude "one year from the date of graduation from the police academy." The language in this letter, which the Town acknowledges was an error, cannot overrule the statutory requirements related to serving a probationary period.

A termination notice to a probationary employee must be delivered prior to the end of the probationary period. Lydon's probationary period commenced when she took and subscribed to the Stoughton oath on June 22, 2017. Her termination notice was delivered on June 21, 2018. This notice was within her 12-month probationary period. Consequently, Ms. Lydon was not a tenured civil service employee at the time of her termination; she was not entitled to the protections afforded to tenured civil service employees under Section 41; and the Commission lacks jurisdiction to hear the instant appeal.

CONCLUSION

For all of the above reasons, Ms. Lydon's appeal under Docket No. D1-18-115 is hereby ***dismissed***.[3]

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 25, 2019.

Notice to:

Patrick N. Bryant, Esq.
Pyle Rome Ehrenberg, PC
2 Liberty Square, 10th Floor
Boston, MA 02109

John F. Dolan, Jr., Esq.
Lighthouse Legal Counsel, LLC
775 East Falmouth Highway
East Falmouth, MA 02536

* * * * * *

Request By: JOHN F. MURPHY for the Commission to initiate an investigation regarding the January 25, 2019 Barnstable Deputy Police Chief Assessment Center Examination.

RE: Tracking Number: I-19-066

April 25, 2019
Christopher C. Bowman, Chairman

Investigation by Commission-Barnstable Deputy Police Chief Exam-Fair Test Appeal—Where a disappointed Barnstable police lieutenant seeking appointment to Deputy Chief had prematurely filed a "fair test" appeal, the Commission also dismissed his request that it conduct an investigation into the promotional exam.

RESPONSE TO REQUEST FOR INVESTIGATION

On January 25, 2019, the Petitioner, John F. Murphy (Lt. Murphy), a lieutenant in the Town of Barnstable (Town)'s Police Department (BPD), sat for an Assessment Center Deputy Police Chief examination, which was held at the Town's School Administration Building.

2. The state's Human Resources Division (HRD) had delegated responsibility for the Assessment Center examination to the BPD and the BPD contracted with a private vendor to conduct the examination.

3. Since I have concluded that the Appellant, as of June 21, 2018, had not completed her probationary period, I need not address the other issues raised by the Town, including the Appellant's resignation letter and timing of day that the graduation took place as compared to the time of day in which the Appellant was terminated.

3. On February 6, 2019, the initial scores (for the assessment center and employment / experience) were released to the examination applicants, including Lt. Murphy.

4. On February 22, 2019, Lt. Murphy filed a "fair test" appeal with HRD to contest whether the examination was a fair test of the applicants' fitness to actually perform the primary or dominant duties of the position for which the examination was held.

5. HRD denied Lt. Murphy's "fair test" appeal as, according to HRD, it was untimely.

6. On March 18, 2019, Lt. Murphy filed an appeal with the Civil Service Commission (Commission), contesting HRD's determination regarding his "fair test" appeal. (See B2-19-065)

7. On March 19, 2019, Lt. Murphy filed a Petition with the Commission, asking the Commission to investigate essentially the same concerns that he brought to HRD's attention via the "fair test" appeal. For example, Lt. Murphy argued that: 1) the failure of the vendor to conduct an in-person orientation with the applicants prior to the examination undermined the test; and 2) certain questions (i.e. - define leadership) and case scenarios (give a community meeting addressing overtime issues) were not appropriate in the context of the Deputy Police Chief position in Barnstable.

8. On April 16, 2019, I concurrently held a pre-hearing conference regarding Lt. Murphy's "fair test" appeal (B2-19-065) and a show cause conference regarding his request for the Commission to conduct an investigation (I-19-066). Present were: Lt. Murphy; counsel for HRD; and counsel for the Town.

9. During the pre-hearing / show cause conference, Lt. Murphy acknowledged that his "fair test" appeal was untimely and withdrew his appeal under Docket No. B2-19-065. However, Lt. Murphy argued that the Commission should exercise its discretion to conduct an investigation into how the Deputy Police Chief examination was administered.

APPLICABLE CIVIL SERVICE LAW AND RULES & FINAL 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).

After careful review and consideration of the entire record in this matter, including the written submissions of the Petitioner and his statements at the Show Cause Conference, I have concluded that an investigation is not warranted and recommend that the Commission not exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

* * *

On April 25, 2019, the Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) voted to adopt the recommendation of Commissioner Bowman; the Commission will not exercise its discretion to initiate an investigation.

Notice to:

John F. Murphy
[Address redacted]

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street: STE 600
Boston, MA 02114

T. David Houghton, Esq.
Barnstable Legal Department
367 Main Street
Hyannis, MA 02601

* * * * * *

Request by: RANDOLPH BLAKE for the Commission to initiate an investigation regarding the Springfield Fire Department

Tracking Number: I-18-052

April 25, 2019
Christopher C. Bowman, Chairman

Investigation by Commission-Springfield Fire Department Promotional Process for Captain—The Commission exercised its discretion and declined to initiate an investigation into the Springfield Fire Department's promotional process for captain or its decision to return two employees to civil service positions from a non-civil service position.

RESPONSE TO REQUEST FOR INVESTIGATION

On March 16, 2018, the Petitioner, Randolph Blake (Lt. Blake), a lieutenant in the City of Springfield (City)'s Fire Department (SFD), filed a petition with the Civil Service Commission (Commission), asking the Commission to initiate an investigation under G.L. c. 31, s. 2(a) to review: whether the SFD violated his rights under the Fourteenth Amendment of the Constitution and failed to abide by basic merit principles in a recent promotional process for Fire Captain by allegedly: a) failing to issue "request for promotional evaluation forms" referenced in a collective bargaining agreement (CBA); b) failing to administer drug tests; and c) failing to enforce a local ordinance related to residency requirements. Further, the Petitioner asks the Commission and/or the state's Human Resources Division (HRD) to review the SFD's decision to return two (2) employees to civil service positions from a non-civil service position.

2. On May 9, 2018, I held a show cause conference at the Springfield State Building which was attended by the Petitioner, his counsel, counsel for the SFD and counsel for HRD (via telephone).

3. By agreement of the parties, the SFD and HRD had thirty (30) days to file a response to the Petition regarding whether the Commission should initiate an investigation; and the Petitioner had three (3) weeks thereafter to file a reply.

4. As part of the filings, the SFD was required to provide a status update on any related judicial and/or other proceedings related to the issues raised in this petition; and the SFD had the opportunity to address whether: a) candidates for promotion are required under the CBA to undergo drug testing; and b) candidate(s) recently promoted to Fire Captain underwent drug screening.

5. HRD, the City and the Petitioner submitted their respective position statements.

APPLICABLE CIVIL SERVICE LAW AND RULES & FINAL 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).

After careful review and consideration of the entire record in this matter, including the submissions of HRD, the Petitioner and the City, I have concluded that an investigation is not warranted and I recommend that the Commission not exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

* * *

By vote on April 25, 2019, the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) voted to accept the recommendation of Commissioner Bowman; an investigation will not be initiated.

Notice to:

Arnold Lizana III, Esq.
1175 Peachtree Street NE, 10th Floor
Atlanta, GA 30361

Maurice M. Cahillane, Esq.
City of Springfield
36 Court Street, Room 05
Springfield, MA 01103

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

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KEVIN M. BRAXTON

v.

CITY OF MEDFORD

G1-18-077

May 9, 2019
Christopher C. Bowman, Chairman

***Bypass Appeal-Original Appointment as a Medford Reserve Police Officer-Bias-Driving Record-Late Application-Social Media-Employment History*—**In a decision by Chair Christopher C. Bowman, the Commission allowed the bypass appeal from an African-American candidate for original appointment as a reserve police officer, rejecting the City's stated reasons relating to his driving record, employment history, the lateness of his application, and social media postings. The decision also finds that the process was corrupted by bias as a captain on the interview panel had negative history with the candidate's father who had served as a detective with the Medford Police Department.

DECISION

On May 3, 2018, the Appellant, Kevin M. Braxton (Mr. Braxton), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Medford (City) to bypass him for appointment to permanent reserve police officer in the City's Police Department (MPD). A pre-hearing was held at the offices of the Commission on June 5, 2018 and a full hearing was held at the same location over two (2) days on July 30th and July 31st, 2018.[1] The full hearing was digitally-recorded and both parties received a CD of the recording.[2]

FINDINGS OF FACT

Fourteen exhibits were entered into evidence (Respondent Exhibits 1-11 (R1 - R11) and Appellant Exhibits 1-3 (A1 - A3)). Based on these exhibits and the testimony of the following witnesses:

Called by the City:

- Kevin Faller, Captain of the Medford Police Department
- John Buckley, Lieutenant of the Medford Police Department

Called by Mr. Braxton:

- Kevin M. Braxton, Appellant
- Kevin Braxton Sr.; Appellant's Father and former Medford Police Detective;
- Barry Clemente, Captain of the Medford Police Department
- Joseph Casey, Lieutenant of the Medford Police Department

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

Mr. Braxton

1. Mr. Braxton is a thirty-four (34) year-old male who resides in Medford. He identified himself as "Black / Latino / Native American" on his student officer application. (Exhibit R4)

2. Mr. Braxton's family has a long tradition of serving in law enforcement, including his grandfather, who served as one the first black motorcycle police officers in Boston and his father, who served as a detective for the Medford Police Department. He has one (1) infant child. (Testimony of Mr. Braxton)

3. Mr. Braxton's father worked for the MPD for thirty-five (35) years, and as a detective since 1990. He retired on December 31, 2017. (Testimony of Kevin Braxton, Sr.)

4. Mr. Braxton has been employed by the Transportation Security Administration (TSA) as a Security Officer since September 2015. (Testimony of Mr. Braxton and Exhibit R4)

2017 Hiring Process

5. On March 25, 2017, Mr. Braxton took the civil service examination for police officer and received a score of 96. (Stipulated Fact)

6. On August 4, 2017, HRD established an eligible list of candidates for Medford Police Officer, upon which Mr. Braxton's name was included. (Stipulated Fact)

7. On September 14, 2017, the City received Certification No. 04958 from HRD, from which the City eventually appointed thirteen (13) candidates as Permanent Reserve Police Officers. (Stipulated Fact)

8. Mr. Braxton was ranked tenth (10th) on Certification No. 04958 and four (4) of the appointed candidates were ranked below him, resulting in a "bypass" of Mr. Braxton. (Stipulated Facts)

9. Of the nineteen (19) candidates considered for appointment, approximately six (6) were minorities. (Testimony of Lt. Casey)

10. Of the thirteen (13) candidates appointed, one (1) candidate was a minority (Asian). (Testimony of Lt. Casey)

11. Four (4) of the six (6) minority candidates, including Mr. Braxton, were bypassed for appointment. (Testimony of Lt. Casey)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

12. The City's stated reasons for bypassing Mr. Braxton were: 1) Failure to submit application and required documents on time; 2) Poor Driving History; 3) Past Employment; 4) Failure to list Social Media site on Application; and 5) Oral Board Interview. (Exhibit R4)

Failure to Submit Application and Required Documentation On Time

13. All application packets were emailed to the candidates on September 26, 2017. (Exhibit R7)

14. The candidates were instructed to email a copy of their final packet no later than 4:30 P.M. on Thursday, October 5, 2017. A hard copy printout of the same packet was required to be turned in personally to Lt. Casey on October 5, 2017, between the hours of 8:30 A.M. and 4:30 P.M. (Exhibit R7)

15. Five (5) candidates, including Mr. Braxton and Candidate B, failed to meet the October 5th deadline. (Testimony of Lt. Casey)

16. When Candidate B failed to meet the deadline, his father, who is a Medford Police Officer, was contacted by the background investigator. Candidate B told the background investigator that he never received the email with the attached application. He was permitted to turn in his application on October 10th, five days after the deadline. (Testimony of Lt. Buckley)

17. Mr. Braxton submitted his application in-hand to Lt. Casey on Thursday, October 5, 2017 at 9:40 P.M., approximately five (5) hours after the deadline. Mr. Braxton informed Lt. Casey that the delay was, in part, due to the birth of his child the prior weekend. The electronic copy of the application was submitted by Mr. Braxton the following day. (Testimony of Lt. Casey)

Poor Driving History

18. The MPD's background investigation report of Mr. Braxton states in part: "Mr. Braxton has a poor driving history that reflect numerous license suspensions, numerous 'responsible' findings, and several 'at fault' motor vehicle accidents. Mr. Braxton has had his license to operate a motor vehicle suspended five (5) times since 2006." (Exhibit R2)

19. Mr. Braxton's license was not suspended five (5) times. Rather, it appears that his license was suspended twice a decade ago for payment-related issues. (Exhibit A3)

20. In the past five (5) years, Mr. Braxton has had two (2) negative entries on his driving history: a citation for failing to yield in 2012 and a surchargeable accident in 2013. (Exhibit A3)

Past Employment

21. The MPD concluded that Mr. Braxton's employment record "had concerns" due to: Mr. Braxton having held sixteen (16) jobs since 2004; discipline at his current TSA job for repeated tardiness; failure to report employment from 2013 at Home Depot; warnings for tardiness at two (2) other prior employers; and termination from an employer in 2010 for misuse of company equipment. (Exhibit R2)

22. Mr. Braxton has been employed full-time for the TSA at Logan Airport since September 2015. Prior to that, he was employed full-time as a residential counselor for two (2) years at a community health organization in Chelsea. He left that $12.00 / hour job for a better-paying job with the TSA. (Exhibit R2)

23. Mr. Braxton acknowledges that he forgot to list his part-time employment at Home Depot on the application. He subsequently provided the background investigator with his W-2 from Home Depot. (Testimony of Mr. Braxton)

24. Mr. Braxton worked for Trader Joe's in Cambridge in 2010. At times, the employee entrance door was locked upon arrival. Employees would bypass this entrance by entering through an opening near the conveyor belt. On one occasion when Mr. Braxton used this access point, a visiting Regional Vice President was present. Mr. Braxton was terminated, but received a six (6)-month severance payment. (Testimony of Mr. Braxton and Exhibit R5)

25. Mr. Braxton acknowledges that he was tardy for his current employment with the TSA on multiple occasions. He attributed the problem in part to a drawbridge between the employee parking lot and the airport. (Testimony of Mr. Braxton)

26. Mr. Braxton's current supervisor at the TSA told MPD investigators that Mr. Braxton "is an excellent employee." She described him as a "mature person and a 'go to officer' when she needs assistance." Mr. Braxton had recently been recognized as employee of the month. (Exhibit R4)

27. The MPD background investigation contains five (5) paragraphs regarding a workers compensation claim filed by Mr. Braxton while employed at the TSA, including detailed medical information regarding Mr. Braxton's diagnosis (back injury, muscle spasms) and treatment (physical therapy). (Exhibit R4)

Failure to list Social Media site on Application

28. The MPD's bypass reasons related to Mr. Braxton's social media account states:

> "Mr. Braxton did not report that he had a Facebook account in his application. During his background investigation it was learned that he did in fact have a Facebook account. Upon searching the account, it was revealed that Mr. Braxton's Facebook profile image was that of President Donald Trump performing a Nazi salute while standing in front of a swastika.
>
> Lt. John Buckley, background investigator for Mr. Braxton, spoke with Mr. Braxton about the image and the symbolism. Mr. Braxton [sic] [apparently should read: "Lt. Buckley"] recognized that while he may have anti-Trump sentiments, the imagery of Nazi salutes and symbols may evoke unwanted fear and strong emotional responses. Mr. Braxton agreed. As of this report, there is no longer a Facebook account for Mr. Braxton. Mr. Braxton was asked about this image at his Oral Board interview on October 18, 2017. Mr. Braxton admitted it was a poor choice and that is was not mean [sic] to be offensive." (Exhibit R2)

29. Mr. Braxton de-activated his Facebook account in February 2017, several months prior to completing his student officer application. (Testimony of Mr. Braxton and Exhibit A2)

30. In October 2016, the president of the Medford Police Patrolmen's Association admitted poor judgment after photographs of Medford officers (in uniform) are shown mockingly "arresting someone" dressed up as Hillary Clinton in an orange jumpsuit. The Patrolmen's Association also posted a photograph of three officers posing with someone dressed up as Donald Trump, with a Trump mask on. The caption said, "Making America GREAT again in West Medford Square!" The local union president acknowledged it was poor judgment on his part and took the photographs down. (Exhibit A1)

Oral Board Interview

31. The MPD's bypass reasons related to Mr. Braxton's interview stated:

> "Mr. Braxton completed his Oral Board interview on October 18th, 2017. The interview was conducted by Captain Barry Clemente, Captain Alan Doherty and Captain Keven Faller (video and notes on file). Mr. Braxton scored an overall average score of 20.167 (out of a possible score of 30). Mr. Braxton ranked tied for 16th out of 19 candidates interviewed." (Exhibit R2)

32. Captain Doherty's General Comments regarding Mr. Braxton stated:

> "Kevin was honest and forthright indicating that he as (sic) made some poor choices in life including too much alcohol and weed in his late teens and early 20s. Kevin is soft spoken serious (sic) and yet affable. Kevin loves music, the arts, camping and current events. He is married with a 3 mo old girl. He presented professionally and describes himself as a critical thinker. Kevin's lone negatives surround his tardiness in reporting to the workplace, his drivers history including payment defaults, and his social media facebook page offensive profile picture characterization. Kevin makes no excuses and owns his own characterized immaturity but claims it is in the past." (Exhibit R10)

33. Captain Clemente's General Comments regarding Mr. Braxton stated:

> "Candidate early, dressed professionally. Has a back injury buy (sic) states it is fine. Candidate is growing up and taking responsibility for his actions. Has a newborn with his wife." (Exhibit R10)

34. Captain Clemente recommended that Mr. Braxton be appointed. (Testimony of Captain Faller)

35. Captain Faller previously served as the supervisor of Mr. Braxton's father when he served as a detective. Captain Faller once questioned Mr. Braxton, Sr. about how he could work details, but call in sick for detective duty claiming a knee injury. (Testimony of Captain Faller)

36. Captain Faller, with the approval of the Police Chief, removed Mr. Braxton's father from the Detective division due to a sick time usage issue. (Testimony of Captain Faller)

37. Captain Faller's rating of the Appellant was the lowest of the three (3) interview panelists. His General Comments regarding Mr. Braxton stated:

> "Dressed Professional. Hard time answering numerous questions. Issues with driving history and job history."

(Exhibit R10)

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:

> "(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 employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, § 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 Service 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* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

As stated in the findings, of the nineteen (19) candidates considered for appointment, approximately six (6) were minorities. Of the thirteen (13) candidates appointed, only one (1) candidate was a minority (Asian). Four (4) of the six (6) minority candidates, including Mr. Braxton, were bypassed for appointment. I have weighed the proffered justifications for bypass here carefully to ensure that the decision making was in accordance with basic merit principles. *See Malloch* v. *Town of Hanover & others*, 472 Mass. 783 (2015) citing *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, *supra* at 264.

After carefully weighing the proffered reasons for bypass, I have concluded that the City has not shown, by a preponderance of the evidence, that there was reasonable justification to bypass Mr. Braxton for appointment as a reserve police officer.

First, the City acknowledges that at least one appointed candidate was not only permitted to submit his application for employment five (5) days late, but that the background investigator contacted that candidate's father, a Medford police officer, to inquire why the application hadn't been submitted as of the deadline. This type of professional courtesy suggests an uneven playing field among candidates and undermines the City's argument that receiving Mr. Braxton's application five (5) hours after the deadline was a valid reason for bypass.

Second, the City just got it wrong regarding Mr. Braxton's driving history. His license was not suspended five times. Rather, it appears that his license was suspended on two (2) occasions over a decade ago for payment-related reasons. His driving record over the past five years, which is the most relevant, includes one (1) surchargeable accident and one citation for a failure to yield. There were no negative entries on Mr. Braxton's driving history for the four (4) most recent years. This record, when viewed in the proper context, does not provide a reasonable justification for bypass.

Third, while the City has raised legitimate concerns regarding parts of Mr. Braxton's employment history, including tardiness with his current employer, it appeared that the City was attempting to paint a somewhat inaccurate picture of Mr. Braxton, referencing his "sixteen (16) jobs since 2004". Mr. Braxton acknowledges that he was unsure of his career path during his later teens and early 20s, but became more focused in his late 20s. He has been employed full-time for the TSA since September 2015, where he had recently been recognized as employee of the month. He stuck with a $12/hour job at a community health center for two (2) years prior to that, leaving only to secure a higher paying job to support himself and his family. Again, when viewed in the proper context, and given the appropriate scrutiny that is warranted here, the City has not shown that this is a valid reason to bypass Mr. Braxton for appointment.

Fourth, the purported concerns regarding the Facebook posting appears to be a lot about nothing. I credit Mr. Braxton's testimony that he had de-activated his Facebook account several months before he even took the civil service examination for police officer. Further, the prior posting, discovered by the MPD, appears to fall squarely in the category of a matter of public concern where Mr. Braxton was exercising his First Amendment right to criticize a political figure. Upon being informed that the posting had been discovered, Mr. Braxton promptly re-activated his Facebook account for the sole purpose of deleting the posting, after which he de-activated the account again.

Finally, while the Commission, and prior judicial decisions, has firmly established the permissibility of inherently subjective interviews to screen applicants, the Commission is charged with ensuring that those interviews are fair and impartial. Here, one of the three interview panelists recommended Mr. Braxton for appointment. Of the remaining two (2) panelists, one (1) of them had formed negative opinions about Mr. Braxton's father, a former Medford police detective. I reviewed the entirety of Mr. Braxton's recorded interview. As alluded to by one of the panelists, Mr. Braxton has a rather quiet demeanor. He appears to collect this thoughts before answering each question, at times resulting in awkward moments of silence where rapid fire answers are more common. However, even considering the subjective nature of the interview process and the deference due to the Appointing Authority, it was difficult to see the justification for the unusually low rating by the one (1) panelist who had a prior negative opinion of Mr. Braxton's father. To me, this raised real questions regarding whether Mr. Braxton's interview performance, standing alone, could justify the City's decision to bypass him for appointment.

For all of the above reasons, I believe that limited relief is warranted here to ensure that Mr. Braxton receives one (1) additional consideration for appointment.

CONCLUSION

Mr. Braxton's appeal under Docket No. G1-18-077 is hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. HRD shall place Mr. Braxton's name at the top of the next Certification issued to the City of Medford for reserve police officer to ensure that he receives one additional consideration for appointment.

* * *

By a 4-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Not Participating]) on May 9, 2019.

Notice to:

Elijah Bresley, Esq.
Law Office of Joseph L. Sulman
1001 Watertown Street, Third Floor
West Newton, MA 02465

Kimberly M. Scanlon, Esq.
City of Medford, Law Department
85 George P. Hassett Drive
Medford, MA 02155

Michael Downey, Esq.
Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

CEDRIC CRAWFORD

v.

CITY OF LEOMINSTER

D1-18-109

May 9, 2019
Christopher C. Bowman, Chairman

***Disciplinary Action-Modification of Discipline of Leominster Police Officer-Discharge Reduced to 60 Day Suspension-Bias-Lack of Evidence-Disparate Treatment*—**A unanimous Commission voted to modify the discharge of an African-American police officer to a 60-day suspension, finding that the City had failed to prove the most serious of the charges relating to insubordination and the officer had been subjected to disparately harsh discipline. The Commission's order to reinstate the Appellant is conditioned on the Superior Court's granting his appeal challenging the revocation of his license to carry a firearm.

DECISION
(Corrected Copy Issued 5/13/19
re: Page 15, Paragraph 3)

On June 11, 2018, the Appellant, Cedric Crawford (Mr. Crawford), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the City Leominster (City) to terminate him as a patrol officer from the City's Police Department (Department).

On July 9, 2018, I held a pre-hearing conference at the Armand P. Mercier Community Center, 21 Salem Street, Lowell, Massachusetts 01854. The full hearing was held at the same location on September 24, 2018.[1] As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of the Appellant, were sequestered.

A digital recording was created of the hearing and both parties were provided with a CD of the proceeding. The City had the digital recording transcribed by a Certified Court Reporter and Notary Public and have filed the transcript with the Commission which will serve as the official record of the proceeding.

FINDINGS OF FACT

Nineteen (19) Joint Exhibits, numbered 1-19, were agreed to by counsel prior to the hearing and entered into evidence. At the hearing, I accepted Exhibit "A" through Exhibit "T" into evidence. I also left the record open for various documents which have been submitted and marked as Exhibits "U" and "V". Additionally, on or about November 6, the City provided a transcript of the Appellant's appeal in Leominster District Court concerning the revocation of his License to Carry Firearms. I have marked that transcript as Exhibit "W" and the City's Trial Memorandum related to that proceeding as Exhibit "X". Based on the documents submitted and the testimony of the following witnesses:

For the City:

- Vang Lee, Sergeant, Leominster Police Department;
- Matthew Fallon, Patrol Officer, Leominster Police Department;
- Michael Goldman, Chief of Police, Leominster Police Department;

For the Appellant:

- Cedric Crawford, Appellant;
- Kenneth Leone, Patrol Officer, Leominster Police Department;
- Corey Donnelly, Patrol Officer, Leominster Police Department;

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

1. At the time of his termination on June 4, 2018, Mr. Crawford had been employed by the City for approximately six (6) years as a patrol officer. (Stipulated Fact) He was one of only two African American employees in the Police Department. (Exhibit 13) Mr. Crawford is a fourteen (14)-year service veteran with two (2) combat deployments (Kuwait and Iraq). He received a "General Discharge" from the Massachusetts National Guard on September 29, 2017, for "continuous and willful absence." (Stipulations, Testimony of Mr. Crawford, Exhibit 9, Exhibit Q)

2. Chief Goldman is a thirty (30)-year veteran of the Leominster Police Department, the last three of which he has served as Interim Chief of Police. Beneath Chief Goldman, in order of rank, are five (5) Lieutenants, eight (8) Sergeants, and fifty-six (56) Patrol Officers. Uniformed personnel generally work a so-called 4x2 schedule although there are a few officers of varying ranks that work a Monday to Friday, 8a-4p administrative schedule. (Testimony of Chief Goldman)

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.

Night/Morning of May 11th/May 12th, 2018

3. On the night of May 11, 2018, Mr. Crawford was working his 11p-7a shift when, at approximately 1:00AM, he was dispatched to CVS on Nelson Street for a reported shoplifting. While en route to the CVS, dispatch advised that the suspect had left the location in a grey vehicle. Dispatch provided responding officers with the vehicle make, model, and license plate number. (Testimony of Sgt. Lee, Testimony of Mr. Crawford, Exhibit S)

4. As Mr. Crawford approached the CVS in his patrol cruiser, he identified the suspect vehicle and initiated a traffic stop. (Testimony of Mr. Crawford, Exhibit S)

5. As he approached the vehicle Mr. Crawford observed the driver removing items from his person and placing them on the front passenger seat. Mr. Crawford ordered the driver to step out of the vehicle, which he did nonviolently, whereupon Mr. Crawford performed a pat frisk. When asked by Mr. Crawford, the driver admitted that the items in his car were from the CVS. While placing the suspect under arrest, Mr. Crawford requested that a tow truck be contacted to respond to the scene to tow the suspect's vehicle. (Testimony of Mr. Crawford, Exhibit S)

6. Sergeant Vang Lee (Sgt. Lee) was the Officer-in-Charge of Mr. Crawford's 11p-7a shift commencing on May 11, 2018. Sgt. Lee is an eleven (11) year veteran of the LPD and was promoted to the rank of Sergeant in October 2017. (Testimony of Sgt. Lee)

7. Since his promotion, Sgt. Lee has re-trained or counseled essentially every patrol officer on the 11p-7a shift. He also has, on occasion, referred officers for discipline up the chain of command. (Testimony of Chief Goldman, Testimony of Sgt. Lee, Exhibit U)

8. Sgt. Lee was working in the station on the night of May 11, 2018, when he overheard the radio traffic relative to the shoplifting call at CVS which Mr. Crawford responded to. Sgt. Lee was contemporaneously observing the vehicle locations of the responding officers via each vehicle's GPS tracking device. None of the patrol units that responded to the shoplifting call went to the CVS to speak to the reporting party. When Sgt. Lee heard Mr. Crawford request a tow, he requested that Mr. Crawford contact him via phone. (Testimony of Sgt. Lee, Exhibit 6)

9. The purpose of Sgt. Lee's phone call with Mr. Crawford was to inquire as to whether anyone had responded to the CVS to speak with the reporting party "to find out if a crime was actually committed" and to confirm that the suspect was involved in the reported shoplifting. In response to Sgt. Lee's initial directive to report to the CVS to speak to the reporting party, Mr. Crawford initially questioned why it was necessary given the suspect's admitting to stealing the items from CVS. Sgt. Lee renewed his directive that Mr. Crawford go to the CVS and he concluded his call by saying words to the effect that he was "sick and tired of guys not speaking with the [reporting party]". (Testimony of Sgt. Lee, Exhibit 6)

10. Mr. Crawford returned to the CVS with the suspect from the vehicle, confirmed his involvement via eyewitness identification, and then transported the arrestee to the station for booking. (Testimony of Sgt. Lee and Mr. Crawford)

11. Sgt. Lee, as the OIC, performed the booking of the suspect, which took approximately thirty (30) minutes. While Sgt. Lee was booking the arrestee, Mr. Crawford was preparing his report of the incident. (Testimony of Mr. Crawford and Sgt. Lee)

12. Immediately following the booking of Mr. Crawford's arrestee, Sgt. Lee had to process another arrest by another officer, Officer Matthew Fallon (Officer Fallon). Following that booking, Sgt. Lee proceeded to review Mr. Crawford's incident report of the CVS call. By the time he first reviewed Mr. Crawford's report, Mr. Crawford had vacated the station and returned to his patrol sector. (Testimony of Sgt. Lee and Mr. Crawford)

13. Upon Sgt. Lee's initial review of Mr. Crawford's report of the CVS call, Sgt. Lee found the report to be deficient in certain respects and contacted Mr. Crawford over the Department's radio system to request that he return to the station. (Testimony of Sgt. Lee)

14. When Mr. Crawford arrived at the station he reported to the OIC's office. Sgt. Lee advised Mr. Crawford that he needed to add more information to his report. Contrary to the statement in the Mayor's June 4, 2018 termination letter that Mr. Crawford "left the OIC's office without acknowledging Sgt. Lee and the requests he made of you", Mr. Crawford *acknowledged Sgt. Lee by nodding his head in response to Sgt. Lee's comments* and exited the office. (Testimony of Sgt. Lee)

15. Mr. Crawford proceeded into the report writing room, which is next door to the OIC's office. Sgt. Lee went into the report room with the other materials pertaining to Mr. Crawford's arrest and he began to explain to Mr. Crawford why the missing information needed to be included in the report. (Testimony of Sgt. Lee)

16. At the time Sgt. Lee walked into the report room, Mr. Crawford was seated at a computer terminal with his back to Sgt. Lee and the door to the report room. Officer Fallon was in the room at that time, as well, preparing his report from his arrest that Sgt. Lee had booked earlier that evening. Officer Fallon was facing the entryway of the report room and his back was to Mr. Crawford and Sgt. Lee. (Testimony of Sgt. Lee and Officer Fallon)

17. During this conversation, Sgt. Lee attempted to impress upon Mr. Crawford the need to speak to the reporting party. Mr. Crawford told Sgt. Lee that he had never done that in the six years he had worked in Leominster under these circumstances (i.e.—suspect making an admission). Sgt. Lee responded with words to the effect that he would be expected to always speak to a reporting party from "now on". (Testimony of Sgt. Lee)

18. Mr. Crawford stood up from his chair and stood in very close proximity, nose-to-nose almost, with Sgt. Lee, while yelling at him. What Mr. Crawford specifically said Sgt. Lee could not recall. (Testimony of Sgt. Lee)

19. Sgt. Lee told Mr. Crawford to step back. Mr. Crawford did step back as directed and immediately walked around Sgt. Lee, removed his tactical vest, and as he reached the doorway of the report room, threw his tactical vest against the wall opposite the report room. (Testimony of Sgt. Lee and Mr. Crawford, Exhibit P - Video)

20. Mr. Crawford threw the weighted Kevlar vest with such force that it bounced off the wall and landed on the floor. The portable radio attached to Mr. Crawford's vest can be seen on the video recording bouncing on the floor as the vest hit the ground. Mr. Crawford then walked away from the door to the report room and towards the stairwell at the end of the hallway. (Exhibit P - Video)

21. As he was walking toward the stairwell, Mr. Crawford stepped on the vest almost falling to the ground. Sgt. Lee emerged from the report room and looked in Mr. Crawford's direction at which time Mr. Crawford, who was facing away from Sgt. Lee (toward the stairwell), stopped and put his arms in the air. (Exhibit P - Video)

22. Mr. Crawford then turned around, and while bending over, walked two (2) or three (3) steps in Sgt. Lee's direction and picked up his vest and an object which had flown from it and yelled "I can't take this shit no more, I'm going home" or words to that effect. (Exhibit P - Video)

23. It does not appear that Mr. Crawford was "about to become physically violent towards [Sgt. Lee] who is standing in the hallway" as alleged in the Mayor's June 4, 2018 termination letter to Mr. Crawford. (Exhibit P - Video)

24. Mr. Crawford had no intention of becoming physically violent toward Sgt. Lee. The purpose of him turning around, bending over, and moving back toward Sgt. Lee was solely to pick up his vest and the object that had been fallen from it. (Testimony of Mr. Crawford)[2]

25. Mr. Crawford did not say anything threatening to Sgt. Lee. (Testimony of Sgt. Lee)

26. Mr. Crawford then turned around and proceeded to walk to the end of the hallway towards the stairwell at the back of the building that led to the officers' locker room in the basement of the building. Sgt. Lee returned to the OIC's office. (Testimony of Sgt. Lee andMr. Crawford)

27. From the OIC's office, Sgt. Lee directed the on-duty dispatcher to contact Officer Donnelly, the third shift union steward, to report back to the police station for purposes of speaking with Mr. Crawford. (Testimony of Sgt. Lee)

28. Approximately five minutes after the incident in the hallway with Mr. Crawford, and while still in the OIC's office, Sgt. Lee heard a loud bang coming from the basement of the building. Sgt. Lee asked Officer Fallon, who was still in the report room, if he had heard the noise. He and Officer Fallon proceeded downstairs to investigate the source of the noise. (Testimony of Sgt. Lee)

29. Sgt. Lee and Officer Fallon walked down the flight of stairs to the basement landing and down the hallway to the officers' locker room. After making entry into the locker room, Sgt. Lee found Mr. Crawford seated at a bench facing his open locker, resting his head in his hands. (Testimony of Sgt. Lee)

30. Sgt. Lee approached Mr. Crawford and stood behind him at an angle while Mr. Crawford remained seated. Officer Fallon stood several feet away from Sgt. Lee's location given the conversation he was having with a fellow patrol officer. In response to Sgt. Lee's question if Mr. Crawford "was OK", Mr. Crawford asked Sgt. Lee why he was "badgering him." (Testimony of Sgt. Lee)

31. Sgt. Lee responded that he was not badgering Mr. Crawford. Rather, he was "trying to make him a better officer." (Testimony of Sgt. Lee)

32. When Sgt. Lee told Mr. Crawford that he did not want to see him lose his job, Mr. Crawford began to cry and said he "had a lot of shit going on." (Testimony of Sgt. Lee)

33. When Sgt. Lee told Mr. Crawford to go home for the rest of his shift, Mr. Crawford stood up, unholstered his loaded firearm and placed it into the space above the shelf of his locker. He thereafter removed his duty belt and undershirt and threw both in the main space of his locker before donning his personal sweatshirt and leaving the locker room. (Testimony of Mr. Crawford)

34. Mr. Crawford did not "recklessly and dangerously [throw] the loaded weapon into [his] locker" as alleged in the Mayor's June 4, 2018 termination letter to Mr. Crawford. (Testimony of Mr. Crawford)[3]

35. Chief Goldman learned of Mr. Crawford's conduct and actions when he checked his Department e-mail in the morning hours of May 12 and read Sgt. Lee's report of the incident that occurred with Mr. Crawford earlier that morning. (Testimony of Chief Goldman, Exhibit 6)

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2. During Sgt. Lee's candid testimony before the Commission, he initially did not even recall that Mr. Crawford turned around and walked back toward him, stating: "And then he was trying to pick up his vest, almost tripping. And then he said that he's sick and tired of this shit and that he was going to go home. And then he just left to go downstairs … I recall him just leaving to go down. I can't recall if he turned around and faced me." After being shown the video and asked "Do you see him turn around *and come back at you now*?", Sgt. Lee stated "I can't see it". After being shown the video a second time, Sgt. Lee acknowledged that Mr. Crawford could be seen turning around, but, even when prompted by counsel a second time, Sgt. Lee did not state that Mr. Crawford "came back at [him]."

3. I carefully considered Sgt. Lee's written statement and testimony that Mr. Crawford "threw" his firearm into the locker. I did not make such a finding for multiple reasons including: 1) Mr. Crawford's credible testimony to the contrary; 2) Sgt. Lee's somewhat equivocal *initial* testimony on this subject, initially testifying before the Commission that Mr. Crawford "pretty much" threw the firearm into to the top shelf of the locker; 3) Officer Donnelly's credible testimony that Sgt. Lee, only minutes after the incident told him: "I *think* he [Crawford] threw his gun in the locker."; 4) the description of the physical configuration of the locker (two shelves) which would make it hard to "throw" the firearm into it; and 5) the very close distance between where it appears that Mr. Crawford was standing and the locker.

36. Chief Goldman went to the police station to prepare paperwork placing Mr. Crawford on administrative leave. In addition, Chief Goldman prepared a notice to Mr. Crawford suspending his License to Carry Firearms. (Testimony of Chief Goldman, Exhibit 1, Exhibit A)

37. The on-duty sergeant, Sergeant Fraher, delivered the notices to Mr. Crawford at his residence. (Testimony of Chief Goldman, Exhibit 8)

38. In the days that followed, Chief Goldman reviewed the Department's audio and video recordings that captured Mr. Crawford's behavior. Following his review of the video, Chief Goldman converted the suspension of Mr. Crawford's LTC to a full revocation. (Testimony of Chief Goldman, Exhibit B)

39. As part of his review of the incident, Chief Goldman reviewed Mr. Crawford's arrest report of the shoplifting call at CVS. Chief Goldman agreed with Sgt. Lee's assessment that the report was deficient. Chief Goldman also spoke with Sgt. Lee and Officer Fallon as to the incident and Mr. Crawford's conduct. (Testimony of Chief Goldman)

40. Chief Goldman did not speak with Mr. Crawford and/or ask him for a written statement regarding the events of May 12th. (Testimony of Chief Goldman and Mr. Crawford)

41. Via an undated memorandum to Mayor Mazzarella, Chief Goldman requested that the Mayor convene a hearing to consider whether to terminate Mr. Crawford. (Testimony of Chief Goldman, Exhibit 2)

42. As referenced above, Sgt. Lee's written statement (and testimony before the Commission) does not allege that Mr. Crawford threatened him and/or "came back at him" while in the hallway. Chief Goldman's undated memo to the Mayor, however, states in part: "The video is shocking. Crawford clearly commits an unwarranted violent act *and appears on the verge of more violence* …" (emphasis added) (Exhibit 2)

43. Chief Goldman's memo also states in part: "Moments later Sgt Lee heard three loud bangs from the basement. He stated to me *they sounded like gun shots*." (emphasis added) (Exhibit 2) There is no reference that the bangs "sounded like gun shots" in Sgt. Lee's written statement *or* in his testimony before the Commission. (Exhibit 6 and Testimony of Sgt. Lee)

44. Chief Goldman's memo also states in part: "Crawford then removed his duty weapon from his holster and in a reckless and dangerous manner threw the firearm into his locker." (Exhibit 6)

45. Chief Goldman's memo also states in part: "I have suspended his LTC. After viewing the violent episode in the hallway it is my intent to exercise my exclusive right as the issuing authority to revoke his LTC permanently." (Exhibit 2)

46. A local appointing authority hearing took place on May 24, 2018 to determine whether Mr. Crawford should be terminated for alleged violations of Department rules 7.01 (Insubordination), 5.1 (Neglect), or his handling of his tactical vest in violation of Rule 4.02 (Conduct Unbecoming an Officer). (Exhibit 9)

47. At the local hearing, Chief Goldman made a verbal presentation and offered evidence of Mr. Crawford's alleged conduct for the Mayor to consider. The Mayor viewed the video that captured Mr. Crawford's conduct in the hallway, listened to the audio recording of the incident, and reviewed Mr. Crawford's disciplinary history with the Department, as well. (Testimony of Chief Goldman, Exhibit 4).

48. The Mayor terminated Mr. Crawford's employment by letter dated June 4, 2018. The termination letter stated in part:

> "Your conduct towards a superior officer on May 12 represents conduct unbecoming an officer in the extreme. In response to simple requests that you amend your report to include material facts and better support the arrest of the alleged shoplifter, you exhibited gross insubordination to your sergeant. You left the OIC's office without acknowledging Sgt. Lee and the requests he made of you relative to the report and when he attempted to speak to you again the report room, you approached him in a very confrontational manner before exiting the room and violently throwing your tactical gear against the wall. When Sgt. Lee followed you into the hallway, you turned in his direction in a very aggressive manner and it looked like ***you were about to physically attack him***. In the locker room, you showed a reckless disregard for your safety and the safety of your fellow officers in your handling of your loaded duty weapon. Lastly, you neglected your duty and abandoned your responsibilities when you unjustifiably lost your temper and yelled that you were going home after your sergeant asked you to simply revise your report." (emphasis added) (Exhibit 9)

49. On July 17, 2018, Mr. Crawford appealed Chief Goldman's revocation of his LTC in Leominster District Court. (Exhibit C)

50. The District Court subsequently held a hearing on Mr. Crawford's appeal on September 5, 2018, at which Chief Goldman and Mr. Crawford testified. (Exhibit W)

51. On September 6, 2018, the District Court upheld the Chief's revocation, stating the following reasons for the decision:

> "The display of frustration/violence at work. Throwing a tactical vest (with radio attached) against a wall while in yelling conversation with Sergeant Lee (viewed video of incident listened to audio tape.)." (Exhibit D)

52. As of the date of the hearing before the Civil Service Commission, Mr. Crawford had an appeal pending in Superior Court regarding the District Court's decision. (Stipulated)

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). "Basic merit principles" means, among other things, "assuring fair treatment of all appli-

cants 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.

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); *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); *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; *Falmouth* v. *Civil Service Comm'n*, *Id*., quoting internally from *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

ANALYSIS

By a preponderance of the evidence, the City has shown that Mr. Crawford engaged in substantial misconduct which adversely affects the public interest by: 1) standing up from his chair and standing in very close proximity to Sgt. Lee, while yelling at him, after Sgt. Lee was telling him to correct a deficient report; 2) throwing his tactical vest against the wall opposite the report room with such force that it bounced off the wall and landed on the floor; and 3) telling Sgt. Lee that he was going home. These actions constitute a violation of the Department's rules regarding insubordination; neglect of duty; and conduct unbecoming an officer.

The City has not shown, by a preponderance of the evidence, that Mr. Crawford, as alleged by the City: 1) left the OIC's office without acknowledging Sgt. Lee and the requests he made of Mr. Crawford relative to the report; 2) turned in the direction of Sgt. Lee in the hallway in a very aggressive manner like he was about to physically attack Sgt. Lee; or 3) mishandled his firearm in the locker room by throwing it into his locker in a reckless manner.

As stated in the findings, Sgt. Lee testified that Mr. Crawford *did* acknowledge his request to edit the arrest report.

The City (Mayor)'s conclusion that ~~Sgt. Lee~~ **Mr. Crawford** turned in the direction of Sgt. Lee in the hallway in a very aggressive manner like he was about to physically attack Sgt. Lee is not supported by the video evidence or the testimony of Sgt. Lee. The video clearly shows that Mr. Crawford, after throwing his tactical vest against the wall, tripped on the vest and then turned around to pick up the vest before heading down the stairwell. Sgt. Lee never stated in his report that Mr. Crawford, while in the hallway, made any verbal threats against him and/or that Mr. Crawford appeared to be about to attack him. Sgt. Lee's candid and thoughtful testimony before the Commission confirmed that he (Sgt. Lee) never believed that Mr. Crawford was about to attack him in the hallway that morning. The City's false statements regarding this allegation against Mr. Crawford began with a memo from the Police Chief to the City's Mayor stating in part: "The video is shocking. Crawford clearly commits an unwarranted violent act *and appears on the verge of more violence* …". Even the Police Chief, in his testimony before the Commission, could not support the Mayor's more damning allegation that Mr. Crawford "was about to physically attack Sgt. Lee" which would constitute criminal conduct on the part of Mr. Crawford. Simply put, this just didn't happen.

For all the reasons stated in the findings, the City has also not shown that Mr. Crawford mishandled his firearm in the locker room by throwing it into his locker in a reckless manner. There were three persons present in the locker room when this alleged incident occurred: Mr. Crawford, Sgt. Lee and Officer Fallon. The Police Chief, who personally conducted the "investigation" into this matter, never even spoke with Mr. Crawford regarding this allegation before reaching his conclusion. Officer Fallon's report made no mention of Mr. Crawford throwing his firearm into his

locker and the Police Chief appeared to do little or no follow-up to ask Officer Fallon exactly what he did—or did not—see in the locker room that morning. That leaves the statement of Sgt. Lee. As referenced previously, I found Sgt. Lee's testimony before the Commission, in general, to be candid and forthcoming. He listened to the questions carefully; offered thoughtful answers; and took his entire sworn testimony before the Commission seriously. On this topic, however, I simply believe that Sgt. Lee mis-remembered what occurred here. Given the physical configuration of the locker; how close Mr. Crawford was standing to it; and the plausible testimony of Mr. Crawford, it is more likely that Mr. Crawford placed his firearm on the shelf near the top of the locker and then threw his *gear* into the larger, bottom section of the locker. In short, Mr. Crawford did not, as alleged by the City, mishandle his firearm on the morning in question.

Having determined that Mr. Crawford did engage in some misconduct, I must determine whether the level of discipline here (termination) was warranted.

As stated by the SJC 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], 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).
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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 town on the basis of essentially similar fact finding without an adequate explanation." *Id*. (citations omitted).

First, my findings of fact do differ significantly from those reported by the City. As stated above, after a de novo hearing, the preponderance of the evidence does not support some of the City's more serious allegations against Mr. Crawford, including the unsupported allegations that Mr. Crawford was on the verge of attacking Sgt. Lee or that Mr. Crawford mishandled his firearm by throwing it into his locker.

Second, I considered whether favoritism or bias played any role in the City's decision to terminate Mr. Crawford. I can't ignore that Mr. Crawford, according to a separate MCAD filing, was one of only two (2) African American police officers in a seventy (70)-member police department. I did not find any bias on the part of Sgt. Lee. He is, by all accounts, an equal opportunity stickler, requiring that every report, in every circumstance, be thorough and precise. While his practice, immediately upon his promotion, of documenting *and disciplining* officers for alleged errors and omissions may arguably not be the most effective management practice, there is no evidence that he singled out Mr. Crawford for submitting a deficient report. I do question, however, how the City reached its unsupported conclusion that Mr. Crawford was on the verge of physically attacking Sgt. Lee. That unsupported conclusion, and how it was reached, to me, is potentially troubling given that Mr. Crawford was one of only two (2) African-American police officers in the City. It raises the real question of whether some degree of implicit bias infected the decision-making process here.

Third, I considered Mr. Crawford's prior discipline. In 2017, he received a written warning for neglect of duty in violation of Department regulations and he also received two training notices for deficient performance in his capacity as a patrol officer. In 2016, Mr. Crawford was verbally counseled and removed from the Department's detail list for using his cell phone while working a detail in violation of Department policy. In 2015, Mr. Crawford received a verbal reprimand for neglect of duty in violation of Department regulations and two training notices. (Testimony of Chief Goldman, Exhibit G, Exhibit H, Exhibit I, Exhibit J, Exhibit K, Exhibit L, Exhibit M). By letter dated March 6, 2018, Mr. Crawford was suspended for a period of ten (10) working days, five (5) days of which were held in abeyance for neglect of duty and insubordination. The incident giving rise to this suspension occurred on November 23, 2017, when Mr. Crawford locked himself out of his police cruiser and failed to respond to a call for service. The resulting investigation into the incident conducted by the Department concluded that Mr. Crawford was insubordinate towards a superior officer (Sgt. Lee) during his investigatory interview and that he neglected his duties when he locked himself out of his cruiser without reporting the incident to dispatch. (Testimony of Chief Goldman, Exhibit F, Exhibit G).

Fourth, in regard to whether the discipline meted out here (termination) was consistent with the principles of uniformity and the equitable treatment of similarly situated individuals, I reviewed the discipline, and the underlying offenses, of other officers, referenced in Exhibits 15, 16, 17 and 18. Of those, the only potentially comparable matter occurred in in 2016. Officer A was given twenty (20) hours of punishment duty for: a) a 30-40 minute delay in responding to assist a fellow police officer, due to transporting a laborer working on his home; and b) confronting a sergeant in a "loud and angry manner" after the sergeant ordered the police officer to cover as house officer. The 2016 discipline letter from the Police Chief to Officer A states in part: "you are well aware of your past disciplinary issues [] that has factored into my decision." (Exhibit 15)

After a careful review of the above-referenced factors, I have concluded that a modification of the discipline imposed (termination) by the City on June 4, 2018 is warranted. The City has not proven the most serious allegations against Mr. Crawford, and, for those allegations that have been proven, the City appears to have meted out far less discipline against others, including Officer A, who also had prior discipline. Mr. Crawford's discipline should be modified to a sixty (60)-day suspension. This recognizes the Town's failure to prove the most serious allegations while considering that Crawford's insubordination and angry outburst was more severe than Officer A's misconduct.

Finally, although the termination letter makes no reference to it, I need to separately consider that Chief Goldman suspended, and subsequently revoked, Mr. Crawford's LTC permit. Mr. Crawford sought review of the Chief's revocation in the Leominster District Court. Prior to the hearing before the Commission, the court upheld the Chief's revocation, following a court hearing at which Mr. Crawford and Chief Goldman testified.

The City argues that, given that the Department requires an officer to possess and maintain a valid LTC permit to serve as a police officer, Mr. Crawford is not able to perform the essential functions of his position if he lacks the required permit, thus providing further justification for his termination. Mr. Crawford's post-hearing brief does not address the issue.

The courts have acknowledged a potential reason for allowing reinstatement of police officers who do not possess LTCs, even when such possession is made a condition of employment by a rule, regulation or collective bargaining agreement. Allowing the revocation or suspension of an LTC to trump a finding that there was no just cause for discharge would nullify the just cause requirements embodied in G.L. c. 31, § 43 or a collective bargaining agreement. In confirming an arbitrator's award reinstating a municipal police officer, the Appeals Court, in an unpublished decision, noted:

> Just cause for dismissal is not established by the unadorned fact that a chief exercises his discretion to refuse to issue an employee a firearm, because, if that were all that was needed to dismiss a police officer, the officer's contractual right not to be discharged except for just cause is meaningless.

City Manager of Worcester v. *New England Police Benev. Ass'n, Local 911*, 85 Mass. App. Ct. 1119, 2014 WL 1884385, *1 (2014) (Rule 1:28).

Here, in the instant appeal, the Chief's decision to revoke Mr. Crawford's LTC has been affirmed by the District Court; Mr. Crawford has appealed that ruling to Superior Court; and that appeal is still pending. While my findings and conclusions are based on considerably more evidence (including very credible and candid testimony from Sgt. Lee and others) than was before the District Court, I cannot presume or predict the outcome of the Superior Court Appeal.[4]

For this reason, and because of the inherent requirement of a police officer to carry a firearm, the relief ordered by the Commission here is contingent upon a successful appeal by Mr. Crawford of the District Court's decision to affirm the revocation of his LTC.

CONCLUSION

Mr. Crawford's appeal under Docket No. D1-18-109 is hereby ***allowed in part***. His termination is hereby modified to a sixty (60) day suspension. Said relief is contingent upon Mr. Crawford successfully appealing the District Court's decision to affirm the Police Chief's revocation of his license to carry a firearm.

CONCURRING OPINION OF COMMISSIONER CAMUSO

I concur in the Decision as I agree that the findings and credibility determinations of the Presiding Commissioner, Chairman Bowman, show that the City did not establish just cause for terminating the Appellant for the limited unprofessional behavior that is supported by the evidence. I write to note that I believe the statement in the Decision that there is an "inherent requirement of a police officer to carry a firearm" is not necessary to this Decision and is, in my view, inconsistent with my understanding that a law enforcement officer can, in appropriate circumstances, be placed on limited or restricted duty that does not require that he or she be required to carry a firearm. Thus, I do not believe that the Commission's authority to reinstate an officer, in an appropriate case, necessarily must be conditioned on that officer's prior reinstatement, reissuance or renewal of a revoked or lapsed license to carry.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan*, Commissioners) on May 9, 2019.

Notice to:

Scott A. Lathrop, Esq.
176 Fitchburg Road
Townsend, MA 01469

Brian M. Maser, Esq.
KP Law, PC
101 Arch Street
Boston, MA 02110

*Commissioner Tivnan concurs in the Decision insofar as it finds that the Appellant's conduct does not warrant termination, but would impose further remedial discipline for the misconduct which the Appellant committed and was not his first offense.

* * * * * *

4. The evidence presented to me does not corroborate the Chief's testimony that Mr. Crawford was "on the verge of violence" nor does it corroborate the Mayor's further inference that Mr. Crawford was about to attack Sgt. Lee or that he :"threw" his firearm in a "reckless and dangerous manner". Neither of those individuals are percipient witnesses to the incident. Sgt. Lee, himself, does not claim that he thought he was ever in jeopardy of being attacked.

JEFFREY K. REGER, DANIEL E. CRESPI, JOHN F. ADAMS and JEFFREY J. RUSSELL

v.

DEPARTMENT OF STATE POLICE

D-18-178 (Reger)
D-18-179 (Crespi)
D-18-180 (Adams)
D-18-181 (Russell)

May 9, 2019
Christopher C. Bowman, Chairman

Motion for Reconsideration-State Police Overtime Scandal-Lack of Due Process in Suspending Troopers Without Pay-Jurisdiction of Civil Service Commission-Timeliness of Appeal—Ruling on a motion for reconsideration filed by the State Police following the Commission's order to reinstate four troopers after they had been suspended without pay and without any due process, the Commission once again rejected the State Police's argument that it had no jurisdiction over disciplinary matters handled administratively in-house. The Superior Court has rejected the State Police position on multiple occasions. The Commission also rejected the argument that the Troopers had filed their appeals late since the State Police had failed to follow any of the requirements of civil service law and the Commission has broad powers under Chapter 310 to restore and protect the civil service rights of tenured employees.

DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION & MOTION TO STAY

On March 28, 2019, the Civil Service Commission (Commission) issued a decision [32 MCSR 136] allowing the Appellants' appeals, concluding that: (1) the Appellants had been deprived of their right to a hearing before they were suspended without pay, as intended by the provisions of G.L.c. 22C, § 13, G.L.c. 31,§§ 41 through 45, Department Rules 6.4 through 6.9, and, to the extent applicable, the provisions of the collective bargaining agreement governing their employment with the Department; and (2) the Appellants could contest their suspensions to the Commission, which has jurisdiction to rectify procedural irregularities pursuant to G.L.c.31, §42, as well as require that the Department prove just cause for their suspension by a preponderance of the evidence, pursuant to G.L.c.31, § 43. The Commission's decision required that the Troopers be restored to their employment immediately without loss of compensation or other rights.

On April 8, 2019, the Respondent filed a Motion for Reconsideration of the Commission's March 28, 2019 decision or, in the alternative, a stay of the decision pending judicial review. The Respondent made three (3) arguments in favor of their motion: 1) The Commission lacks jurisdiction to hear the appeals; 2) the Appellants' appeals to the Commission were untimely; and 3) the Commission's decision contained statements that were unsupported by the record and inaccurate or incomplete.

On April 18th and 19th, 2019, the Appellants filed oppositions to the Respondent's motion, refuting the above-referenced arguments by the Respondent.

A Motion for Reconsideration must identify a clerical error or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. (801 CMR 1.01(7)(l))

Based on a careful review of the parties' submissions, the Respondent's Motion for Reconsideration and Motion to Stay is ***denied.***

The Commission's March 28, 2019 decision provided detailed findings and analysis regarding why the Commission has jurisdiction to hear the instant appeals. The Respondent's motion does not identify a significant factor that the Commission may have overlooked that would warrant reconsideration by the Commission.

The argument regarding timeliness, which was never raised by the Respondent prior to filing a Motion for Reconsideration, is unpersuasive. The relevant statute provides as follows: "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. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action …" G.L. c. 31, § 42, as amended by St. 1979, c. 196. The Respondent contends that the "trigger date" for the statutory ten-day filing period was August 15, 2018 (the day of their duty status hearing), which would have required the Appellants to file an appeal with the Commission by August 29, 2018. The Appellants appeals were received by the Commission on September 17th, 18th and 21st, 2018. Here, however, the ten-day period for filing a complaint with the Commission is linked to failures to comply with the statutory requirements by the Respondent. The Respondent effectively *acknowledges* that it followed *none* of the requirements of the civil service law (G.L. c. 31, §§ 41-45). The Respondent, *as of the date of this decision:* 1) has yet to provide the Appellants with *any* written notice of the discipline imposed, let alone a copy of the civil service law, as required; 2) refuses to acknowledge that any discipline has even occurred; and, 3) for at least three (3) of the Appellants, has yet to conduct a full hearing. Put simply, the Respondent's failure to follow the requirements of section forty-one were *ongoing* when the Appellants filed their appeal with the Commission—and their appeals cannot be considered untimely. (*See City of Worcester* v. *Civ. Serv. Comm'n & Karen Walsh*, 83 Mass. App. Ct. 1112 (Rule 1:28 Decision), *rev.den.*, 464 Mass. 1100 (2013) (The Appeals Court rejected the City's argument on timeliness where the ten-day day complaint for filing a complaint with the Commission was linked to failures by the City to comply with the statute).

Further, 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 their own, the civil service commis-

sion may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirements of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights." Here, the Appellants acquired certain rights of appeal under Chapter 31 and the Respondent has actively worked to circumvent those rights through no fault of the Appellants. Under these circumstances, the Commission is warranted in taking the action of hearing these appeals to restore and protect those rights.

Finally, I have carefully reviewed the Respondent's arguments that the Commission's decision contained statements that were unsupported by the record and inaccurate or incomplete. It did not.

For all of these reasons, the Respondent's Motion for Reconsideration and Motion to Stay is ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 9, 2019.

Notice to:

Appearance for Appellants Reger & Crespi:
Joseph Kittredge, Esq.
Lorena Galvez, Esq.
Rafanelli Kittredge, P.C.
One Keefe Road
Acton, MA 01720

Appearance for Appellants Adams & Russell:
Daniel J. Moynihan, P.C.
271 Main Street, Suite 302
Stoneham, MA 02180

Appearance for Respondent
Daniel Brunelli, Esq.
Department of State Police
470 Worcester Road
Framingham, MA 01702

* * * * * *

FERRUCCIO ROMEO

v.

TOWN OF WINTHROP

E-18-222

May 9, 2019
Christopher C. Bowman, Chairman

Examination Appeal-Winthrop Police Department-Promotional List-Patrolman Reinstated After Discharge Following an Arbitration Award-Placement on Top of Sergeant's List-Lieutenant's Exam— The Commission dismissed an appeal from a Winthrop patrol officer who was reinstated following his discharge after receiving a favorable arbitrator's award. The officer argued unsuccessfully that he should be placed at the top of the sergeant's list and should also be allowed to take the lieutenant's exam—notwithstanding the fact that he had never served a day as a sergeant. The decision notes that Winthrop had allowed the Appellant to sit for a makeup sergeant's exam and that he was currently number three on the list so no further relief was warranted.

ORDER OF DISMISSAL

On November 10, 2018, the Appellant, Ferruccio Romeo (Mr. Romeo), a police officer for the Town of Winthrop (Town), filed an appeal with the Civil Service Commission.

2. On November 19, 2018, Mr. Romeo filed a "motion to amend appeal" and a "motion for speedy hearing".

3. On December 4, 2018, I held a pre-hearing conference which was attended by Mr. Romeo and, via phone, counsel for the Town.

4. As part of the pre-hearing conference, Mr. Romeo provided clarification regarding his appeal. According to Mr. Romeo:

A. On January 9, 2015, the Town terminated him as a police officer.

B. An arbitrator overturned the termination.

C. Judicial appeals by the Town were unsuccessful.

D. Mr. Romeo was returned to the payroll on 7/22/18 and returned to duty on 9/7/18.

5. Based on the documents and the statements of the parties, it appears the following also occurred:

a. An arbitrator approved a mutual agreement of the parties allowing Mr. Romeo to sit for a make-up promotional examination for sergeant on October 25, 2018.

b. As part of a separate discrimination case, Mr. Romeo sought a Superior Court Order allowing him more time to prepare for the make-up examination, which took the form of an Assessment Center. The Superior Court denied his request.

c. On October 25, 2018, Mr. Romeo took the Assessment Center promotional examination for sergeant and receive a score of 78.

6. Mr. Romeo, via his appeal to the Commission, sought the following relief:

I. To be placed at the top of the eligible list for sergeant .

II. To be allowed to sit for an upcoming promotional examination for lieutenant, notwithstanding the civil service law, which states, in part, that only those "in the next lower title" (i.e.—sergeant) are eligible to sit for the promotional examination (i.e.—for lieutenant).

7. Mr. Romeo argued that relief is warranted, in part, because he was prejudiced by the change in format of the examination. Specifically, Mr. Romeo argued that, had he not been terminated, he would have sat for a "traditional" multiple choice examination in 2015, as opposed to an assessment center-type examination in 2018. Further, Mr. Romeo continues to argue that he was prejudiced by the lack of time to prepare for the examination.

8. Mr. Romeo argued that, had he not been terminated, he may have been promoted to sergeant, allowing him to sit for the lieutenant's promotional examination. Further, Mr. Romeo argued that he has performed many of the duties of sergeant over the years.

9. Three other Winthrop police officers have filed an appeal with the Commission, contesting whether Mr. Romeo should have been able to sit for the make-up examination on October 25th.

10. The Town had thirty (30) days to file a Motion for Summary Decision and Mr. Romeo had thirty (30) days thereafter to file an opposition and Cross-Motion for Summary Decision.

11. The Town submitted a Motion to Dismiss on January 2, 2019. Mr. Romeo filed an opposition to the Town's motion and a Motion for Summary Decision on February 1, 2019.

12. An updated eligible list for Sergeant was established on April 1, 2019. Mr. Romeo is ranked third.

ANALYSIS

I have carefully reviewed the parties' submissions, including Mr. Romeo's detailed Motion for Summary Decision. Mr. Romeo has already received the appropriate relief. Over the objection of other police officers, Mr. Romeo, upon his reinstatement, was allowed to sit for a make-up examination for police sergeant. Permanent promotional appointments to sergeant were on hold until such time as an updated eligible list was established. Mr. Romeo took the make-up examination and has now been added to the eligible list, ranked third (within the statutory "2N+1" formula for any future vacancy.) No further relief is warranted.

For this reason, Mr. Romeo's appeal under Docket No. E-18-222 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 9, 2019.

Notice to:

Ferruccio Romeo
[Address redacted]

Howard Greenspan, Esq.
200 Broadway
Lynnfield, MA 01940

* * * * * *

RICHARD PERRY

v.

DEPARTMENT OF CORRECTION

C-18-172

May 23, 2019
Christopher C. Bowman, Chairman

Reclassification Appeal-Department of Correction-Storekeeper III to IV-Scope of Duties—A Storekeeper III at the Department of Correction failed in his bid to obtain a reclassification to Storekeeper IV where his duties fell squarely within the purview of a Storekeeper II or III. Although the Appellant performed the same duties as his retired superior, a Storekeeper IV, that person's job duties also fell within the Storekeeper II or III series.

DECISION

On September 4, 2018, the Appellant, Richard Perry (Mr. Perry), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the August 7, 2018 decision of the state's Human Resources Division (HRD) in which HRD affirmed the decision of the Department of Correction (DOC) to deny his request to be reclassified from Storekeeper III to Storekeeper IV.

On October 16, 2018, I held a pre-hearing at the offices of the Commission and a full hearing was held at the same location on December 11, 2018[1] . The hearing was digitally recorded and one CD was made of the hearing.[2]

FINDINGS OF FACT

Forty-one (41) exhibits were entered into evidence (Respondent Exhibits 1-15 (R1 - R15) and Appellant Exhibits 1-13 (A1 - A26)).. Based on the documents submitted into evidence and the testimony of:

For DOC:

- Sara Parmenter, Director of Payroll and Personnel, DOC;

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

For Mr. Perry:

- Eugene Munroe, Assistant Institution Steward, DOC (Mr. Perry's Supervisor);
- Richard Perry, 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:

BACKGROUND

1. Mr. Perry has been employed by DOC for approximately six (6) years. (Stipulated Fact) He has an Associate's degree from Fisher College. Prior to working for DOC, he worked for a furniture inventory warehouse and a company that installs floor boards. (Testimony of Mr. Perry)

2. In March 2014, Mr. Perry began working on the second floor of DOC's Bridgewater Kitchen Warehouse, reporting to SB, who was a Storekeeper IV. (Testimony of Mr. Perry)

3. SB retired on June 30, 2015. (Testimony of Mr. Perry)

4. At the time of SB's retirement, there was a statewide hiring freeze in place, limiting what, if any, jobs could be posted. (Testimony of Mr. Perry & Ms. Parmenter; Exhibit A2)

5. The Storekeeper IV position previously filled by SB has never been posted. (Testimony of Ms. Parmenter)

6. On July 1, 2015, the day after SB's retirement, Mr. Perry's supervisor (Mr. Munroe) sent an email stating: "As of today, July 1, 2015, Rick Perry will assume the duties and responsibilities for the upstairs institution supplies. Any questions concerning this area can be directed to Rick or myself." Duties for the cage and hot tool area will be expertly dispatched by [another employee] and myself. (Exhibit A7)

7. Part of the statewide hiring freeze guidelines stated that non-management classification appeals could go forward and that "it is critical to ensure … that duties must be assigned consistent with class specifications so that positions do not need to be reallocated. Any position reallocations have to be accomplished within an agency's spending plan and all delegation agreements with HRD." (Exhibit A2)

8. On February 15, 2018, Mr. Perry filed a request with DOC to be reclassified from Storekeeper III to Storekeeper IV. (Stipulated Fact)

9. On April 26, 2018, DOC denied Mr. Perry's request for reclassification. (Stipulated Fact)

10. On August 7, 2018, HRD denied Mr. Perry's appeal of DOC's determination. (Stipulated Fact)

HRD Job Specifications (Last Updated in 1987)

11. Incumbents of positions in the Storekeeper Series unpack and examine incoming goods; purchase supplies and equipment; store goods, supplies and equipment; mark identifying code, etc. on articles; issue supplies, materials and equipment; maintain records; take inventories; and perform related work as required. The basic purpose of this work is to receive, store, issue, ship and purchase supplies, materials and equipment for agency use. (Exhibit R13)

12. A Storekeeper III is the second-level supervisory job in the series. (Exhibit R13)

13. A Storekeeper IV is the third-level supervisory job in the series. (Exhibit R13)

14. A Storekeeper III: 1) determines space requirements and methods of storage for storeroom articles; 2) provides technical assistance to employees on the methods to be used for storing, receiving, shipping and handling storeroom items.; and 3) recommends methods and procedures to be used in handling, storing, issuing and shipping storeroom items. (Exhibit R13)

15. A Storekeeper IV: 1) coordinates activities of workers engaged in storekeeping activities to ensure effective operations and compliance with established standards; 2) evaluates storekeeping activities in order to determine effectiveness and to make recommendations concerning changes as needed; 3) confers with superiors in order to provide information and resolve problems. (Exhibit R13)

Mr. Perry's Job Duties and Responsibilities

16. Mr. Perry is a first-level supervisor, providing supervision to a Storekeeper II, a Storekeeper I and two (2) inmates. (Testimony of Mr. Perry) Until he began the process of filing an appeal for reclassification, Mr. Perry did not complete the performance evaluations of the Storekeeper II and Storekeeper I. After learning the supervisory requirements of the Storekeeper series, it was decided that Mr. Perry would begin completing those evaluations. (Testimony of Mr. Munroe)

17. Mr. Perry is responsible for receipt, storage and distribution of inventory on the second floor of the kitchen warehouse. This includes such items as paper products and chemicals as well as other non-kitchen inventory stored on the second floor such as clothes and mattresses. (Testimony of Mr. Perry)

18. Mr. Perry has ensured that storage racks are well organized and clearly marked on the second floor. (Testimony of Mr. Perry)

19. Prior to SB's retirement, Mr. Perry and SB would jointly conduct a monthly inventory of all products on the second floor. After

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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.

SB's retirement, Mr. Perry and a Storekeeper II would jointly conduct the monthly inventory. (Testimony of Mr. Perry)

20. Mr. Perry ensures that the inventory is maintained on DOC's shared network. (Exhibit R6)

21. Mr. Perry supervises the loading and unloading of trucks. He makes recommendations regarding the proper method to load trucks to ensure maximum efficiency. (Testimony of Mr. Perry and Exhibit R6)

22. Mr. Perry schedules the monthly delivery of products to four (4) different institutions. (Testimony of Mr. Perry and Exhibit R6)

23. Mr. Perry ensures that all material handling procedures are maintained (i.e.—handling of chemicals properly, etc.). (Testimony of Mr. Perry and Exhibit R6)

24. Mr. Perry prepares weekly health and safety inspection reports. (Testimony of Mr. Munroe and Exhibit R6)

25. Mr. Perry ensures that only authorized individuals (i.e.—properly assigned inmates) have access to the second floor of the kitchen warehouse. (Testimony of Mr. Munroe & Mr. Perry; Exhibit R6)

26. Mr. Perry is responsible for operating or overseeing those who operate a forklift, an electric pallet jack, the dock plate and a delivery truck. (Exhibit R6)

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, § 49.

Mr. Perry must show that he performs the distinguishing duties of the Storekeeper IV title more than 50% of the time. *See Gaffey* v. *Dept. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also 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 duties encompassed within the higher level position the majority of the time….").

ANALYSIS

The genesis of Mr. Perry's appeal was the retirement of SB, a Storekeeper IV who served as Mr. Perry's supervisor. In short, Mr. Perry argues that since he has been assigned to perform all of the duties of SB upon his retirement, he should be reclassified to the title held by SB: Storekeeper IV. I credit Mr. Perry's testimony that he performs all the job duties previously performed by his former supervisor. The evidence, including Mr. Perry's own testimony, however, does not show that those job duties fall under the classification specifications of a Storekeeper IV. Rather, Mr. Perry's job duties fall squarely under the specifications of a Storekeeper II or III. He is a first-level supervisor who determines space requirements and methods of storage for storeroom articles; provides technical assistance to employees on the methods to be used for storing, receiving, shipping and handling storeroom items; and recommends methods and procedures to be used in handling, storing, issuing and shipping storeroom items.

Mr. Perry's successful efforts to label and organize all inventory on the second floor is an example of determining space requirements and methods of storage for storeroom articles. His recommendations regarding how to best load the delivery truck is an example of providing technical assistance to employees on the methods to be used for storing, receiving, shipping and handling storeroom items. His guidance on ensuring the proper handling and storage of chemicals is an example of recommending methods and procedures to be used in handling, storing, issuing and shipping storeroom items. His duties, however, do not entail the higher level coordination and evaluation included in the job specifications of a Storekeeper IV.

Although this appeal must be denied, it should not be viewed as a negative reflection on Mr. Perry or his work. Mr. Perry's commitment, organization skills and dedication were evident in the documents submitted as well as his professional presentation to the Commission. DOC is fortunate to have someone with his skill set in this mission-critical position.

CONCLUSION

Mr. Perry's re-classification appeal under Docket No. C-18-172 is hereby ***denied***.

* * *

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman and Stein, Commissioners [Tivnan, Commissioner—No][3]) on May 23, 2019.

Notice to:

Richard Perry
[Addres redacted]

Joseph Santoro
Norman Chalupka, Esq.
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * * *

3. Commissioner Tivnan voted no as he believes the appeal should be allowed.

VERONICA VILA

v.

SPRINGFIELD POLICE DEPARTMENT

G1-18-122

May 23, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Driving Record-Police Incident Reports-Harassment Prevention Order—The Commission affirmed the bypass of a 29-year-old female for appointment as a full-time Springfield police officer based on seven police incident reports over the last five years, a poor driving record, and her acknowledgement that she had violated a harassment prevention order.

DECISION

On July 5, 2018, the Appellant, Veronica Vila (Ms. Vila), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Springfield Police Department (SPD) to bypass her for appointment as a permanent, full-time police officer. A pre-hearing was held at the Springfield State Building in Springfield, MA on August 8, 2018 and a full hearing was held at the same location on October 24, 2018.[1] The full hearing was digitally-recorded and both parties received a CD of the recording.[2] The SPD submitted a post-hearing brief on December 21, 2018. The Appellant did not submit a post-hearing brief.

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence (Respondent Exhibits 1-6 (R1 - R6) and Appellant Exhibits 1-3 (A1 - A3)). Based on these exhibits and the testimony of the following witnesses:

Called by the SPD:

- Lynn Vedovelli, Human Resources / Payroll Manager; SPD;

Called by Ms. Vila:

- Veronica Vila, Appellant;

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

Ms. Vila

1. Ms. Vila is a twenty-nine (29) year-old black female with three (3) children who was born and raised in Springfield, MA. She has an Associate's degree in criminal justice and is working toward obtaining her Bachelor's degree. She is currently employed as a paraprofessional in a local school department. (Testimony of Ms. Vila and Exhibit A3)

2018 Hiring Process

2. On March 25, 2017, Ms. Vila took the civil service examination for police officer and received a score of 96. (Stipulated Fact)

3. On January 19, 2018, the SPD received Certification No. 04971 from the state's Human Resources Division (HRD), from which the SPD eventually appointed thirty-two (32) candidates as permanent, full-time police officers. (Stipulated Fact)

4. Ms. Vila was ranked twenty-seventh (27th) on Certification No. 04971 (Stipulated Fact)

5. On February 14, 2018, the SPD provided HRD with reasons for the proposed bypass of Ms. Vila.[3] (Stipulated Fact)

6. The SPD's stated reasons for bypassing Ms. Vila were: 1) work history; 2) driving history; and 3) a pattern of inappropriate behavior. (Exhibit R1)

7. On June 7, 2018, HRD approved the reasons for bypass. (Stipulated Fact)

Employment History

8. The SPD's bypass letter states: "Candidate was employed at the [CT] Department of Corrections from 6/2014 through 01/2017. During the interview candidate stated that she failed to return back to work after a leave. Question 16 of the registration packet asks: 'Have you ever walked off a job without notice?' Candidate answered No." (Exhibit R1)

9. The background investigator's report regarding Ms. Vila stated:

> "Spoke with several co workers from past and present employments. They all spoke highly of her, worked well with others and were (sic) always on time. Then I spoke with Ms. Vila about why she left the Department of Corrections. She stated that she was pregnant and also her 2nd born child [had medical issues]. While working double shifts and taking her daughter to her appointments was a lil (sic) too much. She was a single mom and wasn't able to do it all so she decided to take care of her daughter.
>
> I did speak with [an employee] from the Department of Corrections. She stated that Ms. Vila never gave her 2 weeks notice after her leave with FMLA. As a matter of fact she just never showed back up at all. Then when they gave her a time frame on when to return. This is when she gave her resignation." (Exhibit A1)

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. As a consent decree community, Springfield must provide HRD with reasons for bypass. Since 2009, HRD delegated that responsibility to all non-consent decree communities.

Driving History

10. The SPD's bypass letter states: "Poor Driving Record (Attachment H)." (Exhibit R1)

11. Prior to the full hearing, Ms. Vila obtained a true and attested copy of her driving record. It shows the following violations for which she was found responsible in the (5)-year period preceding this hiring cycle: Speeding (2016); Speeding (2015); Speeding (2014); Child without seatbelt (2013). This record also shows that Ms. Vila's license was suspended once in 2007 and reinstated in 2008. (Exhibit A2)

Pattern of inappropriate behavior

12. The SPD's bypass letter references seven (7) police incident reports from 2013 to 2018 in which Ms. Vila was alleged to have engaged in criminal conduct, including two (2) incidents in which she was alleged to have violated the terms of a harassment prevention order that had been placed against her. (Exhibit R1)

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:

> "(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 employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, § 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 Service 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 candidate seeking to become a police officer and drive a City-owned police cruiser.

I reviewed the multiple police incident reports and carefully reviewed Ms. Vila's testimony regarding the underlying incidents referenced in those reports. At a minimum, Ms. Vila appears to acknowledge that she violated a harassment prevention order that was placed against her. Further, some of the explanations that Ms. Vila offered regarding the allegations contained in other incident reports were inconsistent and not plausible. Most of these events occurred within the five (5)-year period immediately preceding this hiring cycle.

The recent driving infractions, the recent police incident reports, and the acknowledgment by Ms. Vila that she violated a harassment prevention order, taken together, provided the SPD with reasonable justification to bypass her for appointment to the position of permanent, full-time police officer.

CONCLUSION

Ms. Vila's appeal under Docket No. G1-18-122 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 23, 2019.

Notice to:

Veronica Vila
[Address redacted]

Steven Weiner, Esq.
930 Main Street
Springfield, MA 01103

Talia K. Gee, Esq.
City of Springfield
36 Court Street, Room 5
Springfield, MA 01103

* * * * * *

SCOTT BACON

v.

CITY OF HOLYOKE[1]

G1-17-075

May 23, 2019
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment as a Holyoke Firefighter-Residency Preference—The Commission affirmed the bypass of a candidate for original appointment to the Holyoke Fire Department whose claimed residency preference in Holyoke could not be verified and who gave information about his residency that was inconsistent and conflicting.

DECISION

The Appellant, Scott Bacon (hereinafter "Mr. Bacon" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on April 21, 2017, under G.L. c. 31, s. 2(b), appealing the decision of the Fire Commissioners of the City of Holyoke (hereafter "Respondent") to bypass him for appointment to the permanent, full-time position of firefighter. A prehearing conference was held in this case on May 10, 2017 at the State Office Building in Springfield.[2] A full hearing was held on the appeal on July 26, 2017 at the same location. Having not received a written request for a public hearing, the hearing was private. The hearing was digitally recorded and copies of the recording were sent to the parties.[3] All witnesses, with the exception of the Appellant, were sequestered. After the hearing, the Appellant asked to call additional witnesses, add exhibits and opposed the documents submitted in response to my order at the hearing. A ruling on August 22, 2017 denied the request for additional testimony and admitted the parties' post-hearing documents. The Appellant noted his opposition to the ruling. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Twenty-two (22) Exhibits were entered into evidence at the hearing.[4] Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- John Pond, Chief, Holyoke Fire Department (HFD)
- Michael Boucher, Lieutenant, Professional Standards Division, HFD

Called by the Appellant:

- Scott Bacon (Appellant)

and taking administrative notice of all matters filed in the case; stipulations[5] ; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. At the time of the Commission hearing, the Appellant was forty-eight (48) years old. [6] (Testimony of Appellant) He took and passed the firefighter exam on April 16, 2016. He submitted a Residency Preference form for the examination, claiming residency in the City of Holyoke. (R.Ex. 2) The one (1)-year residency period required for residency preference for the 2016 firefighter exam was April 16, 2015 to April 16, 2016. (R.Ex. 10; *see* G.L. c. 31, s. 58)

1. Attorney Kevin C. Maynard previously represented the Respondent.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq*., apply to adjudications before the Commission with G.L. c. 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.

4. The exhibits entered into the record at the hearing include Respondent's Exhibits (R.Ex.) 1 through 13 and Appellant's Exhibits (A.Ex.-) 1 through 9. In response to my order at the hearing, the Respondent produced post-hearing the partial applications of the selected candidates (using the candidates' initials); the applications of the candidates (using candidates' initials) who bypassed the Appellant; the investigation reports of the candidates (using candidates' initials) who bypassed the Appellant; a letter from Fire Commissioner Joshua Garcia dated August 23, 2017; the minutes of the Jan. 25, 2017 Board of Fire Commission meeting; an August 1, 2017 statement of a civilian member of the HFD; an affidavit of Personnel Director Kimberly Counter; and a Dec. 20, 2016 email exchange between the civilian HFD employee and a then-Assistant Solicitor (all cited as R.PH.Ex.-). I give limited weight to written statements submitted post-hearing by people who did not testify at the hearing. Post-hearing, the Appellant requested and was allowed (without objection) to submit two (2) screenshots allegedly of Lt. Boucher's Instagram account and profile, a screen shot allegedly pertaining to a fundraiser for a member of the Appellant's family, and a screen shot allegedly from Mayor Morse's Facebook account (cited as A.PH.Ex.-). The Appellant reported that he had filed a complaint at the State Ethics Commission regarding the Respondent's actions regarding his bypass. The complaint is not included in the record as Appellant's counsel expressed some concern about whether it constitutes a public record. However, on representation of counsel, I have no reason to doubt that the Appellant filed such a complaint. As with all evidence, the material included in the record post-hearing is given the weight it is due based on its reliability.

5. At the prehearing conference in this case, the parties stipulated to certain facts. (Administrative Notice) In addition, the parties presented another stipulation at the full hearing. Specifically, Fire Commissioner Joshua Garcia was going to testify at the hearing but, during the hearing, he informed Respondent's counsel that a personal matter arose and he would not be able to testify. The parties stipulated that if Mr. Garcia had testified, he would indicate that the Fire Commission did not ask the Appellant about alleged omissions in filling out the application (regarding questions 26, 27, 28, 72 and 76), that references to such alleged omissions in the bypass letter would not suffice, on their own, as reasons to bypass the Appellant, that the Fire Commission did ask the Appellant about his residence in the one (1) year prior to the 2016 exam, and that they were informed that the Appellant had already provided his vehicle registration and voter registration in this regard to the HFD. (Digital Recording of Full Hearing at 2 hours, 50 minutes)

6. I take administrative notice that Holyoke is a civil service community that currently has no upper age limit for entry-level firefighters. (*See* https://www.mass.gov/service-details/civil-service-fire-departments ; and https://www.mass.gov/service-details/age-requirements-for-entry-level-public-safety-positions)

2. The Appellant was born and raised in Holyoke. In or about 2014, he lived in Belchertown, where his child lives, and he shared custody with his ex-wife. In or about 2015, the Appellant was dating Ms. D, who lived in Longmeadow where her child attended school. (Testimony of Appellant) In April 2015, the Appellant's credit report indicated that he lived in Longmeadow at Ms. D's address. (R.Exs. 5 and 7 (p. 2) At various times in 2015 and 2016, the Appellant lived in Holyoke, he asserted, for financial reasons, to live with his sister, her husband and their three (3) children. The Appellant did not pay rent at his sister's home but he asserted that he paid for utilities, although the utility bills are in the Appellant's sister's name, and that he performed maintenance but there was no documentation that the Appellant paid such bills or performed maintenance there. In or about the summer of 2015, the Appellant's sister became ill and the Appellant helped take care of her children. Ms. D and the Appellant were married in November 2015. (Testimony of Appellant; R.Exs. 3 and 4; Administrative Notice)

3. On December 12, 2016, the state's Human Resources Division (HRD) established a list of eligible candidates who passed the firefighter exam. On the same date, HRD established certification No. 04132 to fill ten (10) firefighter vacancies in Holyoke. HRD notified candidates on this Certification to indicate their interest in employment at the HFD on or before December 19, 2016 by signing the Certification. The Appellant's name was placed on the eligible list, ranked seventh (in a tie) as a non-veteran with residency preference in Holyoke. He signed the Certification. (R.Exs. 1 and 12) All of the candidates who signed the Certification had claimed Holyoke preferences when they took the examination. (Testimony of Pond; R.Ex. 1)

4. On or about December 17, 2016, the Appellant submitted an application for employment as a Holyoke Firefighter.[7] (R.Ex. 3)

5. The first page of the application includes instructions stating, in part, "deliberate misstatements or omissions can and often will result in your application being rejected." (R.Ex. 3) Each page of the application must be initialed to indicate that the applicant has "provided complete and accurate information." (*Id.*) Section 11 further instructs applicants to certify that they have personally completed and initialed each page and certify that "all statements made are true and complete to the best of my knowledge and belief" and that "any misstatement of material fact may subject me to disqualification; or, if I have been appointed, may disqualify me from continued employment." (*Id.*)

6. The Appellant completed section 2 of the application, which asks for certain contact information for immediate family relatives. In response, the Appellant identified his spouse as Ms. D, writing that her address was the same address in Holyoke as the address of the Appellant, who was living with his sister and her family. (R.Ex. 3)

7. Beginning in December 2016, Lt. Michael Boucher, in the HFD Professional Standards Division (PSD), conducted a background investigation of the Appellant. (R.Exs. 4 - 8) Previously, a civilian member of the HFD would call candidates' references and check their residences for background checks. However, because of prior candidate residency problems, the HFD changed its process so that during this hiring cycle, uniformed members of the HFD Professional Standards Division began conducting the background checks using the process used by the Holyoke Police Department (HPD). (Testimony of Pond)

8. As part of this investigation, Lt. Boucher kept a "Background Investigation checklist" form, which contained fields to document the dates that information in the application was verified, for example, by completing reference checks, completing records checks, dates of examinations, home visits, other actions to verify information, and conducting a discretionary interview to address discrepancies as appropriate. (R.Ex. 8; Testimony of Boucher)

9. On December 22, 2016, Lt. Boucher sent correspondence to the Appellant's personal, employment and landlord references requesting that the references complete the pertinent verification or reference form. (R.Ex. 8; Testimony of Boucher) The landlord verification reference form does not include an attestation, it is not signed under pains of penalty and it does not require notarization. (Administrative Notice) The Appellant's sister received a landlord verification form, filled it in, signed it and submitted it to the HFD. (R.Ex. 4)

10. On or about January 11, 2017, Lt. Boucher obtained the Appellant's credit report, which reported the Appellant's residence at Ms. D's address in Longmeadow as of April, 2015. (R.Ex. 7; Testimony of Boucher))

11. Also on or about January 11, 2017, Lt. Boucher obtained a copy of a Property Card from the Town of Longmeadow, which indicated that Ms. D is the owner of the property at the Longmeadow address in the Appellant's credit report and she purchased the property in 2010. (R.Ex. 5)

12. On January 14 and 15, 2017, at different times of day, Lt. Boucher attempted to visit the Appellant at the Holyoke address listed in the Appellant's application. At the first visit, Lt. Boucher spoke to the Appellant's brother-in-law, who said that the Appellant was at work. At the second visit, no one was there. (R.Ex. 8; Testimony of Appellant and Boucher)[8]

13. During Lt. Boucher's background investigation of the Appellant, he also checked the Appellant's address in the on-

7. The application form requests, among other things, the candidates' record of driving citations. Candidates referenced herein generally did not provide responses. Further, I note that the background investigation checklist that the HFD investigators use included a section regarding the candidates' driving records but that the two (2) HFD investigators checked off that the driving records were "negative" (meaning, apparently, that there was nothing of concern therein) and did not list "any significant items" on the checklist in the space provided regarding the candidates' driving records. (*See* R.PH.Exs.—Applications and Investigation reports)

8. Lt. Boucher's background investigation report asserts that at one of the visits to the Holyoke residence, he encountered a neighbor who stated that the Appellant did not live in his sister's house. However, the Appellant alleged that this neighbor

line "White Pages", which indicated that the Appellant resides in Longmeadow. (Testimony of Boucher)

14. On January 17, 2017, Lt. Boucher conducted an interview with the Appellant to clarify his residency during the residency period, asking the Appellant for residency proof, such as documents of a mortgage, a lease, or a utility bill, which the Appellant did not provide. (R.Ex. 8; Testimony of Boucher) The Appellant provided his motor vehicle registration but it states only that the car was registered in Holyoke (no street name and number is visible on the registration) and that his registration was not effective until November 1, 2016, which is six (6) months after the 2016 firefighter exam and too late to support a claim of residency preference in Holyoke between April 2015 and April 2016. The Appellant also provided his voter registration information, which indicates, in part, that in 2014, the Appellant was registered to vote in Belchertown; on February 10, 2016, just a few months after he married Ms. D in November 2015, the Appellant switched his voter registration from Belchertown to his wife's home address in Longmeadow; and, two (2) months later, on April 13, 2016 (three (3) days prior to the 2016 firefighter exam), the Appellant changed his voter registration address from his wife's Longmeadow address to his sister's Holyoke address. (Testimony of Appellant; A.Ex. 3; R.Ex. 6)

15. On January 22, 2017, Lt. Boucher completed a Background Investigation Report (Report) indicating, in part, that the Appellant's claimed residency preference status could not be verified. (R.Ex. 8; Testimony of Boucher) Lt. Boucher also wrote, in part,

> When mr. (sic) Bacon was givien (sic) the opportunity to explain the discrepancy (sic) … [he] stated he and his family lives (sic) with his sister at the [Holyoke] address provided but his wife wants to keep the house in Longmeadow so the kids (sic) can stay in school there. If he is hired they will sell the house, if not they will move back there. When asked who lives in the Holyoke address with him he stated his brother in law (sic), sister, and their 3 children, himself, his wife and her son ….

(R.Ex. 8)

16. In Holyoke, a three (3)-member Board of Fire Commissioners (Board) is responsible for appointing firefighters. (Testimony of Pond) On January 25, 2017, the Board was scheduled to conduct interviews of the candidates, including the Appellant. At that meeting, Fire Commissioner Garcia stated for the record that one (1) candidate was related to a civilian member of the HFD, adding that the civilian employee would not, and did not participate in her relative's interview; instead, someone else would take the appropriate notes during her relative's interview. The civilian employee took notes during the other candidates' interviews. (R.PH.Ex.—Fire Commission minutes) At the Appellant's Board interview, the Board asked about his residence, requesting his voter registration and motor vehicle registration, which the Appellant had already given to Lt. Boucher. (Stipulation) After the interviews, the Fire Commission voted to hire ten (10)[9] candidates, three (3) of whom were ranked above the Appellant on the Certification, seven (7) of whom were ranked below the Appellant. The Fire Commission also voted to bypass six (6) of the candidates. Of the six (6) candidates who were not selected, three (3) of them (including the Appellant) were not selected because their residency between April 2015 and April 2016 had not been verified. (*Id*.; R.PH.Ex.—Investigations)

17. Of the ten (10) candidates who were selected, four (4) are related to other City of Holyoke employees; three (3) of the four (4) selected candidates who are related to other City of Holyoke employees bypassed the Appellant. Family members of three (3) of the four (4) selected candidates work at HFD. The family relation of the fourth of such candidates is a member of the Holyoke Police Department. (R.PH.Ex.—Affidavit of Acting Personnel Director[10] ; R.Ex. 1) There is no evidence in the record that members of the HFD who are related to two (2) of the selected candidates were involved in the selection process, nor is there any indication in the record that the selected candidate related to a member of the HPD attempted to influence the selection process.

18. By letter dated February 8, 2017, Christopher Hopewell, Chairman of the Board of Fire Commissioners, wrote to HRD, in part,

> … Mr. Bacon's background investigation revealed that he has … claimed the merit (sic) preference status for Holyoke residency …Further investigation … indicates that he resided with his wife at [address redacted] in Longmeadow … during the year preceding the examination date. Specifically, Mr. Bacon's credit report shows that he lived in Belchertown Ma and then moved to Longmeadow, Ma (sic). Additionally, Mr. Bacon's voter registration records indicate that he changed his residence from Belchertown to [address redacted] Longmeadow, MA in 2015 …
>
> On Tuesday, January 17, 2017,, (sic) the investigators met with Mr. Bacon and provided him the opportunity to address the discrepancy in his residency. Mr. Bacon stated he had been living with his sister for a period of two (2) years directly moving from Belchertow,(sic), Ma to the [redacted address of the Appellant's sister] in Holyoke, Ma. When questioned about his recent marriage in 2015 and a home in Longmeadow Ma, Mr. Baker (sic) stated his wife owns the home in Longmeadow Ma and that she keeps it so her [child] could attend school in Longmeadow Ma …. Mr. Baker (sic) failed to provide any evidence to support his claim that he resided in Holyoke for the year preceding the examination date. Additionally, Mr. Bacon was provided the opportunity to address this matter during his interview before the Board … Specifically, he stated that he, his wife and step son l (sic) live in … [his] sister's home without providing any evidence to support his claim. ….

(R.Ex. 11)(emphasis added)[11]

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was someone who was biased against him. As no further evidence was offered regarding the neighbor, I do not rely on his reported statement.

9. One (1) of the ten (10) selected candidates who bypassed the Appellant apparently declined the employment offer and the Respondent subsequently selected another candidate who also bypassed the Appellant. (August 23, 2017 email)

10. The affidavit incorrectly states that the civilian HFD employees relative, who was also a candidate, is unrelated to another Holyoke employee. My calculations here include the civilian HFD's relative as one (1) of the four (4) selected candidates who are related to other Holyoke employees.

11. [See next page.]

19. The Appellant filed the instant appeal on April 21, 2017. (Administrative Notice)

20. On May 3, 2017, HRD notified the Appellant that it had accepted by the bypass reasons offered by the Respondent. (R.Ex. 13)

21. At the July 26, 2017 Civil Service Commission hearing, the Appellant was asked about his residence generally. He was specifically asked if he had changed his voter registration to Holyoke during the year prior to the April 2016 exam. The Appellant tentatively testified that he may have. However, his voter registration information indicates that he did so but not until April 13, 2016, three (3) days prior to the 2016 firefighter exam. At the same Commission hearing, the Appellant was also asked why he would have changed his voter registration from Belchertown to Longmeadow in February 2016, a couple of months after he married Ms. D (who owns a home in Longmeadow) when he was claiming Holyoke residency during that time. The Appellant testified that he thought he would live in Longmeadow. (Testimony of Appellant; R.Ex. 6) I take administrative notice that the Massachusetts Secretary of State voter registration form states, in part, "I hereby swear (affirm) that … I consider this residence [the address the applicant wrote on the form] to be my home. Signed under the penalty of perjury." https://www.sec.state.ma.us/ele/eleepdf/Voter-reg-mail-in.pdf

22. The Appellant was also asked at the Commission hearing if he ever stayed overnight at his wife's house in Longmeadow. As he began to answer, the Appellant testified no, not when they were dating. Asked if he ever stayed at his wife's house when they got married, the Appellant stated no. The Appellant further testified that his wife comes over sometimes and on weekends. (Testimony of Appellant)

Residence of Mr. S

23. It appears that Lt. Boucher also conducted Mr. S's background investigation. Mr. S is one (1) of the three (3) candidates selected who ranked above the Appellant (and, therefore, did not bypass the Appellant). Mr. S's application stated that he lived at an address [redacted] in Holyoke for the one (1)-year period prior to the 2016 firefighter exam. That address is the same address as Mr. D, an HFD firefighter and friend of Lt. Boucher. Lt. Boucher did not know how much Mr. S paid Mr. D for rent. Lt. Boucher sent a landlord verification form to Mr. D at his home but Mr. D did not fill it out and return it to Lt. Boucher. Lt. Boucher then went to the address provided by Mr. S and found Mr. S there. Lt. Boucher did not check Mr. S's voter registration.[12] Lt. Boucher checked Mr. S's credit and his credit report home address was the same as the one Mr. S wrote on his HFD application. Lt. Boucher testified that he obtained Mr. S's car registration but did not so indicate in his investigation report and the car registration is not in the hearing record. Lt. Boucher's background investigation report concludes that Mr. S's Holyoke residence was verified although it does not explain the reason for this conclusion, nor whether Mr. S resided at the Holyoke address for the one (1) year prior to the 2016 firefighter exam as required for a residency preference claim. (Testimony of Boucher; A.Ex. 9; R.PH. Ex.—Applications and Investigations; Administrative Notice) In his HFD application, Mr. S indicated that he had applied to the Easthampton Fire Department, in which he may or may not have claimed residence in Easthampton. However, Mr. S applied to the Easthampton Fire Department in November 2014, which was prior to the one (1)-year period prior to the 2016 firefighter exam. (R.PH.Ex.—Applications; Administrative Notice) On a number of screen shots of Mr. S's Facebook account, Mr. S appears to be posting from Easthampton during the one (1)-year period prior to the 2016 exam but there is insufficient information to indicate if that was where he was residing or visiting at that time. Further, there is no indication that a Facebook subscriber is required to notify Facebook that his or her residence has changed. (A.Ex. 6; Administrative Notice)[13]

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." *City of Cambridge* v. *Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). 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, s. 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 the 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).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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 rea-

11. Three (3) other candidates who were ranked lower than the Appellant were not selected based, in part, on untruthfulness. One (1) of the candidates was not selected because, in part, he was not a Holyoke resident. An additional candidate who was not selected failed to appear at the Fire Commission interview. (R.Ex. 11)

12. The Appellant represents that A.Ex. 5 is Mr. S's voter registration information. A.Ex. 5 states that the Appellant has been registered to vote in Easthampton and Westfield but no dates are visible to indicate when he was registered to vote in those places. The Appellant also represents that A.Ex. 7 is a screen shot of the online White Pages stating that Mr. S lives in Easthampton but it is undated. Because these documents lack dates, I give them minimal weight.

13. One other candidate was selected and that candidate bypassed the Appellant. His residence was verified, he is related to a member of the HPD, and his record included criminal charges six (6) to eight (8) years prior to the hiring process here.

sonable 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, 334 (1983). *See Commissioners of Civil Serv.* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

With respect to residency for initial appointment of fire fighters and police officers, G.L. c. 31, s. 58 provides, in part,

> … upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided…."

Id.

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant because he was not entitled to a Holyoke residency preference for the entire year prior to the April 2016 firefighter exam. Since all of the candidates who signed the certification claimed Holyoke residency preference and the residency preference was verified for the selected candidates, the Appellant's name would have appeared at the bottom of the certification and he would not have been reached for consideration.[14]

In a new background investigation process at the HFD in 2017, uniformed members of the department conducted the background investigation of applicants for the firefighter position. On his application, the Appellant wrote that his home address was a specific address (redacted) in Holyoke, also writing that his wife (Ms. D) resides at the same address. At times in 2015 and 2016, the Appellant lived in Holyoke with his sister, he asserted, for financial reasons. In the summer of 2015, the Appellant's sister became ill and he helped take care of her children when he wasn't working. The Appellant dated Ms. D some time in or about 2015 and they married in November 2015. Ms. D owns a home in Longmeadow where her child attends school.

When Lt. Boucher conducted the Appellant's background investigation, he sought, among other things, to verify information in the Appellant's application, including the Appellant's Holyoke residency, to ensure that he was entitled to the residency preference he had claimed, putting his name higher on the Certification than candidates who do not claim the residency preference. Lt. Boucher checked the Property Card for the Holyoke address that the Appellant provided on his application and found that the Appellant is not listed as an owner. Although the Appellant's sister filled out a landlord verification form stating that the Appellant lived in Holyoke at the pertinent time, she reported that he did not pay rent but paid for utilities and performed some home maintenance instead, which payments or maintenance was not documented. Lt. Boucher checked the Appellant's credit report, using the Holyoke address that the Appellant provided on his application, which report indicated that in April 2015, the Appellant lived at his wife's address in Longmeadow. Lt. Boucher went to the Holyoke address that the Appellant provided on his job application at two different dates and times, according to the Respondent's practice, to find out if the Appellant lived at that address. At one (1) visit, no one was home. At the other visit, Lt. Boucher spoke to the Appellant's brother-in-law, who indicated that the Appellant was at work. Lt. Boucher checked the Appellant's address in the online "White Pages", which indicated that the Appellant lives in Longmeadow.

Seeking further clarification regarding the Appellant's residency preference, Lt. Boucher invited the Appellant to an interview. The Appellant then provided his voter registration and motor vehicle registration. However, the Appellant's voter registration indicated that the Appellant changed his residential address from Belchertown to Longmeadow on Feb. 10, 2016 (only a couple of months prior to the firefighter exam) and from Longmeadow to Holyoke on April 13, 2016 (only three (3) days prior to the 2016 firefighter exam). The Secretary of State voter registration form requires applicants to sign, under penalties of perjury, that they reside at the address provided. The Appellant could not have been registered to vote in Longmeadow unless he swore on the registration form that he resided there. The Appellant's motor vehicle registration indicates that the Appellant owns a car but in the section of the registration requiring the owner's "mailing address", it states only the Appellant's name in Holyoke, with no street name and number visible. In addition, the vehicle registration indicates that it was not effective until November 1, 2016, months *after* the April 2016 exam and after the required residency period.

Thereafter, Lt. Boucher prepared a Background Investigation Report (Report), writing that he was unable to verify the Appellant's Holyoke residency. Further, the three (3)-member Fire Commission interviewed the candidates. The only questions that the Fire Commission asked of the Appellant, beyond the questions asked of all of the candidates whom the Fire Commission interviewed, were about his residency preference claim and they asked him for his voter registration and registry of motor vehicles documentation, which the Appellant had already provided to the Respondent. All of the candidates who signed the pertinent certification, like the Appellant, claimed the residency preference. Lacking verification of his residency preference, the Respondent bypassed the Appellant.

In *Layton v Somerville*, 24 MCSR 440 (2011)[15] , the Commission determined that the word "residence" means " … the physical location of the employee's house or other dwelling place." *Crete*

14. For this reason, it is not necessary to address any other reasons for the Respondent's decision to bypass the Appellant. Similarly, it is not necessary to address the Appellant's other allegations against the Respondent, including the complaints that the Appellant filed against the Respondent at the Mass. Commission Against Discrimination and the Ethics Commission in connection with the Appellant's bypass.

15. *Layton v Somerville*, Ruling on Motion for Reconsideration, at 24 MCSR 619 (2011).

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) While being considered for employment at the HFD, the Appellant presented information about his residency that was, at best, inconsistent and, at worst, conflicting. The Appellant wrote in his application that he and his wife lived at the Appellant's sister's Holyoke address. However, as the Appellant himself acknowledged, his wife owns a home in Longmeadow so her child can attend Longmeadow schools. It is inaccurate to represent that a married couple "resides" in one place, as the Appellant did on his application, while acknowledging that his wife owns a home approximately ten miles away in Longmeadow so that her child can attend school there. Moreover, it strains credulity for the Appellant to testify that he did not stay at his wife's house overnight at all when they were dating or even after they were married and that his wife only visited him in Holyoke sometimes and on weekends. In addition, although the Appellant testified, and his sister's landlord verification form asserts that the Appellant continually resided in Holyoke from January 2015 to the present, including the April 2015 to April 2016 period prior to the April 2016 exam, there is little support for such testimony and assertion. First, both the Appellant and his sister acknowledge that he did not pay her rent. Instead, they assert that the Appellant paid the utility bills at his sister's house. However, the utility bills are in the Appellant's sister's name and the Appellant offered no documentation of any of his purported utility bill payments. Third, Lt. Boucher obtained the Appellant's credit report, which indicated that as of April 2015, the Appellant reported that his home was in Longmeadow (at Ms. D's address). Fourth, Lt. Boucher attempted to verify the Appellant's residence in Holyoke by going to the Holyoke address twice—on two different days and different times of day—but he did not find the Appellant there. Fifth, when Lt. Boucher was unable to verify the Appellant's Holyoke residency, he invited the Appellant to a discretionary interview to give him the opportunity to clarify his residence. As a result of the interview, the Appellant produced his car registration and voter registration. However, the Appellant's car registration only indicated that his car was registered in Holyoke, with no street name and number visible, and it was not effective until November 1, 2016, or six (6) months after the April 2016 firefighter exam. Similarly, the Appellant's voter registration did not support the Appellant's residency claim because it showed that he was registered to vote in Belchertown in 2014; that on February 10, 2016 (two (2) months prior to the April 2016 firefighter exam) he registered to vote in Longmeadow, citing his wife's address there as his home; and that on April 13, 2016 (just days prior to the end of the residency period, and only days prior to the 2016 exam) the Appellant registered to vote in Holyoke using his sister's address. As noted above, voter registration forms are signed under the penalty of perjury. Despite its efforts, the Respondent could not verify that the Appellant actually resided for the full period between April 2015 and April 2016. Since all of the candidates who signed the certification claimed Holyoke residency preference and the residency preference was verified for the selected candidates, the Appellant's name would have appeared at the end of the certification and he would not have been considered for employment.

The Appellant avers that he did reside in Holyoke continuously between April 2015 and April 2016 and that the hiring process for verifying his timely residency in Holyoke was not "uniform". Therefore, he asserts, the Respondent has not established reasonable justification for his bypass. In effect, the Appellant argues that documents obtained in the course of background investigations should be identical. As a practical matter, when seeking to verify residency certain documents or actions can persuasively verify residence, perhaps without the need for further information, while other documents may not, warranting pursuit of additional information. For example, if a candidate produces consistent and reliable documentation of his residency claim for the full one (1)-year period prior to the firefighter exam, little further documentation may be needed. However, when, for example, a candidate is married and asserts that he and his wife live in a city or town hiring firefighters but his wife owns a home in another city or town, where her child attends school, the candidate does not pay rent in the hiring community, the candidate asserts that he pays for utilities in the hiring community but the bill is in someone else's name and there is no documentation indicating that the candidate pays for the utilities, and the investigator twice went to the hiring community address that the candidate provided and could not verify the candidate's address, the appointing authority could seek additional information in order to decide if the candidate's residence had been verified. Presumably, candidates would want the hiring community to accept added information if it would help establish their timely residency. That said, I note that Mr. S, who was selected and ranked higher on the certification than the Appellant, wrote on his application that he lived at a street address [redacted] in Holyoke during the residency period. The Holyoke address he provided is the address of Mr. D, an HFD firefighter and friend of Lt. Boucher. Lt. Boucher sent the usual landlord verification form to Mr. D but Mr. D did not fill it out and return it. Lt. Boucher did not know how much Mr. S paid Mr. D for rent nor if Mr. S resided at the address of Firefighter D for the full year prior to the 2016 firefighter exam. Lt. Boucher visited the address Mr. S provided and found Mr. S there. Lt. Boucher did not check Mr. S's voter registration, although he checked Mr. S's credit report, which affirmed the Holyoke address at that time. Lt. Boucher's background investigation report concludes that Mr. S's Holyoke residence was verified at that time but there is no indication that he verified Mr. S's residency for the full year period prior to the 2016 exam, as required for residency preference. However, this does not undermine the Respondent's determination that the Appellant's timely Holyoke residency was not verified.

The Appellant further argues that the hiring process was unfair because some successful candidates are related to other City of Holyoke employees. As an aside, I note that I had to make multiple requests before the Respondent produced information indicat-

ing which of the selected candidates were related to other Holyoke employees or officials. Four (4) successful candidates are related to other Holyoke employees; three (3) are related to members of the HFD (two (2) uniformed and one (1) civilian) and one (1) is related to a uniformed member of the HPD. There is no evidence in the record to indicate that three (3) of such family members were involved in the hiring process. The one (1) civilian HFD employee related to a selected candidate recused herself from involvement in her relative's candidacy on advice from a City attorney at the time.[16]

CONCLUSION

Accordingly, for the above stated reasons, the bypass appeal of Mr. Bacon, Docket No. G1-17-075, is hereby ***denied***. In addition, by June 28, 2019 the Respondent shall provide a report of any information that supports Mr. S's residency claim for the one (1) year period prior to the 2016 firefighter exam. Upon receipt thereof, the Commission will decide what, if any, further action is necessary.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 23, 2019.

Notice to:

Shawn P. Allyn, Esq.
Allyn & Ball, P.C.
480 Hampden Street, 1st Floor
Holyoke, Massachusetts 01040

Tasha Marshall, Esq.
City of Holyoke Law Department
20 Korean Veterans Plaza
Holyoke, MA 01040

* * * * * *

Request by: ADONNA ANDERSON and NINE OTHER REGISTERED VOTERS for the Civil Service Commission (Commission) to investigate the granting of a provisional promotion by the Saugus Public Schools

RE: Tracking Number: I-19-107

June 6, 2019
Christopher C. Bowman, Chairman

Investigation by Commission-Provisional Promotions of Public School Clerks—The Commission declined to investigate whether the provisional promotion of a Saugus school clerk to a classification two titles higher complied with Civil Service laws, finding such an investigation to be unwarranted at this time. The decision does allow the Petitioners to refile in six months at no charge if they believe at that time that a violation continues to exist.

RESPONSE TO REQUEST FOR INVESTIGATION

On April 29, 2019, the Petitioners, 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 provisional promotion of an employee from Junior Clerk to Principal Clerk (two titles higher) by the Saugus Public Schools (SPS) was consistent with civil service law and rules.

2. On May 21, 2019, I held a show cause conference at the offices of the Commission to provide the Petitioners with the opportunity to show cause why the Commission should open an investigation regarding this matter. The show cause conference was attended by: counsel for the Petitioners, Ms. Anderson, counsel for the SPS and the SPS Superintendent.

3. As part of the show cause conference, I provided the parties with a summary of a series of prior Commission decisions regarding provisional appointments and provisional promotions. (*e.g. Alves* v. *Department of Revenue,* 31 MCSR 295 (2018)).

APPLICABLE CIVIL SERVICE LAW AND RULES & 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).

16. As noted above, the Appellant filed a complaint at the State Ethics Commission regarding the HFD civilian relative's role in the hiring process here. I make no determination whether the civilian employee's conduct satisfied applicable obligations under G.L. c. 268A. However, this Commission has found in other bypass appeals that employees who are related to a candidate should remove themselves from the hiring process entirely so that they are not involved directly in the appointment of their relative or indirectly by undermining other candidates. *See, e.g., Smyth* v. *Quincy*, 24 MCSR 497 (2011); *King* v. *Medford*, 19 MCSR 317 (2006); 20 MCSR 608 (2007); *Minoe* v. *Braintree*, 27 MCSR 615 (2014); *Maldonado* v. *Lawrence*, 31 MCSR 212 (2018).

After careful review and consideration of the entire record in this matter, and for all the reasons stated at the pre-hearing conference, I have concluded that an investigation is not warranted at this time. If, after six (6) months, the Petitioners believe there is a violation of the civil service law as it pertains to a provisional appointment or promotion, the Petitioners may re-file this request with no additional filing fee required.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 6, 2019.

Notice to:

Matthew D. Jones, Esq.
Division of Legal Services
Massachusetts Teachers Association
2 Heritage Drive, 8th Floor
Quincy, MA 02171-2119

Howard Greenspan, Esq.
200 Broadway
Lynnfield, MA 01940

* * * * * *

MICHAEL BUCCELLA

v.

MASSACHUSETTS HUMAN RESOURCES DIVISION

B2-19-036

June 6, 2019
Paul M. Stein, Commissioner

Examination Appeal-E&E Credits-Police Sergeant's Exam-Failure to Submit E&E Claim Form On Line—Once again the Commission declined to order relief to a police officer denied E&E credits on a police promotional exam because the Appellant had failed to submit his E&E claim on-line on the required form. This candidate had submitted E&E documentation but attached it as a PDF to his examination application and not as a separate submission as required. The Commission decision notes that HRD instructions are very clear on how to document E&E claims and nothing in the instructions would lead a reasonable person to conclude that submitting the documents alone, without the E&E claim form, satisfies HRD's requirements. Moreover, the agency bends over backward to provide reminders to candidates on how to do this right and 457 of the 461 police officers who took the same exam managed to comply.

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Michael Buccella, a sworn Police Officer with the Avon Police Department, brought this appeal to the Civil Service Commission (Commission) to contest the decision of the Massachusetts Human Resources Division (HRD) which determined that he had failed the 2018 Police Sergeant Promotional Examination.[1] After a pre-hearing conference on March 12, 2019 and, pursuant to Procedural Order of that date, HRD filed a Motion for Summary Decision, which the Appellant opposed on May 7, 2019 by Motion to Approve Appeal, to which HRD submitted a Rebuttal on May 14, 2019. For the reasons explained below, I conclude that HRD's Motion For Summary Disposition should be granted and the appeal be dismissed.

FINDINGS OF FACT

Based on the submissions of the parties and viewing the evidence most favorably to the Appellant, I find the following material facts are not in dispute:

1. The Appellant, Michael Bucella, is a tenured Police Officer who has been employed with the Town of Avon Police Department since 1999.

2. On June 18, 2018, HRD posted a bulletin for the 2018 promotional examination for Police Sergeant open to Police Officers in various civil service municipalities (one of which was the Town of Avon). The examination contained two components: (1) a written portion administered on September 15, 2018, worth 80% of the applicant's score and (2) an Education and Experience (E&E)

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.

Claim, worth 20% of the applicant's exam score, that was required to be submitted by completing a separate online E&E Claim application within seven (7) days following the written examination.

3. In order to qualify to take the 2018 Police Sergeant examination, applicants were required to submit an application and a $250 examination fee on or before the deadline of August 7, 2018. The examination bulletin stated:

> Once your application is successfully submitted, click on the "click to pay" button to pay for your examination. You will receive a payment confirmation email . . . If you do NOT receive this confirmation, your payment has NOT been received and you will need to log back into your application and click "Click to Pay".

4. The examination bulletin also stated:

> *EDUCATION & EXPERIENCE (E&E): All applicants must complete the 2018 Police Promotional Series E&E Claim application online. Instructions regarding this E&E Claim application will be mailed to candidates prior to the examination date. A confirmation email will be sent upon successful submission of an E&E Claim application. (emphasis added)*
>
> 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. Supporting documentation must be scanned and attached to your application or sent to civilservice@mass.gov no later than September 22, 2018.* (*emphasis added*)
>
> Please note that:
>
> - 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 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. (emphasis added)
>
> Please be sure to read the instructions carefully. No phone calls or email inquiries regarding the content of this exam component will be accepted or responded to. Once you receive your examination mark, you will have seventeen calendar days from the mailing of your mark to appeal in writing your E&E score. (*emphasis added*)

5. On July 26, 2018, Officer Buccella duly submitted an examination application and paid the examination fee by the deadline as instructed in the examination bulletin. When he submitted this initial application, he attached a PDF document containing an attested copy of his college transcript and a copy of a Verification Form attested to by the Avon Police Chief to his tenured service as an Avon Police Officer since 1999.

6. On August 27, 2018, HRD issued an individually addressed email notice entitled ""Education and Experience (E&E) Claim for Departmental Police Promotional Examination" to all applicants who had duly applied to take the 2018 Sergeant's Examination, including Officer Buccella. This notice stated, in relevant part (**all bolding in original**):

> 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. (emphasis added)
>
> . . .
>
> **The Online E&E Claim is now available. To access this exam component**:
>
> 1. Click here [hyperlink] 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)
>
> . . .
>
> Information on how to provide supporting documentation:
>
> 1) Scan and attach documents to your online E&E claim application at the time of submission.
>
> 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. Information must be attached to your online application or emailed to civilservice@mass.gov**. . .

7. On August 31, 2018, HRD issued another individually addressed email entitled "**NOTICE TO APPEAR"** to all candidates eligible to take the 2018 Police Sergeant Examination, including Officer Buccella. In addition to informing candidates of the date, time and place of the written examination, the email also stated (**all bolding in original**):

> **You should have received an email with instructions on how to file your Education & Experience (E&E) Claim on or about Monday, August 27th, 2018. E&E is only applied to those with a passing score on the written examination portion of this examination.**

8. On September 14, 2018, one day before the written examination date, and on September 19, 2018, three days before the E&E Claim was due, HRD reminded all applicants of the obligation to submit an E&E Claim and, again, stating, in part: "The E&E claim application is separate from the Written Exam application you submitted to take the exam. . . . Be advised that this is a separate exam component and must be completed. . . .{Y]ou must complete the online E&E claim. Supporting documentation . . . must be attached to your online claim application or emailed to civil-

service@mass.gov. Documents submitted via any other method that the two listed above will NOT be considered in your claim."

9. Officer Buccella sat for the Police Sergeant examination. He did not at any time complete the on-line E&E Claim form.

10. On or about December 4, 2018, HRD informed Officer Buccella that he had failed the Police Sergeant Examination with a final score of 61.6 (with 70 needed to pass the examination). This score was calculated as follows:

(A) Written Examination Component (80%) 77.00 x.0 .8 = 61.6

(B) E&E Examination Component (20%) 00.00 x 0.2 = 00.0

FINAL SCORE (A) + (B) 61.6

11. On or about December 13, 2018, Officer Buccella duly appealed to HRD for a review of his Police Sergeant examination score. After review, on January 31, 2019, HRD denied the appeal. This appeal to the Commission duly ensued.

STANDARD OF REVIEW

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 C.M.R. 1.01(7) when undisputed facts affirmatively demonstrate "no reasonable expectation" that a party can prevail on at least one "essential element of the case". *See, e.g., Milliken & Co.,* v. *Duro Textiles LLC,* 451 Mass. 547, 550 fn.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, §3 directs HRD to "make and amend rules which shall . . . include provisions for . . . (c) Open competitive and other examinations to test the practical fitness of applicants . . ." Pursuant to this authority, Personnel Administration Rule PAR.06 provides, in relevant part:

PAR.06. Examinations

(1) Procedure

(a) The administrator shall establish procedures for competitive and other examinations to test the practical fitness of applicants.

. . .

(b) The grading of the subject of employment or experience as part of a promotional examination shall be based on a schedule approved by [HRD] which shall include credits for elements of training an experience related to the positon for which the examination is held.

. . .

(2) Content of Examinations

(a) All selection procedures shall be practical in character and shall relate directly to those matters which fairly determine the relative ranking of the persons examined based on the knowledge, abilities and skills required to perform the primary duties (critical and frequent tasks) of the position title or occupational group as determined by reliable and representative job information available to [HRD]. Examinations may . . . include written, oral, practical or performance tests, training and experience rating . . . other generally accepted selection procedures, or combinations of these, which, in the discretion and judgment of [HRD], are appropriate for the position title or occupational group being tested.

. . .

(3) Examination Results

The passing mark for each examination shall be established by [HRD] in accordance with generally accepted selection procedures.

Also, G.L.c.31,§22 provides, in relevant part, that HRD "shall determine the passing requirements of examinations" and, in particular, "an applicant shall be given credit for employment and experience in the position for which the examination is held" and "*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 to the time designated by the administrator." (*emphasis added*)

Section 22 also grants applicants the right to seek review of their examination marks by HRD and, in some cases, to seek further appeal to the Commission.

ANALYSIS

The Commission has construed the applicable Massachusetts civil service laws and rules to vest HRD with broad, although not unfettered, discretion to determine the technical requirements for competitive civil service examinations, including the type and weight given as credit for training and experience, subject to scrutiny solely when HRD's decisions, actions or failure to act are devoid of any rational explanation, are not firmly grounded in common sense, have not been uniformly applied, are arbitrary, capricious or otherwise run afoul of basic merit principles of civil service law. *See, e.g., Borjeson* v. *Human Resources Div.*, 31 MCSR 267 (2018) (Interim Decision), 31 MCSR 297 (Final Decision) (allowing appeal and requiring rescoring of E&E when HRD had arbitrarily changed its long-standing traditional methodology for reasons that were neither "persuasive nor logical"); *Clarke* v. *HRD*, 29 MCSR 1 (2016) (allowing appeal, in part, to grant education credit when documentation submitted indistinguishable from information previously found sufficient to grant such credit); *Merced* v. *Human Resources Div*, 28 MCSR 396 (2015) (affirming HRD's requirement that university teaching credit required faculty status of adjunct professor or higher); *Carroll* v. *Human Resources Div*., 27 MCSR 157 (2014)(deferring to HRD's technical expertise in defining criteria for educational credit); *Cataldo* v. *Human Resources Div*, 23 MCSR 617 (2010) (allowing E&E appeal, in part, for education credit that HRD denied for reasons that could not be reconciled with a reasonable construction of HRD's examination instructions). *See generally*, G.L.c.31,§1 (basis merit principles means "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills", "assuring fair treatment of all applicants" and protecting employ-

ees from "arbitrary and capricious actions"); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303, *rev.den*., 426 Mass. 1102 (1997) (decision "is arbitrary and capricious when it lacks any rational explanation.")

In this appeal, the question presented is whether HRD is justified to treat Officer Buccella's E&E Claim as a separate examination component and to award him no points for that component because he failed to follow the instructions provided to him and never completed, submitted and received confirmation of receipt of the required on-line E&E Claim application form, despite the fact that he did, at the time of submitting his Written Examination application, attach the underlying supporting documents attesting to all of the education experience credit he would have been entitled to claim on the E&E Claim application form.

The Commission has previously considered similar appeals from candidates claiming that their failure to strictly comply with the requirements for submitting the E&E Claim should not be cause to give them a failing grade on that component. In every case, the Commission has sustained HRD's position that the completing the E&E Claim form on-line and obtaining confirmation that it was received is a separate examination component and, therefore, HRD is justified within its broad technical authority over the administration of examinations to give a candidate who does not follow the instructions required to satisfactorily complete the E&E compoment a failing grade on that component. *See Sinopoli* v. *Human Resources Div*., CSC No. B2-19-044, 32 MCSR 184 (2019); *Reese* v. *Human Resources Div*., CSC No. B2-19-046, 32 MCSR 183 (2019); *Silva* v. *Human Resources Div*., 30 MCSR 247 (2017); *Pavone* v. *Human Resources Div*., 28 MCSR 611 (2015).

After carefully considering the facts of this present appeal, I conclude that there are no significant distinctions here that warrant any different result.

First, Officer Buccella erroneously contends that he failed the Police Sergeant's examination solely because of how he handled the E&E Claim component, citing *Silva* v. *Human Resources Div*., *supra*. In fact, HRD appears to have taken notice of the Commission's prior criticism about the approach of automatically giving a failing overall exam score to someone who didn't file an E&E Claim. Now, as in the case of the Police Sergeant's examination, HRD no longer does so. Rather, failure to complete the E&E Claim component now triggers a "zero" score on that component. It was the weighted score of both components (77.0 on the Written Exam and 0.00 on the E&E Component) that resulted in Officer Buccella's failing score of 61.6. Had Officer Buccella scored ten points higher on the Written Exam (i.e. 87), he would have received a weighted score of 69.6, which rounded would have given him a passing grade of 70. I fully appreciate that Officer Buccella may yet believe that failing him is still unfair. However, HRD's choice to award a candidate who fails to follow the instructions in completing the E&E component a "zero" for that component (thereby requiring a candidate to score well above 70 on the Written Component to offset the consequences of that mistake) does not rise to the level of being so devoid of reason that it falls outside the legitimate purview of HRD expertise on such a technical matter.

Second, I give considerable weight to the fact that the instructions about the requirements for submitting and obtaining confirmation of a separately completed E&E Claim form as a condition to passing the examination are clear and unambiguous. Nothing in the instructions could lead a reasonable person to conclude that submitting documents, alone, without the E&E Claim form, satisfied HRD'S requirement for passing the E&E Claim component. It also bears notice that 457 of the 461 police officers who took the same examination complied fully with the instructions and duly filed a confirmed E&E Claim form. Thus, this case is not one in which the Commission is warranted to exercise discretion to grant "Chapter 310" statutory relief to an appellant whose civil service rights have been infringed "through no fault of his own." HRD has good reason to hold Officer Buccella to the same standard as all other similarly situated candidates.

CONCLUSION

Accordingly, for the reasons stated, HRD's Motion for Summary Decision is allowed and Officer Buccella's Motion to Approve Appeal is denied. The appeal of Michael Buccella, under Docket No. B2-19-036, is ***dismissed.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on June 6, 2019.

Notice to:

Michael Buccella, Pro Se
[Address redacted]

Mark P. Detwiler, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street - Suite 600
Boston, MA 02114

* * * * * *

Investigation Re: RESIDENCY PREFERENCE OF CERTAIN PITTSFIELD FIREFIGHTERS APPOINTED FROM CERTIFICATION NO. 05281

Tracking Number: I-18-210

June 6, 2019
Christopher C. Bowman, Chairman

Investigation by Commission-Pittsfield Firefighter Residency Preference—The Commission closed its investigation into the award of residency preferences to three candidates for original appointment as Pittsfield firefighters after the City determined that two of the candidates were not entitled to the preference, but the third now did meet the requirements and could be carried on the new eligibility list.

INVESTIGATION FINDINGS / CONCLUSION

On December 14, 2018, the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(a), initiated an investigation regarding whether certain candidates appointed as firefighters in the City of Pittsfield (City) from Certification No. 05281 were eligible for the residency preference, as claimed by those candidates.

2. At the Commission's request, the City conducted a review and concluded that three (3) candidates appointed from Certification No. 05281 did not meet the requirements of the residency preference, as had been claimed by these candidates.

3. The City subsequently accepted the resignation of two (2) of these candidates.

4. The third candidate's name appears on a new (current) eligible list for Pittsfield firefighter. The City, after review, has concluded that this candidate meets the residency preference requirements for the applicable time period associated with this new eligible list. If and when appointed from this new eligible list, this candidate's civil service seniority date will be modified accordingly.

Based on the above, including the actions taken by the City , the Commission's investigation regarding this matter is ***closed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 6, 2019.

Notice to:

Fernand J. Dupere, Esq.
94 North Elm Street, Suite 307
Westfield, MA 01085

PATRICK TITTA

v.

DEPARTMENT OF CORRECTION

D1-18-099

June 6, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge of Correction Officer-Fraternization-Use of Cell Phone-Failure to Report Being Charged With Assault-Providing False Information to Investigators—A Correction Officer at MCI-Shirley showed a complete disregard for the basic responsibilities of the job and was not improperly discharged for seriously inappropriate discussions with his brother and other inmates at the Worcester County House of Corrections and for failing to notify DOC that he had been charged with assault and battery. The discharge was also supported by proof of his bringing his personal cell phone into the tower at the facility and engaging in multiple personal phone calls while on duty. The Commission did not find that DOC had proven charges that the Appellant had notified his brother about a patient's hospital visit or lied on his employment application.

DECISION

On May 29, 2018, the Appellant, Patrick Titta (Mr. Titta), a Correction Officer I (CO I) at the Department of Correction (DOC), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of DOC to terminate his employment: I held a pre-hearing conference at the offices of the Commission on May 29, 2018 and a full hearing was held over two (2) days at the same location on October 18th and 19th, 2018.[1] The full hearing was digitally recorded and both parties were provided with a CD of the recording.[2]

FINDINGS OF FACT

Twenty-three (23) exhibits (Exhibits 1-23) were entered into evidence at the hearing and two (2) post-hearing exhibits (Exhibits PH1 and PH2) were submitted at my request. Based on the documents submitted and the testimony of the following witnesses:

Called by DOC:

- Shawn Jenkins, former Special Sheriff; Worcester County Sheriff's Office
- Evan Butler; CO I, DOC;
- Jacqueline Thibault, CO II, DOC;
- Ryan Ricchezza, COI, DOC;
- Thomas Perry; CO I; DOC;
- Eugene Jalette, Supervising Identification Agent, DOC;

1. The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq*., apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

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

- Thomas Taft, CO I, DOC
- Katie Appel, Internal Affairs Officer, DOC;

Called by Mr. Titta:

- Patrick Titta, 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. On November 3, 2013, Mr. Titta was appointed as a CO I at DOC. (Stipulated Fact)

2. Prior to his 2013 appointment, Mr. Titta had been non-selected for appointment during two (2) prior hiring cycles. (Post-Hearing Exhibits; Testimony of Jalette)

3. On April 20, 2018, DOC, after providing Mr. Titta with proper notice, held an appointing authority hearing (Commissioner's hearing) to determine whether Mr. Titta should be disciplined, up to and including termination, for charges proffered against him. (Stipulated Fact)

4. Mr. Titta did not testify at the appointing authority hearing. (Stipulated Fact)

5. On May 17, 2018, Mr. Titta was terminated for: 1) using his personal cell phone, while on duty, to notify his brother that an inmate was being transported to the hospital; 2) contacting his brother, while his brother was incarcerated at the Worcester County House of Correction, and discussing inappropriate topics with him and other inmates, and then failing to notify DOC of the conversations; 3) providing false information during the hiring process; 4) providing false information to DOC regarding an off-duty incident at Gillette Stadium in Foxboro; and 5) providing false information to investigators during the internal affairs investigation that is the subject of this appeal.

Using his personal cell phone, while on duty, to notify his brother that an inmate was being transported to the hospital

6. On January 29, 2018, Mr. Titta was working in Tower 1 at MCI Shirley during the 3:00 P.M. to 11:00 P.M. shift. (Testimony of Titta and Appel)

7. The Tower 1 Officer is responsible for opening the gate to let outside vehicles in and out of the facility. (Testimony of Titta)

8. Mr. Titta had his personal cell phone with him will working in Tower 1 on January 29th. (Testimony of Mr. Titta)

9. Mr. Titta engaged in phone conversations on his cell phone while on duty on January 29th, including a thirty (30)-minute phone conversation, beginning at 3:07 P.M., with an off-duty correction officer; and a nineteen (19)-minute call, beginning at 3:43 P.M., with the same off-duty correction officer. (Testimony of Mr. Titta)

10. Mr. Titta also used the DOC phone in the tower to make multiple calls to chat with on-duty officer friends at MCI Shirley during his shift on January 29th including calls at 9:20 PM; 9:37 PM; 9:55 PM; 9:56 PM; 10:03 PM; and 10:20 PM. (Exhibit 11; Testimony of Mr. Titta)

11. Shortly before 9:38 P.M. on January 29th, Officer Evan Butler was alerted to the fact that an inmate in Alpha 1 Housing Unit in Cell Number 50 was "passed out in his cell with vomit everywhere." He approached the cell and saw inmate A. Inmate A was not assigned to Cell Number 50. As Inmate A was unresponsive, Officer Butler immediately called a "Code 99", requesting emergency medical assistance. The Code 99 was made at 9:38 P.M. Officer Butler did not identify Inmate A in the Code 99. Rather, he identified the Cell Number (50) where Inmate A was currently located, but not assigned to. (Testimony of Butler)

12. Officer Butler did not speak with Mr. Titta that night regarding the Code 99. (Testimony of Officer Butler)

13. Responders arrived at the unit at approximately 9:41 PM and Inmate A was ultimately taken out of the unit by EMTs at approximately 10:18 PM. (Testimony of Butler)

14. Mr. Titta got a call in Tower 1 from a Captain telling him that an ambulance was on the way. (Testimony of Titta)

15. As soon as the Code 99 was called, Mr. Butler's partner started securing the unit by using a microphone telling inmates to lock into their cells. (Testimony of Butler)

16. It took all the inmates in the unit approximately "fifteen seconds" to lock in. (Testimony of Thibault)

17. CO II Jacqueline Thibault was working in Outer Control at the time of the Code 99. Her role was to prepare officers for the hospital trip and to watch a video monitor to make sure nothing was going on in the A-1 housing unit. (Testimony of Thibault)

18. At approximately 10:20 PM, Ms. Thibault received an outside telephone call from E, who identified herself as the fiancé of Inmate A. (Testimony of Thibault)

19. E told Ms. Thibault that she was just notified that Inmate A was taken out of the institution in critical condition and she wanted more information. (Testimony of Thibault)

20. Ms. Thibault put the caller on hold to verify her information. E was listed as a contact for Inmate A. Ms. Thibault noted that E kept changing her story about how she learned about Inmate A's status. First, E said she received a text message, then reported it was a Facebook message, then repeated that it was a text message. (Testimony of Thibault)

21. Ms. Thibault knew that Inmate A left MCI Shirley around the same time that E called to ask about him because she got a call from the vehicle trap notifying her that Inmate A was leaving. The vehicle trap officer (not the Appellant) has to verify the name of the inmate who is leaving. (Testimony of Thibault)

22. Families are never notified when an inmate is transported to an outside hospital because it is a security breach. A family member could unexpectedly meet the inmate at the hospital and/or attempt to help the inmate escape. (Testimony of Thibault and Ricchezza) Families are only notified about an inmate's status after the inmate arrives at the hospital if the situation is "life threatening." (Testimony of Thibault)

23. Ms. Thibault filed a report stating in part: "Let it be known that the unit had been locked for a substantial amount of time when she said she had received this information and it seems possible that someone may have a so [sic] kind of unauthorized communication device within the unit." (Exhibit 11)

24. At 11:20 PM on January 29th, Officer Ryan Ricchezza, while working in the Control Room at MCI Shirley, received an outside call phone call from Inmate A's mother, D. D told Ricchezza she received a phone call from her "frantic" daughter who was notified that Inmate A had been sent to the hospital. (Testimony of Ricchezz)

25. Mr. Ricchezza was "taken aback" by the call and it triggered red flags. He found the call to be significant and of concern because, to his knowledge, inmate phones had been turned off earlier in the evening and "the fact that an inmate family is receiving notifications from within the facility during that time is a serious breach of security." (Testimony of Ricchezza)

26. An investigation ensued regarding how family members of inmate A had received information about him leaving the facility for the hospital that night. (Testimony of Perry)

27. On Monday, February 5, 2018, several days after the Code 99, Inmate A, who was back at MCI Shirley in the segregation unit, had a conversation with Officer Thomas Perry at MCI Shirley. Perry was a member of the Inner Perimeter Security ("IPS") team. (Testimony of Perry)

28. Inmate A asked Mr. Perry why he was pending investigation and why he was denied a visit with his fiancé. Mr. Perry explained that IPS was still trying to figure out how his family learned about his outside hospital trip. (Testimony of Perry)

29. Later that same day, on February 5, 2018, Inmate A was given permission to call his fiancé, E. In the recorded phone call, Inmate A called E and told her he was "in the hole" and that he needed to find out who told his family he was sent to the hospital in order to get out of the hole. E added Inmate A's mother, D, into the conversation. (Exhibit 13 - CD of Inmate A phone call to family on February 5, 2018) The recorded conversation then includes the following exchange ["B" refers to Mr. Titta's brother]:

> D (Inmate A's Mother): There's "only one person up there who knows our family".
>
> Inmate A: "Whose that?"
>
> D (Inmate A's Mother): "[B]'s brother"
>
> ....
>
> D (Inmate A's Mother): "I guess when he heard it come across he called [B] and [B] called [F] [Inmate A's Brother] and he [F] called me."

(Exhibit 13)

30. That same day, Inmate A's fiancé, E, called Mr. Perry. E told Mr. Perry that she talked to Inmate A and D. E told Mr. Perry that the mother found out about the hospital trip from F, Inmate A's brother, who learned about it from Mr. Titta's brother, B. (Testimony of Perry)

31. Mr. Titta did not make or receive any telephone calls with his personal cell phone on January 29th from the time the Code 99 was called and until the end of the shift. (Exhibit 19)

32. Mr. Titta has multiple apps on his phone including: iPhone Messenger; Snap Chat; and Facebook Messenger. (Testimony of Mr. Titta)

33. Mr. Titta refused to provide DOC investigators with his cell phone records prior to his termination. (Testimony of Appel)

34. Mr. Perry made some initial Facebook queries and determined that F is the brother of Inmate A. F and Inmate A are believed to have the same mother, D. (Testimony of Titta, Perry and Appel)

35. Mr. Titta is Facebook friends with Inmate A's brother, F. Mr. Titta is Facebook friends with his own brother, B. B is Facebook friends with F and Inmate A's mother, D. (Exhibit 11; Testimony of Perry and Appel)

Contacting his brother, while his brother was incarcerated at the Worcester County House of Correction, and discussing inappropriate topics with him and other inmates, and then failing to notify DOC of the conversations

36. As part of the investigation into whether Mr. Titta used his personal cell phone, while on duty, to notify his brother that Inmate A was being transported to the hospital, DOC reviewed calls between Mr. Titta and his brother while his brother was incarcerated at the Worcester County House of Correction. (WCHOC).

37. On August 29, 2016, Mr. Titta submitted a Confidential Incident Report informing the DOC that "my brother [B] was arrested by Worcester Police. He is being housed at Worcester County Sheriffs office and expected to be there for roughly 6 months. I may be contacted via phone by him." (Exhibit 11)

38. Mr. Titta communicated with B in twenty five (25) recorded telephone calls while B was incarcerated at WCHOC. The calls took place in approximately September and October 2016, while Mr. Titta was employed by the DOC. (Exhibit 14 and Exhibit 11)

39. Mr. Titta did not report to DOC after he spoke with B while B was incarcerated. (Testimony of Appel)

40. In the WCHOC telephone calls between Mr. Titta and B, Mr. Titta discussed topics including, but not limited to: the layout of housing units at MCI Shirley and WCHOC, the crimes of at least one inmate, staff members at MCI Shirley and WCHOC, fights in

prison and inmates housed at MCI Shirley and WCHOC. (Exhibit 14)

41. For example, when B said that he would be in a particular housing unit, and asked his brother "I'm not locked in ever, right?" Mr. Titta replied, "Nah, never, they don't even have locks, they are dorms." (Exhibit 14)

42. Mr. Titta asked B, "[Inmate I] or any of those kids need anything?" B responded, "Need anything?" Mr. Titta replied, "Yeah, I can tell [Inmate G] and all them. [Inmate G] is about to be up there too." (Exhibit 14)

43. In another conversation with B about which housing unit he was in, Mr. Titta told B, "I can call some dude and see if he can help you get over there. He's kind of a faggot." (Exhibit 14)

44. Mr. Titta offered to help get money on the accounts of inmates at WCSO. (Exhibit 14)

45. Mr. Titta and B discussed the fact that G was facing charges for assault and battery on a police officer. (Exhibit 14)

46. Mr. Titta told B that MCI Shirley is separated into separate buildings and that the housing units look the same as the Mod units at WCHOC. He also told B that the inmates are only locked in during the major counts. (Exhibit 14)

47. In one telephone conversation between Mr. Titta and B, Mr. Titta told B "Shoulda had those dudes beat up H, that kid's a faggot." B responds, "Oh yeah, they're gonna fuck him up. I won't say it over the phone, but those dudes are straight fuckin' lifers dude." (Exhibit 14)

48. On or about October 14, 2016, while Mr. Titta was talking to B at WCHOC, B passed the phone to Inmate J. Mr. Titta and Inmate J engaged in a conversation in which Mr. Titta offered to assist J to get a job upon his release. In their telephone conversation, Mr. Titta also thanked J for watching out for his brother in WCHOC. (Exhibit 14)

49. Mr. Titta did not report his communication with Inmate J to DOC. (Testimony of Appel)

50. Mr. Titta placed a three-way call between B and former Inmate C. C, a gang member, was formerly incarcerated at the Middlesex County House of Correction. (Exhibit 14; Testimony of Appel) Mr. Titta did not report his association with C to DOC and did not have permission to associate with C. (Testimony of Appel)

51. On January 24, 2014, Mr. Titta filed a Confidential Incident report, stating that while covering chow that day, he recognized Inmate G. He stated, "I know inmate G from being a friend of my brothers. I played recreational sports with inmate G. We were former friends before inmate G was incarcerated. Ever since I became a correctional officer I have not had any contact with this inmate." (Exhibit 11)

52. During a phone call between Mr. Titta and B in 2016, Mr. Titta tells B, "Yeah I can tell G and all them. G is about to be up there too." Mr. Titta and B talk about a "68 gram necklace" owned by G, and when B asks Mr. Titta if he's seen it, Mr. Titta replies, "Yeah, he's been out too." Mr. Titta also told his brother "I'll tell G and all those kids to put money on those kids' books." (Exhibit 14)

Providing false information during the hiring process

53. In approximately October 2011, Mr. Titta applied to be a Correction Officer with the DOC. In his application, he listed the reason for leaving WCSO as "probationary period." (Post Hearing Exhibits)

54. Later in the same application, on the Employment History Addendum, page 8, he checked a box stating he had been formally disciplined by an employer. On the same page, he said the reason for leaving WCSO was "unknown, probation era," and the sanction was "termination." (Post Hearing Exhibits)

55. In his 2011 application, Mr. Titta disclosed that misdemeanor charges were pending against him in NH District Court. (Post Hearing Exhibits)

56. Mr. Titta was notified that he was not considered for appointment to the January 2012 Academy due to an "unsatisfactory background check/negative employment." (Post Hearing Exhibits)

57. In early 2013, Mr. Titta applied for a position as a DOC Correction Officer again. (Post Hearing Exhibits)

58. In this 2013 application, when asked if he had been convicted of a misdemeanor within the past five years, he answered "yes." He explained "unsure if mis [sic] or a violation, supposed to [unable to read.]" (Post Hearing Exhibits)

59. Later in this 2013 application, he reported the Hampton Beach NH charges and also answered yes "unsure-violation after one year" when asked about misdemeanor convictions." (Post Hearing Exhibits)

60. In 2013, Mr. Titta reported the reason for leaving WCSO as "probationary ended." Later in the application, he checked a box saying he had "never been formally disciplined by an employer," and the reason for leaving was "9 month probationary period." (Post Hearing Exhibits)

61. In June 2013, Mr. Titta's application for appointment to the June 2013 Academy was denied because the "Interview Panel did not recommend you for appointment." (Post Hearing Exhibits)

62. Specifically, the Interview Panel notes state, "Mr. Titta has had previous experience working for the county sheriff's dept, which prepared him to answer the questions accordingly, but the candidate was less than truthful with his answers in this application. He had been terminated by the County Sheriff's dept for an incident he had with law enforcement during his probation period. Due to his lack of responsibility for his actions of that incident and his answers on the application, the panel agreed Mr. Titta is not ready to assume the responsibilities the position requires." (Post Hearing Exhibits)

63. In approximately July 2013, Mr. Titta submitted another (third) application for employment with DOC. (Exhibit 11)

64. In the July 2013 application, Mr. Titta checked "no" when asked if he been convicted of a misdemeanor within the past five years. (Exhibit 11)

65. Next to the "No box" there is a statement that states "conviction will not necessarily disqualify an applicant from employment. Below that statement, it also says, "an applicant for employment with a sealed record on file with the Commissioner of Probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions". (Exhibit 11)

66. Mr. Titta did not indicate that he had been convicted of a misdemeanor within the last 5 years in his July 2013 application because he believed the Hampton Beach misdemeanor charge had been annulled at the time of the application. (Testimony of Tiita)

67. Mr. Titta's criminal attorney for the Hampton Beach misdemeanor charge represented to him that the misdemeanor would be annulled within a year of him pleading guilty as long as he didn't get in any trouble within the year. (Testimony of Titta).

68. Mr. Titta recalls pleading out of the Hampton Beach misdemeanor on or about October or November of 2011 and going back roughly a year later to complete paperwork, submit a New Hampshire CORI and pay fines to annul (seal) the misdemeanor. (Testimony of Titta)

69. Mr. Titta never heard anything again regarding the New Hampshire annulment (sealing of records) and assumed it had been annulled. (Testimony of Titta)

70. After his interview with Officer Appel in March 2018, Mr. Titta obtained a copy of the Docket Case Summary from Seabrook District Court (Exhibit 20) and discovered that the Petition to Annul Record had been denied on November 2, 2013, a day before he was hired by DOC. (Testimony of Titta & Exhibit 20)

71. The Petition to Annul Record was filed on November 14, 2012, before Mr. Titta filed his July 18, 2013 application for employment. (Exhibit 20)

72. Mr. Titta was not notified that the Petition to Annul had been denied and at the time he was interviewed by Officer Appel. (Testimony of Titta)

73. In response to questions about how his WCSO employment ended, Mr. Titta responded "probation era ended" and "pending court case which was dismissed." (Exhibit 11)

74. In July 2013, Mr. Titta reported having been formally disciplined by an employer and stated the reason for the sanction was "Not offered a job post probation era 9-16-11." (Exhibit 11)

75. In May 2013, during the background investigation, Mr. Titta told Officer Thomas Taft that the incident at Hampton Beach was "a situation his brother was involved in and he jumped in, all that came out of it was a fine and was later dropped from his file and since he was on probation he was released from the Sheriff's department a month after the incident." (Testimony of Taft)

76. Mr. Taft reviewed Titta's employment file at the WCSO. The termination letter was not in the file. (Testimony of Taft)

77. DOC did not run a 2013 background check of Mr. Titta in NH because he never lived in NH. (Testimony of Jalette)

78. When Mr. Titta's BOP was checked in MA, his NH conviction did not show up. If Mr. Titta had reported his NH convictions for resisting arrest and disorderly conduct, a BOP would have been run in NH. (Testimony of Jalette)

79. Mr. Taft did not have Mr. Titta's prior applications when he conducted the 2013 background check. (Testimony of Taft)

80. Mr. Titta was appointed as a CO I by DOC on November 3, 2013. (Stipulated Fact)

Providing false information to DOC regarding an off-duty incident at Gillette Stadium in Foxboro

81. On August 11, 2014, during a concert at Gillette Stadium in Foxborough, MA, police were approached by Mr. Titta who reported being hit over the head with a bottle. (Exhibit 11)

82. On August 11, 2014, Mr. Titta filed a Confidential Incident Report stating that he was the victim of a crime and was assaulted while trying to stop an altercation. He reported that "Massachusetts State police arrived on scene and verified me as a victim to a crime. At this time they took down my personal information and explained to me to seek medical attention and that I might be summonsed to court for a statement in the future." (Exhibit 11)

83. On or about September 17, 2014, a complaint was issued and ***Mr. Titta*** was summoned to court for Assault and Battery. (Exhibit 11)

84. On January 13, 2015, Mr. Titta filed another confidential report advising he had been to "Wrentham District Court in follow up to the confidential written in August 2014" and that it was continued to March 24, 2015. (Exhibit 11, p 83)

85. On March 25, 2015, Mr. Titta reported that "On Tuesday March 24, 2015, I attended Wrentham District court. All of the charges were dropped as previously noted." (Exhibit 11)

86. Mr. Titta never reported being charged with Assault and Battery. (Exhibit 11)

Providing false information to investigators during the internal affairs investigation

87. Mr. Titta told investigators that he had no idea how Inmate A's family found out that he was transported to the hospital. (Exhibit 12)

88. Mr. Titta denied offering Inmate J assistance to find a job. (Testimony of Appel)

APPLICABLE CIVIL SERVICE 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 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); *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); *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

By a preponderance of the evidence, DOC has shown that Mr. Titta violated DOC rules and engaged in substantial misconduct by:

> 1. Engaging in inappropriate discussions with his brother and multiple other inmates at the Worcester County House of Correction and failing to disclose those discussions to DOC.
>
> 2. Failing to notify DOC that he was charged with assault and battery regarding an incident at Gillette Stadium.

The evidence presented at the hearing before the Commission, including phone records submitted by Mr. Titta, and Mr. Titta's own testimony, also show that he violated DOC rules and engaged in serious misconduct by:

> 3. Bringing his personal cell phone into Tower 1.
>
> 4. Conducting multiple personal phone calls on his personal cell phone while he was on duty in Tower 1, including a thirty (30)-minute conversation with a friend seven (7) minutes after his shift began.

Mr. Titta's conversations with his brother and other inmates were inappropriate not only because he did not have permission to engage in them, but because of the scope of the confidential information that Mr. Titta shared with his incarcerated brother and other inmates. Mr. Titta talked with his brother about staff members at both MCI Shirley and WCSO. He discussed the crimes (CORI) of multiple inmates, their locations and the fact that they had been in fights. They discussed the layout of MCI Shirley and the fact that certain doors at WCHOC do not lock. Mr. Titta encouraged his brother to have another inmate (H) beat up.

During his recorded phone calls with his brother at WCSO, he discusses several individuals that they both know. It is clear from these conversations that Mr. Titta had unauthorized contact with inmates and former inmates that he should have, but failed to, report to the DOC.

Specifically, Mr. Titta should have, but failed to report that he knew Inmate A, who was housed at MCI Shirley. Mr. Titta admits that he associated with C, a gang member formerly incarcerated at the Middlesex County House of Correction and failed to report it.

In one phone conversation with his brother, Mr. Titta spoke with Inmate J, also housed at WCHOC. In the conversation, Mr. Titta offered to help Inmate J get a job upon his release. Mr. Titta failed to report his contact with Inmate J to the Department and did not have permission to associate with J.

In September 2014, Mr. Titta was issued a complaint for Assault and Battery. Mr. Titta should have, but failed to report criminal charges filed against him to the Department. His subsequent report, dated March 24, 2015, which stated that "all of the charges were dropped as previously noted" was misleading, given that no charges were ever reported.

Finally, Mr. Titta does not deny that he brought his personal cell phone into Tower 1 or that he conducted multiple personal phone calls while on duty. This also violates DOC policies and constitutes substantial misconduct. Only seven (7) minutes into his shift in the tower, Mr. Titta used his personal cell phone to engage in a thirty (30)-minute personal conversation with an off-duty correction officer. DOC was unaware of this misconduct at the time

because Mr. Titta refused to provide DOC with his personal cell phone records at the time. As part of the proceeding before the Commission, Mr. Titta introduced those personal cell phone records to prove that he did not make a call or text his brother during the time period in question. I accepted those records into evidence and gave them weight in that regard. Those records are also relevant, however, in showing that Mr. Titta engaged in the additional misconduct of bringing his personal cell phone into a DOC facility and then using it to make personal calls while on duty. In this context, it is appropriate for me, as part of this de novo proceeding, to consider that this evidence shows further misconduct justifying DOC's decision to terminate his employment.

The preponderance of the evidence does not support the remaining charges against Mr. Titta.

In regard to the charges associated with Mr. Titta allegedly notifying his brother about Inmate A's hospital visit, DOC relied upon quadruple totem pole hearsay from the family of inmate A claiming that the information came from Mr. Titta. DOC produced a recorded telephone conversation between inmate A, his fiancé and his mother to support the allegation that Mr. Titta was the source of the information. This phone call was made on February 5, 2018 as inmate A was being held in solitary confinement pending the investigation into how his family learned of his medical emergency. There is insufficient evidence to corroborate this multiple tiered hearsay that appeared to be motivated by the desire to get inmate A out of solitary confinement.

In regard to allegedly lying on his employment application, Mr. Titta was hired on his third application for employment with the Respondent. In October 2011, his first application, Mr. Titta stated that he had been terminated for an unknown reason while on probation. He also disclosed that he had an open criminal case in NH. He was not hired due to his background check. In April 2013, his second application, Mr. Titta stated that he was released before the end of his probationary period and would be able to be rehired if "no charges". The disclosure regarding the NH charges was updated to reflect his belief that he was not sure if it was a misdemeanor conviction and if it was annulled/sealed after 1 year.

Consistent with the two earlier applications, his third application reflects Mr. Titta's understanding of the progression of his NH case as well as the ending of his employment with WHOC. He discusses his job at WHOC,stating that he was formally disciplined but not offered continued employment after his probationary period because of the pending court case. Mr. Titta did not report the NH charges on this application based on his understanding that he did not have to report the misdemeanor after the year had expired.

Mr. Titta reasonably believed that DOC was aware of the circumstances of his leaving the WHOC. Mr. Titta's description of how his employment ended at the WHOC does not constitute untruthfulness. The same holds true for the NH case against Mr. Titta. Each application follows his understanding of the status of the criminal case and his obligation to report it.

The remaining allegations of untruthfulness rely primarily on the allegation that Mr. Titta was lying to investigators when he denied contacting his brother regarding Inmate A's transport to the hospital. As discussed above, DOC has not proven that Mr. Titta engaged in this misconduct. Thus, his denial cannot constitute untruthfulness.

Having determined that Mr. Titta did engage in misconduct, I must determine whether the level of discipline here (termination) was warranted.

As stated by the SJC 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], 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).
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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 town on the basis of essentially similar fact finding without an adequate explanation." *Id*. (citations omitted).

My findings do differ from DOC. Most significantly, the evidence does not support the allegation that Mr. Titta contacted his brother and notified him that Inmate A was being transported to the hospital. The seriousness of the other misconduct proven here, however, justifies the termination of Mr. Titta as a Correction Officer.

Mr. Titta has a complete disregard for the basic responsibilities of a Correction Officer. He engaged in jaw-dropping conversations with his brother and other inmates while they were incarcerated at the Worcester County House of Correction, discussing the crimes of multiple inmates, their locations, the layout of MCI Shirley, the fact that certain doors at the Worcester facility do not lock and having another inmate beat up. In short, Mr. Titta sounded more like a fellow inmate during these recorded conversations, as opposed to someone who had been entrusted with the responsibility of serving as a correction officer for the Massachusetts Department of Correction. This egregious misconduct, in addition to failing to report that he was charged with assault and battery

regarding the Gillette Stadium incident, justify DOC's decision to terminate Mr. Titta's employment. The additional misconduct related to his personal cell phone usage further reinforces DOC's decision here, but, even without these additional charges, termination was justified.

CONCLUSION

For all of the above reasons, Mr. Titta's appeal under Docket No. D1-18-099 is hereby ***denied***.

* * *

By a 4-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein, and Tivnan, Commissioners) [Camuso-Not Participating] on June 6, 2019.

Notice to:

Joseph Kittredge, Esq.
Lorena Galvez, Esq.
Rafanelli Kittredge, P.C.
One Keefe Road
Acton, MA 01720

Jody Brenner, Esq.
Amy Hughes, Esq.
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * * *

THOMAS UNDERWOOD

v.

CITY OF LOWELL

D-17-082

June 6, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Suspension of Fire Lieutenant-Refusal to Perform an Assignment-Conduct Unbecoming-Insubordination-Disparate Treatment-Demotion—Hearing Commissioner Cynthia A. Ittleman affirmed the 20-day suspension of a long-serving Lowell fire lieutenant who refused to serve shifts on the back step of a ladder truck and went on to undermine the chain of command when attempting to escape the assignment. Commissioner Ittleman also rejected the Appellant's arguments that he had been victimized by disparately harsh discipline or that his reassignment constituted a demotion.

DECISION

The Appellant, Thomas Underwood (hereinafter "Mr. Underwood" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on April 26, 2017, under G.L. c. 31, s. 43, appealing the decision of the City of Lowell ("City") to discipline him by suspending him for five (5) days. A prehearing conference was held in this case on May 8, 2017 at the Mercier Community Center in Lowell. A full hearing was held on the appeal on June 26, 2017 at the same location.[1] The hearing was digitally recorded and copies of the recording were sent to the parties.[2] All witnesses, with the exception of the Appellant, were sequestered. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Eleven (11) Exhibits were entered into evidence at the hearing. At the hearing, I ordered the parties to produce other documents post-hearing, including certain disciplinary actions taken against other members of the Lowell Fire Department. I received the post-hearing documents and the parties submitted written comments thereon. The post-hearing documents were admitted and are given the weight they are due based on the parties' comments.[3] Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. 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 exhibits entered into the record at the hearing include Respondent's Exhibits (R.Ex.) 1 through 8 and Appellant's Exhibits (A.Ex.) 1 through 3. In response to my order at the hearing, the parties also produced information regarding four (4) post-hearing disciplinary actions taken against other members of the Lowell Fire Department, a doctor's note explaining Dep. Panneton's limited speaking ability at the hearing, additional excerpts of the CBA, and daily manning reports for three (3) days in February 2017. The documents produced post-hearing are marked and entered into the record as Post-Hearing Documents and will be given the weight they are due based on other evidence in the record, the reliability of the post-hearing documents, and the parties' written comments on the post-hearing documents.

- Rodney Panneton, Deputy Chief ("Dep. Chief"), Lowell Fire Department (LFD)
- Mark McGuane, Dep. Chief, LFD
- Robert Beane, Captain (Capt.), LFD
- Jeffrey Winward, Chief, LFD

Called by the Appellant:

- Thomas Underwood (Appellant)

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

1. The Appellant is a Lieutenant in the LFD with approximately twenty (20) years of experience at the Department. He also served many years in the active military, where he was a First Sergeant. In 2016, the Appellant received a verbal warning from Capt. Beane that became a written warning; the warning stated that the Appellant was to wear a full uniform while responding to a call and not to release a member of the LFD under certain circumstances, referring the Appellant to an applicable standard operating procedure. (Testimony of Appellant)

2. On March 12, 2017, the Appellant was scheduled to work two (2) shifts, the day shift and the night shift, for a total of twenty-four (24) hours at Engine 7. (Testimony of Panneton)

3. Chief Winward has authorized Dep. Chief Panneton to use his discretion to assign members of the LFD in the interests of the City. (Testimony of Panneton) When Dep. Chief Panneton arrived for the day shift on March 12, he decided to close Engine 7 because it had a mechanical problem. (Testimony of Panneton; Respondent's Exhibit (R.Ex.) 3)

4. As a result of Dep. Chief Panneton's decision, the Appellant was reassigned to the back step of Ladder 2 for the day shift. (Testimony of Panneton; R.Exs. 2 and 3)

5. When the Appellant learned of his reassignment, he called Dep. Chief Panneton to object to it. (Testimony of Panneton; R.Ex. 3)

6. Dep. Chief Panneton told the Appellant that he could perform his reassignment or go home without pay. (Testimony of Panneton; R.Ex. 3) The Appellant went home without pay. (*Id.*)

7. The failure to perform an assignment constitutes abandoning the job without leave and disobeying an order. (Testimony of Winward)

8. On the "manning" level report for March 12, 2017, the Appellant was marked "AWD" or absent without leave, day shift. (R.Ex. 2; Testimony of Winward)

9. If the Appellant performed his assignment on the back step of Ladder 2, he would have been paid his normal Lieutenant rate of pay, plus $2.00 extra per hour for the shift. (Testimony of Winward; R.Ex. 4)

10. The Appellant was also scheduled to work the night shift on Engine 7 on March 12, 2017. (Testimony of Panneton) As in the morning shift, Dep. Chief Panneton closed Engine 7 and reassigned the Appellant to the back step of Ladder 2.

11. Again the Appellant called Dep. Chief Panneton, objecting to his reassignment. Dep. Chief Panneton again informed the Appellant that he was assigned to Ladder 2. In response, the Appellant told Dep. Chief Panneton that he was feeling sick. Dep. Chief Panneton informed the Appellant that a request for sick leave would be denied. (Testimony of Panneton; R.Ex. 3)

12. The Appellant also called Dep. Chief McGuane to ask if he would change Dep. Chief Panneton's reassignment of the Appellant to Ladder 2. Dep. Chief McGuane declined the Appellant's request and told him to perform the reassignment on the night shift or go home without pay. (Testimony of McGuane; R.Ex. 3) In an email message written later on March 12, 2017, Dep. Chief McGuane wrote that when the Appellant asked him to change Dep. Chief Panneton's reassignment, he (Dep. Chief McGuane) "told him I would not and his options were to stay on the back step of Ladder Two or go home AWOL. He chose to go home AWOL." (R.Ex. 3)

13. The Appellant went home and the manning level report for that night indicates that he was marked "AWN", absent without leave, night shift. (Testimony of Winward; R.Ex. 1).

14. Because of the Appellant's failure to perform his reassignment, Capt. Beane had to replace him with another member of the LFD on overtime. (Testimony of Beane)

15. Chief Winward, Dep. Chief McGuane and Dep. Chief Panneton have been assigned to ride the back step of a truck as a Lieutenant. (Testimony of Winward, McGuane and Panneton)

16. In deciding what discipline to issue to the Appellant for twice failing to perform an assignment on March 12, 2017, Chief Winward considered the Appellant's conduct on the two (2) shifts, as well as discipline issued in other instances for disobeying orders. (Testimony of Winward)

17. By memo dated March 24, 2017 delivered to the Appellant in hand, Chief Winward informed the Appellant that he was suspended for five (5) days, attaching copies of G.L. c. 31, ss. 41-45. The memo states, in part,

> … Refusing the orders of a Deputy Chief, going home on A.W.O.L. when you do not agree with those orders, and asking another Deputy Chief to change those orders because you do not agree with them are completely unacceptable behavior. This type of behavior is insubordinate, and constitutes conduct unbecoming a fire officer. You put the citizens of Lowell and the firefighters of the [LFD] at risk by abandoning your post while Captain Beane had to hire someone in your place and wait for him to come to work. …

(R.Ex. 5)

18. By letter dated March 28, 2017 from the Appellant to City Manager Kevin Murphy, the Appellant requested a hearing regarding his suspension. (R.Ex. 6)

19. On March 29, 2017, the Appellant was handed a letter from City Manager Kevin Murphy providing notice that a discipline hearing would be held on April 4, 2017 at 10:00a.m. regarding the five (5)-day suspension. (R.Ex. 7)

20. City Manager Murphy conducted the local discipline hearing on April 4, 2017, at which the Appellant testified. Mr. Murphy issued his findings and conclusions on April 10, 2017, stating that the Appellant had "disobeyed two orders of a superior and engaged in conduct unbecoming of a Fire Officer ..." and that Chief Winward had just cause to suspend the Appellant for five (5) days. (R.Ex. 8) The City Manager's decision was hand delivered to the Appellant's house on April 12, 2017. (*Id*.)

21. The Appellant timely filed the instant appeal on April 26, 2017. (Administrative Notice)

DISCIPLINE OF OTHER MEMBERS OF THE LFD

22. In 2012, a prior LFD Chief issued a five (5)-day suspension for "disobeying a direct order from a superior officer". (Post-Hearing Documents) The Respondent states that the employee had no prior discipline since 1998. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

23. In 2014, a prior LFD Chief issued a twenty-four (24)-hour suspension for " disobeying a direct order from the Senior Fire Captain and for conduct unbecoming a Fire Officer" during a building fire. (Post-Hearing Documents) The Respondent states that the employee had no prior discipline. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

24. In 2016, Chief Winward issued a twenty-four (24)-hour suspension for "disobeying an order of a Superior Officer; and conduct unbecoming a member of the [LFD]" after the employee argued with another member of the LFD and shoved him, and, when a superior officer directed the employee to go to another part of the station, the employee did not comply until the superior officer repeated the order. (Post-Hearing Documents) The Respondent states that the employee previously had been issued warnings and a suspension for sick leave use. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

25. In early 2017, Chief Winward issued a five (5)-day suspension to an employee for refusing a Superior Officer's order to shave, having been ordered to shave on another occasion. The suspension was reduced to a twenty-four (24)-house suspension. (Post-Hearing Documents) The Respondent states that the employee previously had been issued written warnings about sick leave use. (Email from Respondent to Commission and Appellant, July 10, 2017, 12:06 p.m.)

APPLICABLE LAW

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. A person aggrieved by a decision of an appointing authority made pursuant to G.L. c. 31, s. 41 may appeal to the Commission under G.L. c. 31, s. 43.

On appeal to the Commission, under G.L. c. 31, s. 43, the Commission makes 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) and cases cited. 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." *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997). *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).

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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (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, *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.

G.L. c. 31, section 43 also vests the Commission with some discretion to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is "not without bounds" and requires sound and reasoned explanation for doing so. *See Police Comm'r* v. *Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) and cases cited. ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority") "[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals." *Id*. (emphasis added). *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 Respondent has established, by a preponderance of the evidence, that it had just cause to discipline the Appellant. Twice in one day, on two (2) different shifts, the Appellant refused to perform as he was reassigned, and went home instead. The Appellant makes a number of arguments asserting that there was no just cause to discipline him and that, even if just cause was established, the discipline should be reduced because other members of the LFD who were alleged to have disobeyed orders received less discipline. Specifically, the Appellant avers that he was given a choice whether or not to work, that other members of the LFD had gone home without pay and were not alleged to have been AWOL, and no one specifically told him that going home without pay would constitute being AWOL, that the reassignments were a demotion, and that a different reassignment could have been arranged so that, as a superior officer, he did not have to be assigned to the back step of a truck during his reassignment.

The Appellant's arguments are unpersuasive. First, Dep. Chief Panneton is authorized by Chief Winward to make staffing reassignments in the interest of the City as appropriate. That he may have been able to make alternate reassignments to avoid assigning the Appellant to the back step of Ladder 2 does not free the Appellant from his obligation to work where assigned. Dep. Chief Panneton testified that Engine 7, to which the Appellant and others had been assigned initially, had mechanical problems. As a result, he reassigned the members of the LFD, including the Appellant, elsewhere. If members of the LFD, or of any other fire department, were to choose to go home rather than work as they are assigned, the effectiveness of the Department would be jeopardized.

The Appellant avers that as a long-term member of the LFD with many years in active military duty, he knows what an order is and asserts that Dep. Panneton's repeated instruction to work where he was reassigned did not constitute an order. I find that the reassignment was an order, not a choice or a request, that the Appellant refused to obey the order, and that the Appellant's refusal to obey the order constituted insubordination. Dep. Panneton had to repeatedly tell the Appellant to work where he was reassigned or go home without pay. Having refused to work when he was reassigned, the Appellant cannot complain of the results. There is no evidence in the record that the Respondent is barred from interpreting an employee's refusal to work as being AWOL. That the Appellant may not have been expressly informed that going home could be interpreted as being AWOL does not preclude the City from making such a determination. The Appellant was afforded notice of the allegations against him and an opportunity to be heard at which he presented evidence, the hearing was held, the hearing officer issued his findings and conclusions, and the Appellant was able to appeal the local decision to the Commission.

The effect of the Appellant's disobeying of an order is not the sole reason for the Respondent's decision to discipline the Appellant. In addition to arguing with Dep. Chief Panneton about his reassignment, the Appellant called another superior officer in an attempt to work around Dep. Chief Panneton and his reassignment order. Moreover, the Appellant did so on two (2) different shifts, requiring the LFD to engage another member of the Department to work overtime. The Appellant's actions undermine the authority of the chain of command and constitute conduct unbecoming of an officer. The Appellant's insubordination and conduct unbecoming an officer constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.

The Appellant's reassignments did not constitute a demotion. The Appellant's title was not altered when he was reassigned to the back step of Ladder 2. The superior officers who testified at the Commission hearing indicated that when they had been Lieutenants like the Appellant, they too had been assigned, on occasion, to the back step of a fire truck. Further, the Appellant's reassignment did not involve reduced pay. In fact, had the Appellant worked as reassigned, he would have been paid his usual salary and earned an additional amount pursuant to the applicable provisions of the collective bargaining agreement.

The Appellant avers that his five (5)-day suspension constitutes disparate treatment. Having reviewed the four (4) examples of similar discipline issued to members of the LFD, I find that the Appellant's suspension is not disproportionate. A member of the Department with no prior discipline received a five (5)-day suspension for disobeying a direct order. The Appellant's conduct here is worse. Specifically, the Appellant repeatedly refused to obey the order of his reassignment on two (2) different shifts and, further, he asked Dep. Chief McGuane to un-do the reassignment by Dep. Chief Panneton. The Appellant's misconduct does not compare to an employee suspended for twenty-four (24) hours for refusing an order to shave. The other disciplinary examples provided by the Respondent appear to involve a single incident, while there were two (2) separate instances in this case and, while the other disciplines involve disobeying an order, as the Appellant did here, they do not appear to involve allegations of conduct unbecoming an officer. Further, having reached substantially the same findings as the City, modification of the five (5)-day suspension is unwarranted.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. Underwood, Docket No. D-17-082, is hereby ***denied.***

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 6, 2019.

Notice to:

Thomas Underwood
[Address redacted]

Hannah Pappenheim, Esq.
Assistant City Solicitor
City of Lowell
375 Merrimack Street
Lowell, MA 01852

* * * * * *

In Re: PETITION OF JOSEPH HICKEY, LAWRENCE CARDINALE and MICHAEL RAGUCCI (REQUEST TO INVESTIGATE THE EVERETT FIRE CHIEF ASSESSMENT CENTER PROMOTIONAL EXAMINATION)

Tracking No. I-19-038

June 20, 2019
Paul M. Stein, Commissioner

Investigation by Commission-Selection of Permanent Fire Chief in Everett-Challenge to Sole Assessment Center—The Commission declined to open an investigation into the choice of a Sole Assessment Center to handle the appointment of a new Everett Fire Chief. Four Deputy Fire Chiefs had requested the investigation, claiming that the City had chosen Sole Assessment to favor the existing provisionally appointed Fire Chief whose score benefited from points obtained for already having served two years as Fire Chief. The Commission did not explain the reason for its decision other than to note that its investigatory jurisdiction is exercised sparingly, and to cite several examples where it did choose to investigate civil service examinations.

RESPONSE TO REQUEST TO OPEN INVESTIGATION

On February 8, 2019, the Petitioners, Joseph Hickey, Lawrence Cardinale and Michael Ragucci (Petitioners), acting pursuant to G.L. c. 31, §2(a), requested that the Civil Service Commission open an investigation into whether factors other than basic merit principles improperly influenced the procedures approved by the Massachusetts Human Resources Division (HRD) that allowed the City of Everett (Everett) to select a candidate for appointment to the civil service position of permanent Fire Chief in the Everett Fire Department (EFD) through a Sole Assessment Center with "In-Title" Education and Experience (E&E) credit allowed for "In-Title" experience only. On February 15, 2019, the Commission (Bowman, Chair) issued an Order to Show Cause (OSC) why the Commission should conduct such an investigation and I held an OSC conference on February 26, 2019 in the matter at which the Petitioners and HRD appeared through counsel. Following the conference, after inquiry of the Everett City Solicitor as to why Everett did not appear at the OSC conference, I came to learn that notice had not been forwarded to her office in time for Everett's labor counsel to attend the conference. Accordingly, an Interim Order was issued on March 29, 2019 requesting certain information from HRD and Everett, which information was subsequently received. A second OSC conference was convened on April 24, 2019 at which HRD, Everett and the Petitioners appeared and were represented by counsel.[1] Following the second OSC conference, Everett and HRD provided certain additional information that I had requested. After carefully reviewing the Petitioners' request, the information provided by Everett and HRD, and considering the argument of counsel, I have determined that, in the exercise of its broad discretion in this regard, the request for investigation be closed without further action by the Commission.

BACKGROUND

Civil service promotional examinations are used to create eligible lists of candidates for selection to positions in the civil service above the entry level. In the absence of an active eligible list, an appointing authority may fill such positions provisionally, pending the next civil service promotional examination.[2]

Design and administration of promotional examinations come within the purview of the administrative expertise of HRD. See G.L. c. 31, §3(c) & §22; Personnel Administration Rules, PAR.06. The Commission has construed the applicable Massachusetts civil service laws and rules to vest HRD with broad, although not unfettered, discretion to determine the technical requirements for competitive civil service examinations, including the type and weight given as credit for training and experience, subject to scrutiny solely when HRD's decisions, actions or failure to act are devoid of any rational explanation, are not firmly grounded in common sense, have not been uniformly applied, are arbitrary, capricious or otherwise run afoul of basic merit principles of civil service law. *See, e.g*., *Borjeson* v. *Human Resources Div*., 31 MCSR 267 (2018) (Interim Decision), 31 MCSR 297 (Final Decision) (allowing appeal and requiring rescoring of E&E when HRD had arbitrarily changed its long-standing traditional methodology for reasons that were neither "persuasive nor logical"); *Clarke* v. *HRD*, 29 MCSR 1 (2016) (allowing appeal, in part, to grant education credit when documentation submitted indistinguishable from information previously found sufficient to grant such credit); *Merced* v. *Human Resources Div*, 28 MCSR 396 (2015) (affirming HRD's requirement that university teaching credit required faculty status of adjunct professor or higher); *Carroll* v. *Human Resources Div*., 27 MCSR 157 (2014) (deferring to HRD's technical expertise in defining criteria for educational credit); *Cataldo* v. *Human Resources Div*, 23 MCSR 617 (2010) (allowing E&E appeal, in part, for education credit that HRD denied for reasons that could not be reconciled with a reasonable construction of HRD's examination instructions). *See generally*, G.L. c. 31, §1 (basis merit principles means "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills", "assuring fair treatment of all applicants" and protect-

1. The second OSC conference on April 24, 2019 was held in conjunction with two other related hearings concerning E&E issues. (*McDonald* v. *HRD*, CSC No. B2-18-246; *Ridick* v. *HRD*, CSC No. B2-19-085 and was digitally recorded.

2. HRD no longer administers civil service examinations for most civil service entry positions and, save for public safety promotions such as the fire service involved in this matter, most civil service jobs above entry-level are filled using a provisional appointment or provisional promotional process which, although intended to be temporary in nature are, in effect, permanent appointments without the civil service status of a tenured employee promoted from an eligible list after examination.

ing employees from "arbitrary and capricious actions"); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303, *rev.den*., 426 Mass. 1102 (1997) (decision "is arbitrary and capricious when it lacks any rational explanation.")

HRD provides appointing authorities three options for promotional examinations: (1) the traditional written examination administered and scored by HRD, which consists of two components, a written test of technical ability (generally weighted 80%) and a "traditional" education and experience (E&E) component (generally weighted at 20%) that gives credit established by HRD for a candidate's past relevant training and experience; (2) a "Sole Assessment Center", in which HRD authorizes an appointing authority, through a "Delegation Agreement", to administer a vendor created examination, involving oral interviews and practical exercises judged by a panel of experts selected by the vendor, which may also include the "traditional" E&E component or an "In-Title Experience" component that awards points only for a candidate's prior service "in the title" for which the examination is given, but not for any prior service; and (3) a combination of an HRD administered written examination, a vendor created Assessment Center, and a "traditional" E&E component. Under all options, candidates would also have points added to their scores pursuant to statutory mandates, such as veteran's preference.

The petitioners' request for an investigation in this matter challenges Everett's choice of the "Sole Assessment Center" with In-Title experience only. The petitioners, all EFD Deputy Fire Chiefs point to the fact that the EFD has been headed by an Acting Fire Chief who was provisionally appointed to that position more than two years ago when he was then the most junior Deputy Fire Chief and held less tenure in the EFD than other Deputy Fire Chiefs. The petitioner's argue that the choice of an In-Title only Assessment Center was designed to provide an unfair advantage to the Acting Fire Chief over all other Deputy Chiefs eligible to take the Fire Chief's examination by denying them the opportunity to receive credit for their considerable experience as firefighters and officers with the EFD, but who had little or no opportunity to serve "in the title" of Fire Chief. The petitioners also argued that the Acting Fire Chief also had an unfair advantage over the other Deputy Chiefs because he was in a position to play a role in planning for the examination and, therefore, had more time to prepare for the Assessment Center than the other candidates.

Everett contends that the selection of the Assessment Center "In-Title" option was a legitimate choice, given the high-level of responsibility unique to the position of Fire Chief. Everett also contends that, save for involvement of an administrative nature, the Acting Fire Chief played no substantive role in the selection of the Assessment Center vendor or the design of the examination and his limited role was of no material consequence to the ultimate results. The scoring of the Assessment Center exercises were scored by panelists selected by the vendor, who represented that it chose them in a conscious attempt to use qualified, but disinterested experts as the panelists.

HRD points out that the use of a Sole Assessment Center with "In-Title" experience only has been a choice offered to appointing authorities for many years and it is not uncommon for an appointing authority to select that option. HRD exercises no oversight over what option an appointing authority selects.

Four EFD Deputy Fire Chiefs completed and passed the Assessment Center. The Acting Fire Chief received an over-all score of 86 (which included 2 points for veteran's preference and 0.66 credit for his "in-title" service as a provisionally appointed Acting Fire Chief). The scores of the other three Deputy Fire Chiefs were 79, 75 and 70. At my request, HRD made several hypothetical calculations which suggest that, whether an "In-Title only" or a more traditional E&E component were used, the spread in the score of the Acting Fire Chief and the other candidates is large enough that the Acting Fire Chief would still be ranked at the top of any eligible list. Also, at my request, I have received and reviewed the names and credentials of the four Assessment Center panelists, which includes a former Director of HRD's Civil Service Unit, the Director of the Rhode Island Fire Academy, Fire Chief (New Hampshire and Dennis, MA) a Deputy Chief (Worcester,MA), HR Director (Worcester,MA) and a Police Chief (Ipswich). Most have served as panelists on dozens of Assessment Centers.

Commission Response

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 or any authorized representatives of either, may summon witnesses, administer oaths and take testimony for any hearing, investigation or inquiry conducted pursuant to the civil service law and rules. Fees for such witnesses shall be the same as for witnesses before the courts in civil actions and shall be paid from the appropriation for incidental expenses.

These statutes confer 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 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."). As a general rule, the Commission

has chosen to exercise its discretion to initiate a Section 2(a) investigation sparingly, and only when there has been a threshold showing that there is a reasonable likelihood that a violation of civil service law and rules has occurred that has prejudiced the civil service rights of others. A mere possibility of a violation will ordinarily not be sufficient to trigger a full investigation.

For example, the 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. *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). The 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: 2010/2011 Review and Selection of Firefighters in the City of Springfield*, 24 MCSR 627 (2011) Similarly, the Commission took action after investigation of appointments made in Methuen and Oxford in which the direct involvement of the appointing authority (Police Chief and Board of Selectmen, respectively) compromised a selection process which favored certain relatives of the appointing authorities. *In Re: Town of Oxford's 2011 Review and Selection of Permanent Intermittent Police Officer Officers*, CSC No. I-11-280 (2011); *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).

After careful review of all of the information and materials provided by HRD, Everett and its vendor, and the petitioners, I have concluded that opening a Section 2(a) investigation into the matters raised by the petitioners here is not warranted. The request for investigation is ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on June 20, 2019.

Notice to:

Patrick Bryant, Esq.
Pyle, Rome, Ehrenberg, P.C.
2 Liberty Square -10th Floor
Boston, MA 02109

Albert Mason, Esq.
145 Springfield Street
Chicopee, MA 01013

Mark P. Detwiler, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street - Suite 600
Boston, MA 02114

* * * * * *

NICHOLAS MENARD

v.

CITY OF BEVERLY[1]
G1-17-086

June 20, 2019
Cynthia A. Ittleman, Commissioner

***Bypass Appeal-Appointment as a Permanent Reserve Beverly Police Officer-Bias-Nepotism-Successful Candidate-Relatives in the Police Department-Flawed Interviews*—**The Commission reversed the bypass of a qualified candidate for appointment as a permanent reserve Beverly police officer after finding the hiring and interview process tainted by nepotism, bias, flawed procedures, and inaccurate characterizations of candidates' backgrounds. Three of the four successful candidates had close connections to police officers working for the Beverly Police Department.

DECISION

The Appellant, Nicholas Menard (hereinafter Mr. Menard or Appellant), filed a timely appeal with the Civil Service Commission (hereinafter Commission) on May 1, 2017, under G.L. c. 31, s. 2(b), appealing the decision of the City of Beverly (hereinafter City or Respondent) to bypass him for appointment to the position of permanent reserve police officer. A prehearing conference was held in this case on May 16, 2017 at which time the City's Police Chief indicated that he had commenced a new hiring cycle for permanent reserve police officer at which time the Appellant would be reconsidered. In consideration thereof, this appeal was dismissed nisi, effective August 1, 2017. The dismissal also stated that if the Appellant was not appointed as part of the next hiring cycle, the Commission would consider a Motion to Revoke the Order of Dismissal Nisi, to be filed no later than August 1, 2017 seeking to reinstate this appeal for further consideration. The Appellant was bypassed a second time and he timely moved to revoke the dismissal, which request was allowed. On September 11, 2017, another prehearing conference was held. A full hearing was held on October 13, 2017 at the Mercier Community Center in Lowell.[2] The hearing was digitally recorded and copies of the recording were sent to the parties.[3] All witnesses, with the exception of the Appellant, were sequestered.

1. Attorney Eitan Goldberg previously represented the Respondent.

2. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq*., apply to adjudications before the Commission with G.L. c. 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

After the hearing, the parties submitted post-hearing briefs. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT

A total of thirty-five (35) exhibits were entered into the record.[4] Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- William Terry, Capt., Beverly Police Department (BPD)
- John LeLacheur, Chief, BPD

Called by the Appellant:

- Nicholas Menard (Appellant)

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

BACKGROUND

1. The Appellant took and passed the 2015 civil service police officer exam. At the time of this appeal, the Appellant was a firefighter in Cambridge for approximately eight (8) years and a licensed EMT for approximately thirteen (13) years. (Testimony of Appellant)

2. Chief LeLacheur is the appointing authority for hiring police officers at the BPD. Prior to his appointment as Chief of the BPD in 2013, the Chief was a police officer in New Hampshire and a state police officer in New Hampshire. (Testimony of LeLacheur)

3. In the hiring of reserve police officers in 2016 and 2017 from the 2015 civil service police officer exam, Chief LeLacheur was interested in hiring candidates who had already received police academy training because it saves the City money and he was interested in hiring candidates who had experience in law enforcement. In addition to attending the reserve police academy, new hires receive field training, working with members of the BPD. The Chief was concerned that the number of reserve police officers in the BPD was low compared to the number that was authorized. (Testimony of LeLacheur)

Certification 03797

4. Capt. Timothy Hegarty was in charge of civil service matters in the hiring process at the BPD at pertinent times here. (Testimony of LeLacheur) Capt. Hegarty asked the state's Human Resources Division (HRD) for a certification of candidates for reserve police officer who passed the 2015 police officer exam. (Testimony of LeLacheur; R.Ex. 3D).

5. HRD issued Certification 03797 on May 12, 2016 to hire nine (9) reserve police officers, which indicated that the deadline for making appointments was August 4, 2016. Interested candidates signed Certification 03797. Among those who signed this Certification, the Appellant was ranked 14th (tied at 11). (R.Ex. 3D)

Capt. Hegarty and then-Lieut. Terry conducted the candidates' orientation. During the hiring process involving Certification 03797, candidates submitted applications and background investigations were to be completed by Capt. Hegarty, Officer Boccuzzi and Det. Barror. However, Capt. Hegarty was then replaced by Capt. Terry in the hiring process involving Certification 03797. Investigators met with candidates to conduct Initial Candidate Interviews and completed the related form, checked the candidates' personal and professional references, questioned the candidates' neighbors, and checked, among other things, the candidates' employment, credit, criminal and driver records. Det. Barror conducted the Appellant's background investigation. (Testimony of Terry and LeLacheur)

6. As indicated in the Appellant's application, the Appellant,

> attended college;
>
> is a certified paramedic;
>
> has been an EMT instructor;
>
> has been a Cambridge firefighter for approximately a decade;
>
> is a Rescue Diver;
>
> is a boat operator for a Fire Department Marine unit,
>
> is a hazmat technician;
>
> is studying for an M.A. in Human Resource Management for EmergencyServices;
>
> has very positive references, including a positive reference from a Sgt. in the Cambridge Police Department Bomb Squad with whom the Appellant works;
>
> has had no incidents on his adult driver's record for approximately twenty (20) years;
>
> was charged with being a minor in possession of alcohol more than twenty (20) years ago;
>
> lives in Beverly with his wife and children; and
>
> has a fair to poor credit history.

(Exs. 6A - 6E)

In addition, the Appellant works with the State Police on hazmat cases, addressing related chain of custody matters. The hazmat training is six (6) weeks long. The Appellant has also attended a number of training sessions with the State Police lab. He attends

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should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

4. Respondent's Exhibits (R.Ex.) 1 - 3B, 4 through 8A and 8C - 21; Appellant's Exhibits (A.Ex.) 3C, 8B, 22 and 23; and exhibits ordered at the hearing and entered post-hearing as R.Exs. 3D (signed Certification 03797), 6E, 7F, 8D, 8E (signed Certification 04365), 11E, 13E, 14E, 15E, 24, 25 and 26. R.Exs. 24-26 are affidavits of Capt. Hegarty, Sgt. Backstrom and Officer Skerry identifying their interview notes among the Exhibits.

semi-annual training to work with the police bomb squad. The Appellant has also taken training courses for firefighters to use police equipment. Further, the Appellant is licensed to carry a gun and is the Cambridge Police Department SWAT medic, which requires that he be able to carry a gun. He writes fire reports and has testified in court three (3) times in connection with his work. In connection with his diver certification, the Appellant has trained with the environmental police. In addition, the Appellant administers NARCAN to people who have overdosed and has taught others how to use it. Finally, the Appellant has also worked with Massport. (Testimony of Appellant)

7. Question 19B of the application asks if the candidates have any experience as a police officer or firefighter, or in law enforcement more generally, whether as an intern, volunteer or a member of such a department, and whether the candidates have attended any police academy, providing a section for candidates to explain. (R.Ex. 6A) The Appellant checked "no" for each of these questions even though the Appellant indicated elsewhere in his application that he is a firefighter with experience working with police. (*Id*.; Administrative Notice)

8. After conducting background investigations, the Respondent also conducted formal interviews of candidates in relation to Certification 03797. Chief LeLacheur decided that the candidates' performance at the formal interview would account for 75% of the candidates' final score and their rank on the signed Certification would account for 25% of their score. The interviews involved nine (9) questions, the responses to which each interviewer was to grade the candidates from 1 to 5 (with 5 being the highest score) and rankings for appearance, presentation and preparation (each of which were graded from 1 to 10). In October 2016, the following members of the BPD interviewed certain candidates, including the Appellant: Det. William Barror, Capt. William Terry (then-Lieutenant), and Officer Michael Boccuzzi. (Testimony of LeLacheur) Capt. Terry is the third generation of his family serving in the BPD. (Testimony of Terry) The three (3) interviewers collectively scored each candidate's answer to each question. Each interviewer also wrote a few words about the candidates' answers to the questions. (R.Exs. 6D, 9, 11D, 13D, 14D, 15D and 16)

9. Capt. Terry testified that Menard did not have an impressive interview, that the Appellant's answers were not well thought out and were not applicable, without stating how they were inapplicable. (Testimony of Terry)

10. The interviewers also interviewed Candidate A. (Testimony of Terry) Candidate A's name appears four (4) names below the Appellant on Certification 03797. (Administrative Notice; *see also* R.Exs. 3B, 3D, 3E and 8E; A.Ex. 3C)

11. In response to the interview question about the primary duties of a reserve officer, the Appellant stated that it involves keeping the community safe and protecting patrol officers, for which he received a below average score, and the City alleged that the Appellant did not provide details. (R.Ex. 6D) Candidate A answered the same question referencing a complement patrol, working lots of hours and being prepared, lacking detail, and, yet, Candidate A received an above-average score. When asked about meeting training requirements, both Candidate A and the Appellant answered that they work full time but the Appellant suggested that his work schedule could be flexible to accommodate the training. For his response, the Appellant received an average score and Candidate A received an above average score. When they were asked if there was anything to disclose, both the Appellant and Candidate A said there was nothing but the Appellant received a 4 and Candidate A received a 5. With respect to 30 points available in the interview for "general impression", Candidate A received a score of 30 and the Appellant received a score of only 21. (R.Exs. 6D, 7D, 4, 9 and 16) However, there is no indication on the interview form what criteria were to be used in scoring the candidates' in this regard. (Administrative Notice) Capt. Terry testified that Candidate A had an impressive interview. (Testimony of Terry)

12. The interviewers each gave the Appellant a score of 48 out of a possible 75 points, giving him one of the lowest interview scores of candidates who were interviewed in connection with Certification 03797. (R.Ex. 4)

13. The Respondent hired nine (9) candidates in connection with Certification 03797, not including the Appellant. All but one of the selected candidates had higher interview scores than the Appellant. One selected candidate, Candidate B, ranked above the Appellant on the Certification but had the same interview score as the Appellant. (R.Exs. 3A, 3D, 4, and 8C)

14. Candidate A received an interview score of 68 out of 75, the second highest interview score. There is no indication in the record how Candidate A was dressed for his interview. Only two (2) members of the BPD interviewed Candidate A: Capt. Terry and Det. Barror. (R.Ex. 7D) As Candidate A indicated in his application, his uncle is BPD Capt. Timothy Hegarty and Candidate A's cousin is an officer at the BPD. In response to the application essay question about why the candidate wants to be a police officer, Candidate A wrote that, while growing up, he was inspired by his uncle, Capt. Hegarty. (R.Ex. 7A) Capt. Hegarty is listed as the BPD contact for HRD on Certification 03797, as well as on subsequent Certification 06435. He gave the orientation presentation to the candidates who signed Certification 03797 and he participated in the hiring process related to Certification 04635 by interviewing other candidates and attending a meeting with Chief LeLacheur and others to discuss the interview rankings. (Exs. 3D, 8E, 11D, 13D, 14D and 15D; Testimony of LeLacheur; Administrative Notice)

15. Candidate A has worked at the police department of a nearby municipality as a patrolman (though not fulltime), a reserve officer, and an auxiliary officer since 2007. He has completed the academy for reserve and fulltime officers. Candidate A reported no discipline during his police officer experience but he had a minor car accident at work on one (1) occasion and an incident involving a citizen in a traffic matter. The police department of the nearby municipality found no wrongdoing on the part of Candidate A regarding the traffic matter but the citizen sued the municipality. Candidate A has not attended college, his credit record contains no

delinquent accounts, he has no criminal record, no civilian driving incident since 2007, he has attended numerous police training programs, and he was in the military police. (Exs. 7A - 7F)[5]

16. By letter dated February 27, 2017, Chief LeLacheur informed the Appellant that he had been bypassed. The letter did not list any negative reasons for bypassing the Appellant but listed the reasons that the Respondent selected Candidate A. (R.Ex. 1)

Certification 04635

17. Capt. Hegarty requested the next Certification from HRD and received it on May 12, 2017. This new Certification authorized the BPD to hire nine (9) additional reserve police officers, indicating that the deadline for making appointments from this Certification was August 4, 2017. (R.Ex. 8E) However, Chief LeLacheur testified that he only wanted to hire six (6) candidates, in addition to those hired in connection with Certification 03797. On Certification 04635, the Appellant was ranked 4th among those who signed it. (R.Ex. 8E) On a separate document also marked Certification 04635 and dated May 12, 2017, is a list of two (2) candidates' names (Candidates G and H), both of whom signed this two (2)-person list. (*Id.*; Testimony of LeLacheur)

18. In considering candidates on Certification 04635 who had been on the prior Certification, the BPD updated their background investigations. (Testimony of LeLacheur)

19. Capt. Hegarty, Sgt. Backstrom and Officer Skerry conducted the interviews of candidates pertaining to Certification 04635. (Testimony of LeLacheur) Capt. Hegarty participated in the interview of Candidate C, who listed Capt. Hegarty (and the Captain's son, who is also a member of the BPD) as a reference in his application and listed him among eight (8) members of the BPD whom he has known for well more than a decade. (R.Ex. 11A and 11D) The questions asked for this Certification were different from the questions asked of candidates on Certification 03797, given that some of the candidates had been interviewed in consideration under Certification 03797. (*See, e.g.* R.Ex. 13D) Like the interview process for Certification 03797, the interviewers regarding Certification 04635 discussed what score to assign to each candidate's answer and took few notes. (R.Exs. 9 and 16) Chief LeLacheur, who observed these interviews (but not the interviews of candidates relating to Certification 03797), assigned a letter grade to each candidate as follows:

Candidate E received a B+.

Candidate M received an A;

Candidate P received a C+;

Candidate S received an A;

Candidate T received a B+;

Candidate W received a C;

Candidate Y received a B-; and

the Appellant received a C.

(R.Ex. 16)

After the interviews, Capt. Hegarty, Sgt. Backstrom and Officer Skerry met with Chief LeLacheur to discuss the candidates on Certification 04635. (Testimony of Chief LeLacheur) However, for the hiring process under Certification 04635, the interview accounted for 50% of the candidates' final scores and the candidates' civil service exam ranking counted for 50% of the candidates' final scores, instead of the 75% weight given for interviews and 25% weight for rank on the civil service exam used in consideration of candidates under Certification 03797. The resulting rank, combining the candidates' civil service ranking with their oral interview scores, placed the Appellant 7th out of 9 candidates interviewed in connection with Certification 04635. (Testimony of LeLacheur; R.Exs. 9 and 16)

20. At the Commission hearing, when he was asked if the Appellant had any law enforcement experience, Chief LeLacheur testified that he "was told" that the Appellant did not. (Testimony of LeLacheur (Recorded Testimony at 1:51) However, the Chief also testified that he had reviewed the candidates' files. (Testimony of LeLacheur) The Appellant's file included his application, which, at a minimum, included a reference from the Cambridge Police Department Bomb Squad Sergeant with whom the Appellant works. (Exs. 6A - 6E) Chief LeLacheur also testified, in effect, that his decision not to appoint the Appellant was based on a personal feeling. (Testimony of LeLacheur)

21. Asked why he only hired four (4) reserve officers in connection with Certification 04635 when he had testified that he needed six (6), Chief LeLacheur stated that he did not think that the other candidates were qualified. (Testimony of LeLacheur)

22. In connection with Certification 04635, the Respondent hired four (4) candidates, all of whom ranked below the Appellant on this Certification: Candidates C, D, E, and F. (R.Exs. 8A and 8E) Three (3) of the four (4) selected have relatives in the BPD, one (1) of whom is a superior officer; two (2) of the candidates are related to one (1) member of the BPD. The fourth (Candidate C) lists eight (8) members of the BPD he knows personally, knowing most of them for at least a decade. (R.Exs. 11A - 11E, 13A - 13E, 14A - 14E, 15A - 15E) The successful candidates' interview scores were:

Candidate	Score -03797[6]	Score – 04635	Chief's Score – 04635
C	9th out of 17 (interviewer noted "numerous involvements W/ BPD" (R.Ex. 4))	highest of 9	A

5. Candidate A received an honorable military discharge following a physical disqualification. (R.Ex. 7E)

6. Candidates C, D and F had been rejected under certification 03797, with interview scores in the bottom half of those who were interviewed. Curiously, under certification 04635, Chief LeLacheur lowered the weight assigned to the candidates' interview scores from 75% (under certification 03797) to 50%.

D	12th out of 17	4th highest of 9	B+
E	(not on this Cert.)	2d highest of 9	A
F	16th out of 17	3rd highest of 9	B+

(R.Exs. 3A, 3B, 3D, 4, 8A, 8D, 8E, 9, 11D, 13E, 14E, 15E, 16, 24, 25 and 26; A.Ex. 8B)

23. The backgrounds of the four (4) candidates who bypassed the Appellant in connection with 04635 are as follows:

Candidate C

scored highest on the interview;

earned a BA in Criminal Justice in or around 2014;

in 2015, he began employment as a Correction Officer at a County Sheriff's Department; prior to that he was employed by a moving company;

his driver's history includes surchargeable accidents in 2013 and 2017, multiple notices of license suspension and payment defaults in connection with citations for speeding and lane violation for which he was found responsible, in 2012 he was charged with refusing a breathalyzer test in another state and he lost his license but it was reinstated in 2013, and he was required to take a national safety course for incurring multiple incidents within two (2) years;

his CORI indicated that in September 2014, he was charged with "operating after", which was dismissed after he paid certain fines; and

his credit history indicates that, of eight (8) accounts, three (3) would be considered negative and five (5) were accounts in good standing.

(Exs. 11A - 11E)

Candidate D

attended some classes at a community college in 2012;

has been working at Police Department nearby for five months as a reserve police officer, for which he attended a reserve police academy;

has been an Assistant Harbor Master in multiple locations. In one such Asst. Harbor Master job, he worked with Candidate E (whose father is a BPD superior officer);

has a driver's history that includes accidents in 2010 and 2016; and

has a credit history that is ranked as "good".

(Exs. 13A - 13E)

Candidate E

earned a BA in Criminal Justice in 2015;

began employment as a college campus police officer in June 2016, after completing a reserve police academy;

has been an Assistant Harbor Master in two (2) municipalities;

used marijuana in high school;

completed a summer internship at BPD in 2014;

has no CORI or driver history; and

has credit rated as "fair".

(Exs. 14A - 14E)

Candidate F

earned a BA in Criminal Justice in 2015;

began employment as a reserve officer at a Police Department nearby in June 2015 after completing a reserve officer academy;

has been an Assistant Harbor Master;

completed a three-month internship at Police Department nearby in 2014;

completed a one-month internship at the BPD in 2012 (in college);

had been involved in a physical fight in or about 2010. The parents of the victim declined to file criminal charges against Candidate F and others in view of the injuries their son sustained, which required two surgeries, but submitted an undated letter strongly opposing Candidate F's candidacy for the position of reserve police officer;

there was no CORI or driver history found for this candidate; and

his credit is rated "fair".

(R.Ex. 15A - 15E)

24. By letter dated August 2, 2017, Chief LeLacheur informed the Appellant that he had been bypassed again. The letter did not list any negative reasons therefor but stated simply that after the background check, interview, reserve academy experience and law enforcement experience the best candidates were selected: Candidates C, D, E and F. (A.Ex. 23)

25. By letter dated September 25, 2017, Chief LeLacheur again wrote to the Appellant stating that he had been bypassed by Candidates C, D, E and F, this time listing their reported qualifications. This letter also states incorrectly that the Appellant has no law enforcement experience and, although he has not completed the reserve police academy, he has received certain law enforcement training for his work with the State Police and the Cambridge Police Department. (R.Exs. 2 and 6A - 6D; Testimony of Appellant; Administrative Notice)

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

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." *City of Cambridge* v. *Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). 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, s. 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 the 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).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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, 334 (1983). *See Commissioners of Civil Serv.* v. *Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

Civil Service basic merit principles are defined, in 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.

(G.L. c. 31, s. 1)(emphasis added)

ANALYSIS

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. The hiring processes used here, resulting in the selection of four (4) out of five (5) candidates being related to members (including superior officers) of the BPD, were based on unduly subjective and fluid methods of assessing the candidates, in addition to factual inaccuracies and processes that are inconsistent with the basic merit principles of the civil service hiring process.

Capt. Hegarty was at least partly involved in the hiring process when he should not have been involved at all. Capt. Hegarty gave the orientation presentation to candidates related to Certificate 03797. He is also the person who requested both Certifications 03797 and 04635. Although he removed himself from performing background checks at some unknown time and he did not interview the candidates when his nephew (Candidate A) was being considered in connection with Certification 03797, he was clearly involved in the hiring process relating to Certification 04635, interviewing candidates in connection with Certification 04635 (including Candidate C, who listed Capt. Hegarty as a reference and who is one of many members of the BPD whom Candidate C has known for many years), and meeting with Chief LeLacheur and others after the interviews to determine how the candidates would be ranked. By obtaining Certification 04635, the appointing authority was able to reach Candidates D, E and F, all of whom have relatives in the BPD and to reach Candidate C.[7]

The interviews under both Certifications were flawed in a number of ways. First, interviewers did not grade the candidates separately. Rather, they discussed and agreed upon a group score of each candidate's answer to each question, undermining the effect of having multiple interviewers. Also, the interview processes for the two Certifications were different in that Chief LeLacheur sat in on the interviews related to Certification 04635 while he did not do so in the interviews related to Certification 03797. Further, similar responses to the same questions by different candidates were scored differently with no apparent reason.

The hiring process was also flawed in that the Respondent inaccurately concluded, despite clear evidence to the contrary, that the Appellant had no law enforcement experience. Even looking just at the Appellant's application, it was clear that he is a firefighter with years of experience, he is a Paramedic, and that one of his references is in charge of the Cambridge PD Bomb Squad who works with the Appellant. At the Commission's hearing, the Appellant underscored that although he has not attended a police academy per se, he has had a number of police-related trainings in order to be able to work with the CPD Bomb Squad and the State Police regarding hazardous materials, he has been trained with regard to the evidentiary chain of evidence rules and has testified in court. In addition, the Appellant indicated that he has treated people suffering from drug overdoses with NARCAN and he has trained others to use it, a scenario with which police are no doubt confronted all too often.

A hiring process is flawed when, as here, it fails to adequately consider the background of each candidate. One of the candidates who bypassed the Appellant in connection with Certification 04635 has a recent poor driving record. Another candidate who bypassed the Appellant was involved in a fight in high school, only five years prior to the civil service exam involved here, in which the victim was beaten such that he required two surgeries. In addition, while the Respondent indicated that it preferred to hire candidates with law enforcement experience, three of the four candidates selected in connection with Certification 04635 had only graduated from college in 2014 or 2015 and, thus, they had limited law enforcement experience since then. In fact, the Respondent considered as law enforcement experience the brief BPD internships of two of the candidates (Cert. 04635), which candidates are related to members of the BPD. Finally, a hiring process is flawed when, in

7. The record does not include the question forms used in the interviews of Candidates C, D and F, the interviewers' written notes on the question forms indicating the candidates' responses and their reactions to them, or the initials of those who actually conducted the interviews in connection with Certification 03797.

addition to these errors, an appointing authority bypasses a candidate based on a personal feeling.

CONCLUSION

Accordingly, for the above stated reasons, the bypass appeal of Mr. Menard, Docket No. G1-17-086, is hereby ***allowed*** and, 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 state Human Resources Division, or the City of Beverly in its delegated capacity, is ordered to place the name of Nicholas Menard at the top of future certifications for the position of permanent reserve police officer within the City of Beverly Police Department until he is appointed or bypassed. In the event that the City chooses not to appoint reserve officers, the Appellant's name shall be placed at the top of the next certification issued to the City for the position of permanent full-time police officer in Beverly.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 20, 2019.

Notice to:

James Hykel, Esq.
Pyle Rome Ehrenberg PC
2 Liberty Square, 10th Floor
Boston, MA 02109

Jesse Dole, Esq.
Assistant City Solicitor
City of Beverly
191 Cabot Street
Beverly, MA 01915

Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

LARISSA PAOLANTONIO

v.

DEPARTMENT OF CORRECTION

G1-19-089

June 20, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Correction Officer-Lack of Bypass-No Candidate Appointed with Higher Score—Although the DOC had informed this candidate that she was being bypassed for certain non-medical issues, it later determined that no bypass had occurred because no candidate below her on the list ended up being appointed. The appeal was therefore dismissed.

ORDER OF DISMISSAL

On April 14, 2018, the Appellant, Larissa Paolantonio, took the civil service examination for Correctional Program Officer A/B (CPO A/B) and received a score of 71.

2. On May 15, 2018, the state's Human Resources Division (HRD) established an eligible list for CPO A/B which included the name of the Appellant.

3. On October 24, 2018, Certification No. 08878 was sent to the Department of Correction (DOC) from which DOC ultimately appointed 22 candidates for appointment as CPO A/B.

4. The Appellant was ranked 25th on Certification No. 08878.

5. In January or February 2019, the Appellant received a conditional offer of employment from DOC for CPO A/B.

6. At the time of the conditional offer of employment, DOC, according to the Appellant, had not conducted her background investigation.

7. On March 13, 2019, DOC notified the Appellant that she was being bypassed for appointment for non-medical issues related to her background investigation. The specific reasons for bypass were listed on the bypass letter.

8. On April 16, 2019, the Appellant filed a bypass appeal with the Civil Service Commission (Commission)

9. Prior to the pre-hearing, DOC submitted a Motion to Dismiss the Appellant's appeal, stating that nobody ranked below the Appellant was appointed (i.e. - DOC sent the bypass letter and reasons in error).

10. On May 7, 2019, I held a pre-hearing conference which was attended by the Appellant and a DOC representative.

11. In order to verify that no candidate ranked below the Appellant was appointed, I reviewed the signed certification submitted by DOC. That Certification was in alphabetical order by last name.

12. I cross-checked the signed Certification with the Certification sent to DOC by HRD which was in rank order. That Certification appears to contain the same names, in rank order, and appears to show that no candidate ranked below the Appellant was appointed. If true, no bypass occurred.

13. The Appellant, having received a letter with specific bypass reasons, all of which she contests, effectively sought a "name clearing" hearing before the Commission.

14. DOC agreed to inquire as to whether the bypass letter, which was apparently sent in error, could be rescinded, removed and replaced with a non-selection letter.

15. On May 15, 2019, DOC reported that the March 6, 2019 letter would be rescinded, removed from her personnel file and replaced with a non-selection letter stating simply that she was among a group of tied candidates not selected.

16. That same day, May 15, 2019, I inquired with the Appellant as to whether she wished to withdraw her appeal and that, absent a withdrawal, the Commission would issue / publish an Order of Dismissal, stating the reasons why the Commission lacks jurisdiction to hear the appeal.

17. The Appellant did not reply to my inquiry.

ANALYSIS

The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass. *See Edson* v. *Reading*, 21 MCSR 453 (2008) (upheld by Superior Court; *Edson* v. *Civil Service Comm'n*, Middlesex Sup. Ct. No. 08-CV3418 (2009); *Bartolomei* v. *Holyoke*, 21 MCSR 94 (2008); *Coughlin* v. *Plymouth*, 19 MCSR 434 (2006); *Kallas* 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); *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates); *Cotter* v. *Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing HRD's guide), *rev'd in part on other grounds*, 323 F.3d 160 (1St Cir. 2003) ("when a civil service exam results in a tie -score, and the appointing authority ... promotes some but not all of the candidates, no actionable ` bypass ' has taken place in the parlance of... civil service")

CONCLUSION

Since no candidate ranked below the Appellant was appointed, there was no bypass. For this reason, the Appellant's appeal under Docket No. G1-19-089 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 20, 2019.

Notice to:

Larissa Paolantonio
[Address redacted]

Joseph Santoro
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * * *

RICHARD ZIMMERMAN

v.

CITY OF WALTHAM

D-19-112

June 20, 2019
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Provisional Employment-Suspension of Waltham Public Health Nurse—The Commission lacked jurisdiction to hear the appeal of a City of Waltham Public Health Nurse from a three-day suspension since his appointment had been a provisional one.

ORDER OF DISMISSAL

On May 14, 2019, the Appellant, Richard Zimmerman (Mr. Zimmerman), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Waltham (City) to suspend him for three (3) days from his position as Public Health Nurse, an "official service" civil service position.

On June 11, 2019, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Zimmerman, counsel for the City and a City representative.

At the pre-hearing conference, the parties agreed that Mr. Zimmerman was appointed through a provisional appointment, as there has been no examination and/or eligible list for the position of Public Health Nurse in many years.

ANALYSIS

G.L. c. 31, §§ 41-45 provide certain protections to permanent, tenured civil service employees, including the right to contest a suspension to the Commission. Mr. Zimmerman is not a permanent, tenured civil service employee. Rather, he is a provisional employee.

Provisional employees do not enjoy the same protections that tenured civil service employees enjoy, including the right to appeal a disciplinary decision to the Commission (*see Rose* v. *Executive Officer of Health and Human Services*, 21 MCSR 23 (2008) (provisional employee had no right to appeal her termination to the Commission even though she had been treated as a tenured civil service employee throughout her almost 30 year career); *see also Hampton* v. *Boston*, Case No. D-05-430 (2006) (provisional employee had no right to appeal his 3-month suspension to the Commission)).

The limited protections afforded to provisional employees under the civil service law have also been confirmed by numerous judicial decisions. *See Dallas* v. *Commissioner of Public Health & others*, 1 Mass. App. Ct. 768, 771 (1974), referring to *Sullivan* v. *Commissioner of Commerce and Dev*., 351 Mass. 462, 465 (1966) (in the case of provisional employees, there is "no tenure, no right of hearing, no restriction of the power to discharge"). *See also Rafferty* v. *Comm'r of Pub. Welfare*, 20 Mass. App. Ct. 718, 482 (1985) (terminated provisional employee has right to an informal hearing by the Appointing Authority, but no further right to appeal to the Civil Service Commission).

Based on a plain reading of the statute and the above-referenced Commission and court decisions, the Commission does not have jurisdiction to hear this appeal. For this reason, Mr. Zimmerman's appeal under Docket No. D-19-112 is ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners] on June 20, 2019.

Notice to:

Richard Zimmerman
[Address redacted]

Luke Stanton, Esq.
City of Waltham
119 School Street
Waltham, MA 02451

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HOWARD ASNES, ROBERT LEURINI and DAVID NIX

v.

DEPARTMENT OF CORRECTION

C-19-075 (Asnes)
C-19-077 (Leurini)
C-19-078 (Nix)

July 18, 2019
Christopher C. Bowman, Chairman

Reclassification Appeal-Department of Correction-Industrial Instructors-Improper Classification-Reallocation of a Class—The reclassification appeals of three water management employees within the Industrial Instructor series at MCI Norfolk were dismissed as they were somewhat randomly classified in that series 19 years ago by agreement between their union and HRD but the series does not reflect their duties. None of the Appellants perform any kind of instruction of inmates which is a core function of Industrial Instructors. DOC has initiated discussion with HRD regarding the modification of the Industrial Instructor Classification Specification to include maintenance personnel without any contact with inmates.

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Civil Service Commission (Commission) received the following reclassification appeals from employees at the Massachusetts Department of Correction (DOC) who have titles in the Industrial Instructor (II) series:

I. Howard Asnes	II 2 seeking II 3	C-19-075
II. Robert Leurini	II 1 seeking II 2	C-19-077
III. David Nix	II 1 seeking II 2	C-19-078

1. I held three (3) pre-hearing conferences on April 30, 2019 at the offices of the Commission which were attended by the Appellants and a DOC Representative.

2. All three (3) of the Appellants work at the Water Treatment Plant at MCI Norfolk. Mr. Asnes is the primary operator of the plant and reports to an Environmental Analyst V; Mr. Luerini and Mr. Nix report to Mr. Asnes; they both sample and test water; order supplies; maintain records, etc.

3. None of the three (3) Appellants provide instructions to inmates regarding water treatment issues.

4. Mr. Luerini and Mr. Nix both previously worked at the Sewage Treatment Plant at MCI Norfolk where they held titles in a maintenance series and were part of a different union.

5. Approximately nineteen (19) years ago, employees in the Water Treatment Plant in then-Bargaining Unit 4 were reclassified from maintenance series titles to Industrial Instructor titles. This reclassification was done via an MOU between the state's Human Resources Division (HRD) and MCOFU.

6. According to Mr. Asnes, one (1) of the primary reasons behind this 2001 MOU was that Water Treatment employees had contact with inmates (i.e.—when they collect water samples in the institution, etc.).

7. One result of this 2001 reclassification was that these Water Treatment employees were moved from Group 1 to Group 4. Group 4 employees may retire at 50% of their salary after 20 years of service.

8. According to the 1987 Classification Specifications, still in effect today, Industrial Instructors: "instruct trainees in the use of hand tools and the operation of industrial shop machinery or equipment; determine methods of instruction to be used and assign tasks to trainees; inspect equipment and materials and perform preventative maintenance; monitor the activities of the assigned area; motivate trainees; and perform related work as required. The basic purpose of this work is to instruct trainees in an industrial arts subject to provide for the development of manual skills and familiarity with tools and machinery."

9. I listened carefully to all three Appellants regarding their job duties and responsibilities in the Water Plant. To me, their duties, while mission critical, are not even remotely related to what is described above as the basic purpose of the work of industrial instructors. *See Asselin* v. *Department of Correction*, 18 MCSR 387 (2005) ("Although all maintenance personnel in Bargaining Unit 4 were reclassified into Industrial Instructor positions in July of 2001, the Classification Specification for the Industrial Instructor Series has not been reviewed to reflect the level distinguishing duties performed by maintenance personnel.") The same holds true today, fourteen years after the *Asselin* decision.

10. Given that the Industrial Instructor series has never been updated to reflect the duties of maintenance personnel, or, more specifically, the duties performed by the Appellants, an analysis of whether the Appellants perform the level-distinguishing duties of the Industrial Instructor series is not possible. The only global level-distinguishing duties that can be assessed are supervisory duties, as was the case in *Asselin*. Here, Mr. Asnes is not a second-level supervisor and Mr. Leurini and Mr. Nix are not first-level supervisors.

11. Put simply, there appeared to be no basis upon which a reclassification in the Industrial Instructor Series could be granted. Rather, the issue here appeared to be more related to the reallocation of a class or group of classes to a higher group or job groups, whose positions are included in a collective bargaining unit represented by MCOFU. G.L. c. 30, s. 49 does not apply to such matters.

12. For all of the above reasons, I provided DOC with thirty days to file a Motion to Dismiss and the Appellants had thirty days thereafter to file a reply. I instructed DOC, as part of their motion, to provide information regarding what steps will be taken to update the 1987 Specifications in light of the 2001 MOU.

13. On June 3, 2019, DOC submitted a Motion to Dismiss. As part of their Motion to Dismiss, DOC stated in part: "Upon a care-

ful review of the Classification Specification Guide, it reveals that the Drinking Water Facilities Operator series (Drinking Water Facilities Operator II) may be the more suitable classification, given the current level of distinguishing duties of the workers presently assigned to the Water Treatment Plant. The Drinking Water Facilities Operator II classification does contain a special requirement. That special requirement is the possession of a current and valid Massachusetts Grade II Drinking Water License. The Industrial Instructor classification has no special requirements."

14. DOC also stated in the motion that: "The Department has initiated discussions with HRD regarding modification of the Industrial Instructor Classification Specification."

15. The Appellants did not file a reply to DOC's Motion to Dismiss.

ANALYSIS / CONCLUSION

The Appellants do not provide instruction to inmates, a core part of the duties required of Industrial Instructors. Further, they do not meet the supervisory requirements of the titles to which they are seeking reclassification.

Also, the issue presented here does not appear to be the individual reallocation of a manager or employee's position, but, rather, the reallocation of a class or group. G.L. c. 30, s. 49 states in part that: "the provisions of this section, as they relate to appeals on the reallocation of a class or group of classes to a higher job group or job groups, shall not apply to any employee whose position is included in a collective bargaining unit represented by an employee organization certified in accordance with the provisions of section four of chapter one hundred and fifty E."

For all of the above reasons, the Appellants' appeals are hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Howard Asnes
Robert Leurini
David Nix
Addresses redacted

Joseph Santoro
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

* * * * * *

GIULIO BONAVITA

v.

HUMAN RESOURCES DIVISION & TOWN OF WINTHROP

E-19-029

July 18, 2019
Christopher C. Bowman, Chairman

Examination Appeal-Promotional Exam for Winthrop Police Sergeant-Training and Experience Credits—Icily noting that "[a]lmost every premise of Mr. Bonavita's appeal is wrong", Chairman Christopher C. Bowman dismissed his appeal from the denial of the two-point credit for 25 years of service on a police sergeant promotional exam as he had never submitted to HRD any documentation showing the number of days and shifts he worked as a reserve police officer and wrongly claimed that two other competing candidates had receive the credit.

ORDER OF DISMISSAL

On April 3, 2018, pursuant to a delegation agreement, the Town of Winthrop (Town) held an assessment center promotional examination for police sergeant.

2. The Appellant, Guilio Bonavita (Mr. Bonavita), a Winthrop Police Officer, took the above-referenced promotional examination on April 3, 2018.

3. Pursuant to G.L. c. 31, s. 59:

> " … 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 [two additional points]."

4. HRD requires that time as a Reserve, Intermittent or Temporary Police Officer be submitted in the number of days or shifts worked for each year of the additional service. In accordance with MGL Chapter 31, Section 59, HRD counts two hundred fifty days, or the equivalent thereof, of permanent reserve/intermittent service to be equivalent to one year of permanent full-time service in a regular police or fire force. (*See DeFrancesco* v. *Human Resources Division*, 21 MCSR 662 (2008))

5. Although Mr. Bonavita served as a reserve police officer as of 7/21/92, he has never provided HRD with an employment verification form with the number of days or shifts he worked as a reserve police officer.

6. Mr. Bonavita began serving as a permanent, full-time police officer in Winthrop as of 1/25/94.

7. Based on the above, Mr. Bonavita had served as a police officer for approximately 24 years and 2 months as of the date of the promotional examination on April 3, 2018. Thus, he did not qualify for the 2 points that is awarded to police officers with 25 years of service.

8. Two (2) Winthrop police officers took a make-up examination for police sergeant on October 25, 2018. Although one of the candidates was awarded 2 points for being a veteran, neither of the candidates received 2 points based on 25 years of service.

9. On February 7, 2019, Mr. Bonavita filed an appeal with the Commission, alleging that: a) he "did submit a letter for 25 years of service to receive 2 pts to my final passing score"; and b) "On October 25, 2018, a second Assessment Center (same exact test) was administered to two Winthrop Officers with Ryan Strategies. They were allowed to accrue time and credit up to October 25, 2018. I feel that as a member of the same Police Department and same Police Union that I also should be allowed to accrue the same time of credit as of October 25, 2018 giving me the 25 years of experience and 2 pts …".

10. On April 17, 2019, the Town filed a Motion to Dismiss Mr. Bonavita's appeal

11. On April 23, 2019, HRD filed a Motion for Summary Decision seeking dismissal of Mr. Bonavita's appeal.

12. Mr. Bonavita did not file a reply / opposition.

ANALYSIS / CONCLUSION

Almost every premise of Mr. Bonavita's appeal is wrong.

First, he has never submitted documentation to HRD to show the number of days or shifts that he worked as a reserve police officer in Winthrop.

Second, the two (2) candidates who took the make-up examination on October 25, 2018 did not receive 2 additional points for 25 years of service.

Third, as referenced in HRD's Motion for Summary Decision, the cut-off date to determine whether the two (2) candidates who took the October 25, 2018 make-up examination had served for 25 years was April 3, 2018, the same date that applied to Mr. Bonavita.

For these reasons, Mr. Bonavita's appeal under Docket No. E-19-029 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Giulio Bonavita
[Address redacted]

Patrick G. Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Howard L. Greenspan, Esq.
200 Broadway, Suite 304
Lynnfield, MA 01940

* * * * * *

EMANUEL BRANDAO

v.

BOSTON POLICE DEPARTMENT

D1-19-087

July 18, 2019
Christopher C. Bowman, Chairman

Civil Service Jurisdiction-Tenured Employee-Police Probationary Period-Lack of Notice—A Boston police officer discharged during his probationary period failed to convince the Commission that Boston's lack of notice to him that the probationary period does not include time spent on leave of absence should void his discharge. This candidate had performed the duties of a police officer for only 197 days and taken two military leaves during the probationary period. The Appellant was discharged in early 2019 because of an incident while off-duty in Rhode Island where he failed to properly secure his Department-issued firearm when giving his car keys to a civilian who then used the keys to steal his firearm.

DECISION ON MOTION TO DISMISS

PROCEDURAL HISTORY

On April 8, 2019, the Appellant, Emanuel Brandao (Mr. Brandao), pursuant to the provisions of G.L. c. 31, § 42, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to terminate his employment without first affording him due process requirements provided to tenured employees by G.L. c. 31, § 41. On May 14, 2019, I held a pre-hearing conference which was attended by Mr. Brandao, his counsel and counsel for the BPD. At the pre-hearing, the BPD submitted a Motion to Dismiss Mr. Brandao's appeal, arguing that, at the time of his termination, Mr. Brandao was a probationary employee, who was not entitled to the due process requirements provided to tenured civil service employees, including a local appointing authority hearing and the right to file an appeal with the Commission. On May 23, 2019, Mr. Brandao filed an opposition to the BPD's Motion to Dismiss.

BACKGROUND

The following facts do not appear to be in dispute:

1. The Boston Police Academy (BPA) provides training for new Boston Police recruits. The BPA's Massachusetts Criminal Justice Training Council-approved program is about 30 weeks in length and divided into two sections: curriculum and practicum. The curriculum or written portion involves training in laws, rules, and tactics, and evaluations by examinations. The second part, which

occurs about 2.5 months after the start of the Academy program, is practical or hands-on training.

2. Mr. Brandao began his required training at the Boston Police Academy on December 5, 2016.

3. Upon beginning the Boston Police Academy on December 5, 2016, the student officers, including Mr. Brandao, received a copy of Boston Police Academy Rules and Procedures which state in part that a probationary period does not include time spent on a leave of absence.

4. The last day of training at the Academy was June 16, 2017. On that day, the Boston Police Commissioner came to the Boston Baptist College, a facility being used that day for training, and swore in the Boston student officers as Boston police officers. After being sworn in, the Boston recruits were issued a badge and a gun. The reason for swearing in the Boston recruits that day was so Boston recruits could serve as full sworn Boston Police officers during the "Sail Boston" event that was scheduled to occur that weekend.

5. On June 17, 2017, Mr. Brandao began performing the duties of a Boston Police Officer as part of the Sail Boston event.

6. On June 21, 2017, a graduation ceremony was held at the IBEW Union Hall in Boston.

7. A Police Commissioner's Personnel Order dated June 21, 2017 stated, "the following named Student Officer [including Mr. Brandao], assigned to the Bureau of Professional Development, Student Officer Unit, Org. #71020, are hereby appointed Probationary Police Officers, effective Friday, June 16, 2017 and hereby reassigned to the BPD / Academy, Org. # 71000. The Probationary Police Officers will be detailed to the below assignments effective Saturday, June 24, 2017."

8. Pursuant to a memorandum from the state's Human Resources Division (HRD) dated March 21, 2003, " … a police officer's twelve-month probationary period begins upon successful completion of the police academy and allowed to perform the duties of a police officer."

9. Consistent with the 2003 HRD directive, the Commission, in *Patterson* v. *Town of Plymouth*, 21 MCSR 650 (2008), concluded that Mr. Patterson's probationary period began upon graduating from the Police Academy and being sworn in as a police officer (as opposed to a future date when he worked his first shift).[1]

10. Mr. Brandao took a leave of absence for military leave from October 5, 2017 to November 14, 2017.

11. Mr. Brandao took a second leave of absence for military leave from January 8, 2018 to December 27, 2018.

12. The BPD did not issue Mr. Brandao a written notice that it was extending his probationary period by the number of days he was on military leave following his leaves.

13. On February 4, 2019, the BPD placed Mr. Brandao on paid administrative leave.

14. As of February 4, 2019, Mr. Brandao had performed the duties of a police officer on a full-time basis for 197 days.

15. On March 28, 2019, the BPD issued Mr. Brandao a termination letter, stating in part:

> "I hereby notify you that your conduct during your probationary period has been unsatisfactory and renders you unfit to be a police officer with the Boston Police Department. Specifically, on or about February 2, 2019, while off-duty and in Rhode Island, you failed to properly secure your Department-issued firearm when you gave you[r] vehicle keys to a civilian and that civilian used those keys to take your firearm."

16. By letter dated April 2, 2019, the BPD notified the Personnel Administrator (HRD) of Mr. Brandao's termination.

17. The BPD did not provide Mr. Brandao with the due process rights provided to permanent, tenured civil service employees, including prior notice, a local hearing, and copies of the civil service law regarding appeal rights, as they concluded that he was in his probationary period at the time of his termination.

APPLICABLE LAW

G.L. c. 31, § 34 states in relevant part:

> "During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.
>
> …
>
> If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of

1. The Commission relied on *Board of Selectmen of Brookline* v. *Smith*, 58 Mass. App. Ct. 813, 792 (2003) to support its conclusion in *Patterson* regarding the probationary period start date. However, in *Smith*, the question of whether the date of swearing in or the date of actual work was the starting point was not at issue. The issue in *Smith* was whether time in the Police Academy counted toward the probationary period. Although *Smith* referred to the swearing in date as the start of the probationary period, there was no indication that Smith did or did not work that day, a matter that was irrelevant in that case. The Commission's decision in *Patterson*, however, was consistent with the 2003 HRD directive and the Commission has not issued a decision contrary to *Patterson* in regard to the start date of a probationary period since its issuance.

such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period.

If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.

If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as a tenured employee until he has served a full probationary period or the remainder thereof, as the case may be, following the termination of said educational leave and his commencing of or return to employment.

The probationary period of an employee shall not be deemed to be interrupted by his temporary appointment pursuant to section six to a position in a higher title in the same departmental unit, by his temporary promotional appointment pursuant to section seven, or by his provisional promotion pursuant to section fifteen."

G.L. c. 31, § 41 states in relevant part:

"Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two."

G.L. c. 31, § 61 states:

"Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a 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 shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters."

The Personnel Administration Rules state in relevant part:

PAR.12 PROBATIONARY PERIOD

(2) The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period.

PAR.13 LEAVES OF ABSENCE

(1) A civil service employee seeking a leave of absence or renewal of same for a period longer than three months shall submit a written request for the leave or renewal to the appointing authority at least twenty-one days before the leave unless submission within such time period is impracticable.

(2) When an appointing authority requests prior approval of the administrator for an employee leave of absence or renewal of a leave of absence under MGL c. 31, §37, for a period to exceed three months, such approval shall be requested at least fourteen days before the leave or renewal of leave of the employee is to commence unless request within such time period is impracticable. Said request shall be in writing. A copy of the request shall be delivered to the affected employee. If approval is granted, the written notice of said approval by the administrator shall be delivered to the applicant.

Arguments

Mr. Brandao argues that: a) the BPD was required to notify him that his probationary period was being extended due to his leave of absence for military leave; b) the BPD failed to notify him that his probationary period was extended; and c) as a result of the failure to notify him of an extension of his probationary period, he had gained permanent status as of the time of his termination and was entitled to all of the due process rights afforded to permanent, tenured civil service employees, which were not provided to him, warranting his reinstatement.

The BPD argues that, since Mr. Brandao has not performed the duties of a police officer on a full-time basis for twelve months, he cannot be considered a tenured employee. The BPD argues that Mr. Brandao's military leave of absence was not an extension of the probationary period, but, rather, it tolled the probationary period, which does not require a notice under the Personnel Administration Rules. If such notice is required, the BPD argues that the Rules given to Mr. Brandao while enrolled in the Police

Academy clearly state that leaves of absences toll the probationary period.

Analysis

Although it is not central to this appeal, Mr. Brandao's probationary period here *began* on June 16, 2017, the day he had completed all of the requirements of the Police Academy and, most importantly, *was sworn in as a Boston police officer*. This probationary period start date is consistent with prior Commission decisions and guidance offered by HRD dating back to 2003.

The legislature provided for an *extension* of this probationary period for one reason: unsatisfactory performance of the probationary employee. In such cases, the Legislature stated that the probationary period could be extended for a maximum of two months, effectively increasing the number of months a probationary police officer shall actually perform the duties of such position on a full-time basis from twelve months to up to fourteen months.

It is undisputed that Mr. Brandao, at the time of his termination, had not performed the duties of a police officer for twelve months. Although Mr. Brandao seeks to distinguish this appeal from the SJC's decision in *Police Commissioner of Boston* v. *Cecil*, 431 Mass. 410 (2000), the Court, in *Cecil*, unequivocally reinforced the need to actually perform the duties of a police officer for twelve months before becoming a permanent, tenured police officer.

In *Cecil*, the SJC summarized the facts found by the Commission as follows:

> "Cecil was appointed a Boston police officer on March 22, 1995, and thus began his one-year probationary period in the position. On March 12, 1996, the Probate and Family Court issued an ex parte protective order against Cecil pursuant to G. L. c. 209A. Cecil notified his captain of the existence of the order, as required by the department's rules and regulations, and that a hearing was scheduled for March 22. He surrendered his service weapon, also in accordance with the department's rules and regulations.
>
> Cecil was the subject of an ongoing departmental investigation that had begun earlier in March, 1996, involving his marital circumstances, prior military experience, and a civilian complaint. As a result of that investigation, the bureau of internal investigations (bureau) had recommended that Cecil was unfit for duty.
>
> The commissioner notified Cecil on March 13, 1996, that, effective the next day, he was being placed on paid administrative leave and relieved of his duties as a Boston police officer pending the outcome of the investigation. On March 21 the commissioner notified Cecil that pursuant to G. L. c. 31, s. 34[3], his probationary period was being extended for two months to May 21, 1996. No reasons for the extension were stated.
>
> On March 22, 1996, the ex parte protective order was vacated. Accordingly, Cecil notified his captain and requested permission to return to his duties. He received no response. His request was renewed on March 25, 1996, by counsel, who also requested rescission of the extension of his probationary period. There was no response.
>
> The bureau, as part of its ongoing investigation of Cecil, sought an evaluation of his fitness for duty from the department's medical unit. Cecil was evaluated by a psychologist during July, 1996, and a report was submitted to the bureau in October. On October 22 the commissioner notified Cecil pursuant to s. 34, fifth par., that his employment was terminated for unsatisfactory "conduct and capacity" during his probationary period. The letter referred to the psychological report and recent information indicating "a propensity for untruthfulness and violence . . . characteristics . . . unsuitable for a Boston [p]olice offficer.
>
> Cecil appealed to the commission pursuant to G. L. c. 31, §§ 42 and 43, on October 29, 1996, and a hearing took place before the division of administrative law appeals. The administrative magistrate concluded that the department's use of the administrative leave to extend Cecil's probationary period of employment was inconsistent with the "basic merit principles" of civil service because it was intended, at least in part, to block his attainment of tenure and the accompanying job protections afforded by G. L. c. 31, §§ 41-45. The administrative magistrate also concluded that, absent statutory authority to extend or toll the probationary period of employment during an administrative leave, such leave can have no such effect, wherefore Cecil must be deemed to have completed his probationary period of employment and entitled to tenure. She recognized the legitimate purpose of the department's investigation into Cecil's conduct and capacity to serve as a Boston police officer, but discounted it for the reasons stated. She recommended that Cecil be recognized as having acquired tenured status such that the department was required to follow the procedural requirements of G. L. c. 31, §§ 41-42, before terminating his employment. She further recommended that Cecil be restored to his position with back pay. The commission adopted the findings of the administrative magistrate and ordered the recommended action. The Superior Court affirmed the decision of the commission.

The SJC offered the following analysis in overruling the Superior Court:

> "When interpreting an earlier version of s. 34 we said that its "manifest purpose is that the fitness of an appointee be actually demonstrated by service within a probationary period." *Younie* v. *Director of Div. of Unemployment Compensation*, 306 Mass. 567, 570 (1940). This purpose is "designed to benefit the public." *Leominster* v. *International Bhd. of Police Officers, Local 338*, 33 Mass. App. Ct..121, 127 (1992). "With respect to police officers and fire fighters, in particular, the Legislature recognized the special need of a prolonged probationary period by extending the period from six months to one year. See St. 1977, c. 348, and now G. L. c. 31, s. 61. Courage, good judgment, and the ability to work under stress in the public interest and as part of an organization, are qualities that are not quickly perceived. **The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree." Id. Where s. 61 calls for a newly appointed police officer to *"actually perform the duties of such position on a fulltime basis* for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer.** The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period. (emphasis added)
>
> The department has a legitimate interest in placing any officer on administrative leave pending the outcome of an investigation concerning that officer's fitness to continue serving. There is no challenge to the department's authority to take such action, nor is there any serious dispute here as to the department's basis for taking such action against Cecil. The commission concluded that, because the department could conduct its investigation against Cecil as a tenured employee just as easily as it could if he were a probationary employee, then he should not be deprived

of the "basic merit principles" of civil service. That reasoning is hollow. **We have made clear that care must be taken "not to hobble the employer unduly in the process of selection for tenure because dislodgment thereafter is notoriously difficult; the rigidities in removing unfit tenured employees which have led to attempts at Federal reform teach a lesson as to the pretenure period also**." *Costa* v. *Selectmen of Billerica*, 377 Mass. 853, 860-861 (1979). The department proceeded judiciously in this case, taking care to make an informed decision as to Cecil's fitness. It did so out of fairness to him, because it was mindful of its responsibility to the public, and because of the time, training, and money it had invested in Cecil's appointment. It is not disputed that the commissioner could have sent Cecil a termination notice on March 13, 1996, based on the G. L. c. 209A order and the other matters then under investigation. The commissioner chose not to act in haste, and for that Cecil may receive no windfall. The commission's suggestion that the commissioner could have waited until Cecil was tenured before placing him on administrative leave disregards the commissioner's responsibility to the public as well as the public interest, and does nothing to legitimately advance "basic merit principles." (emphasis added)

The legitimacy of the need promptly to take a probationary officer out of service pending an investigation as to his fitness justifies the need for tolling his twelve-month probationary period, in the public interest. Other jurisdictions have taken this view. In *Matter of Garcia*, 225 A.D.2d 123 (N.Y. 1996), aff'd, 90 N.Y.2d 991 (1997), a probationary period was extended pending a fourteen-month investigation into the propriety of an officer's response at the scene of a crime. The officer was placed on modified duty, not one of the statutorily permitted grounds for extending the period of probation, and the officer made an argument similar to that made here. The court concluded that "because [the officer] was not performing 'police duties,' " the probationary period was tolled. Id. at 126. The court reasoned that the tolling was "consistent with the function of probation, which is to permit the appointing officer the opportunity to evaluate the officer's merit and fitness to perform the duties of police work." Id. The court further reasoned that, consistent with the premise of probation, the department should not be denied the opportunity to conduct a complete and thorough investigation before taking action. Id. at 127. We think the court's reasoning in Matter of Garcia, supra, is applicable here.

The commission's expressed concern that tolling the probationary period pending an investigation opens the process to abuse is answered by the facts of the case. Cecil's leave was not indefinite, but tied to the outcome of the investigation. He was being paid his full salary while the investigation was being conducted, so the department had an interest in concluding the investigation in a timely fashion. *See Pennsylvania Dep't of Pub. Welfare* v. *State Civil Serv. Comm'n*, 707 A.2d 589, 591 (Pa. Commw. Ct. 1998) (probationary period may be extended for purpose of good faith evaluation and not as pretext for improper purpose).

Finally, Cecil argues that he was denied a "name-clearing" hearing. *See Costa* v. *Selectmen of Billerica*, supra at 862; *Fontana* v. *Commissioner of Metro. Dist. Comm'n*, 34 Mass. App. Ct. 63, 70 (1993). He is entitled to such a hearing, but he must request one within a reasonable time after the rescript issues herein. Such a hearing is independent of his termination.

We conclude that the paid administrative leave imposed on Cecil pending the outcome of the investigation into specific matters that affected his fitness to serve ***tolled his probationary period***, and that such tolling was consistent with the purpose of probationary employment and the public interest. ***The commission's conclusion that administrative leave could not toll the probationary period is an error of law***. (emphasis added)

The judgment of the Superior Court is vacated. The case is remanded to the Superior Court for the entry of a judgment setting aside the decision of the commission and affirming the commissioner's termination of Cecil's employment. The order for back pay is vacated."

Mr. Brandao rightfully points out that the underlying facts in *Cecil* are distinguishable from the facts before the Commission as part of the instant appeal, including that the BPD provided Cecil with notice that the paid administrative leave would impact his probationary period. However, nothing in *Cecil* stands for the proposition that police officers, such as Mr. Brandao, can be **granted tenure** without actually performing those duties for at least twelve months.

Mr. Brandao also argues that the Commission, in *Patterson* v. *Town of Plymouth*, 21 MCSR 650 (2008), previously ruled that the failure of the appointing authority to notify Patterson that his probationary period was being extended due to a short medical leave, effectively required the police department to credit that time toward the probationary period, giving Patterson tenure as a police officer. The findings in *Patterson* do state that Patterson took a short-term medical leave and that he was not notified that his probationary period was being extended. Based on a full reading of the decision, it appears that Patterson could only be considered tenured if those weeks on leave were credited toward the probationary period. The Commission's analysis in *Patterson* does not explicitly draw that conclusion, however, and more importantly, the primary issue in *Patterson* appeared to be when the probationary period *began*—at the time of being sworn in as a police officer or days later when Patterson worked his first shift.

The Commission has more squarely addressed the issue of an alleged lack of notice in cases unrelated to performance-related extensions in *Andrade* v. *City of Cambridge*, 31 MCSR 90 (2018) (currently pending appeal in Superior Court). In *Andrade*, the City, approximately six weeks prior to the expiration of Mr. Andrade's probationary period, placed him on paid administrative leave after he was arrested for a domestic assault and battery. Mr. Andrade never returned to performing his duties as a firefighter and the City terminated him several months later. The City never notified Mr. Andrade that this paid administrative leave would interrupt his probationary period.

In *Andrade*, the Commission concluded:

"That leaves the more substantive issue of whether the City's failure to extend Mr. Andrade's probationary period under Section 34 resulted in Mr. Andrade becoming a tenured employee, notwithstanding the requirement in Section 61 that firefighters must perform the duties of the position for twelve months before obtaining tenure.

While it is true that, in *Cecil*, the Boston Police Department extended Cecil's probationary period under Section 34, pending an internal investigation, the SJC's decision, when read in its entirety, emphasizes the Legislature's clear intent on ensuring that firefighters and police officers *actually perform the duties of the position for twelve months* prior to obtaining tenure stating:

> '*Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months", the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.'(emphasis added)*
>
> Further, just as in *Cecil*, there is no serious dispute regarding the legitimacy of the City's decision to place Mr. Andrade on paid administrative leave as he had just been arrested for the serious charge of domestic assault and battery. The City's failure to extend Mr. Andrade's probationary period under Section 34 did not result in Mr. Andrade *actually performing the duties of firefighter for the twelve months* as required by the Legislature in Section 61 and, for that reason, Mr. Andrade's probationary period had not ended at the time he was terminated."

Just as in *Andrade*, the parties in the instant appeal do not dispute that Mr. Brandao had *not actually performed the duties of police officer for twelve months at the time of his termination*. Thus, his probationary period had not ended at the time of his termination and he had not become a permanent, tenured police officer.

That leaves the issue of whether, as argued by Mr. Brandao, the Personnel Administration Rules, carve out an exception to the statutory requirement that an employee is actually required to perform the duties of a police officer before gaining tenure. They do not.

As referenced above, the statute allows for ***one*** circumstance in which a probationary period can be ***extended*** requiring the probationary police officer or firefighter to actually perform the duties of police officer or firefighter for up to two ***additional*** months. That extension, and ***additional*** work requirement, may occur only when the appointing authority has documented performance-related issues and provided the police officer or firefighter with proper notice in a timely manner. Failure of the appointing authority to follow these requirements, including providing the employee with notice, results in the probationary period not being extended and no ***additional*** hours of work being required of the police officer or firefighter in order to obtain tenure. Failure to provide the employee with notice does ***not*** relieve the probationary employee of the *statutory* requirement of the probationary employee to actually perform the duties of a police officer or firefighter before obtaining tenure.

The PARs cannot supersede the statutory requirement of having to actually perform the duties of a police officer or firefighter for twelve months before obtaining tenure, nor do I believe they were intended to. As referenced above, PAR 12.02 states:

"PAR.12 PROBATIONARY PERIOD

> (2) The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period."

Although PAR 12.02 references an "extended" probationary period and an "extension" of the probationary period, it does not—and cannot—actually be referring to an extension in the statutory sense, which term appears only once in the context of performance related extensions of the probationary period, that provides for up to a total of fourteen months of "actual performance" before the employee obtains tenure.

Rather, when read in the proper context, the PARs are clearly referencing additional reasons why a probationary period may be "postponed" (or tolled) absences other than the reasons listed in Section 34 (illness and educational leave). Put another way, the PARs are referring to circumstances in which the *period of time* during which the employee must actually perform the duties for twelve months is being tolled. For example, under PAR 12.02 the BPD may extend the *period of time* that an employee on military leave, such as Mr. Brandao, is given to actually perform the duties of a police officer for twelve months. On the one hand, HRD's rule would not (and could not) enable an appointing authority, other than for performance-related reasons for which specific notice is given, to require the employee to perform the duties of said position for more than twelve months. On the other hand, HRD is fully justified to conclude and provide by rule, that many circumstances beyond illness and educational leave could trigger the need for a postponement or tolling of the probationary period. Importantly, the statutory provisions for postponing or tolling the probationary time for employees on sick or educational leave explicitly state that the employee is not relieved from actually performing the duties for the required number of months before obtaining tenure and there is no statutory notice required in those circumstances. While the PARs can be used to expand the list of reasons for a postponement or tolling, they cannot be used to override and restrict application of the unequivocal requirement mandated by statute and judicial instruction that a probationary police officer or firefighter actually perform the duties of the position for twelve months before obtaining tenure. I do not construe the HRD rule to intend to impose a notice requirement on the appointing authority that absences for additional reasons will postpone or toll the statutory twelve months' period of service as required by law.

Assuming, arguendo, that the PARs could override the statute in this regard, the BPD did provide Mr. Brandao with fair notice when he first enrolled in the Police Academy, that a probationary period does not include time spent on a leave of absence.

CONCLUSION

Mr. Brandao had not performed the duties of a probationary police officer for twelve months at the time of his termination. As such, he was not entitled to the due process rights afforded to tenured civil service employees. For this reason, Mr. Brandao's appeal under Docket No. D1-19-087 is hereby ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Bryan Decker, Esq.
Decker & Rubin, PC
295 Freeport Street
Boston, MA 02122

Winifred Gibbons, Esq.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

* * * * * *

JAMES BRISLIN

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

C-18-062

July 18, 2019
Christopher C. Bowman, Chairman

Reclassification Appeal-MCAD Program Coordinator Position-Impermissible Request to Promote Without Posting a Position-Pay Raise Disguised as a Reclassification—A scathing decision by Commission Chair Christopher C. Bowman denied a reclassification appeal from a former MCAD employee whose appeal did not represent a bona fide reclassification appeal but was an ex post facto attempt to justify a former MCAD Chairwoman's impermissible request to promote the Appellant without posting the position and grant him a pay raise that was not authorized by the collective bargaining agreement. Moreover, even if the appeal were to be treated as a reclassification appeal, the Appellant failed to show he spent the majority of his time coordinating programs, although he certainly did provide valued administrative support--in particular to the former Chairwoman Jamie Williamson who pushed for his "reclassification."

DECISION

On March 31, 2018, the Appellant, James Brislin (Mr. Brislin), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny his request for reclassification from Program Coordinator I (PC I) to Program Coordinator II (PC II), which it rendered on behalf of Respondent Massachusetts Commission Against Discrimination (MCAD). On April 24, 2018, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location over three days on July 26, 2018, September 7, 2018, and November 20, 2018.[1] All witnesses, with the exception of the Mr. Brislin, were sequestered. The full hearing was digitally recorded and both parties received three (3) CDs of the proceeding. On February 4, 2019, the parties submitted proposed decisions.

FINDINGS OF FACT

The following documents were entered into evidence: Joint Exhibits 1 - 9; Respondent Exhibits 1-11; Appellant Exhibits 1-27; and Lettered Exhibits A - H. Based on these documents and the testimony of the following witnesses:

Called by MCAD:

- Sunila Thomas-George, Esq., Current Chairwoman, MCAD;
- Melanie Louie, Fiscal Officer, MCAD
- Geraldine Fasnacht, Esq., Enforcement Advisor Unit Supervisor, MCAD
- Nancy Daiute, Personnel Analyst, Organizational Development Group, HRD

Called by Mr. Brislin:

- James Bailey Brislin, Esq., Appellant
- Jamie R. Williamson, Former Chairwoman, MCAD
- Yaw Gyebi, Jr., Esq., Former Chief of Enforcement, MCAD

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 evidence establishes the following findings of fact:

1. Mr. Brislin obtained a "bachelor of philosophy" degree from the Catholic University of America in 2006. He also has a juris doctor from Western New England College, which he obtained in 2013. (Testimony of Appellant)

2. He is a member of the bar in the Commonwealth of Massachusetts and in the U.S. District Court for the District Court of Massachusetts." (Testimony of Appellant) While attending law school, he was employed as a "legislative research and strategy director" at the Family Institute of Connecticut. Prior to that, he worked as a sales support specialist at the Aetna Life Insurance Company in their Middletown, CT facility. (Testimony of Appellant)

3. MCAD's mission is to eradicate discrimination in the Commonwealth of Massachusetts by investigating, prosecuting and adjudicating complaints of discrimination that occur in a variety of societal activities including but not limited to employment, housing, and access to places of public accommodation, education and outreach. (Testimony of Thomas George)

4. MCAD is led by three Commissioners, each appointed to three-year terms, one of which is designated as Chair by the Governor. MCAD's statewide investigations are divided into three geographical sections, with each area of coverage allocated to one of the three Commissioners. The MCAD's Springfield office is home

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.

to one Commissioner who covers investigations in the Berkshires, Springfield and most of Worcester. A second Commissioner, stationed at the MCAD's Boston headquarters, oversees investigations east of Worcester, including Boston, as well as the area north of Boston. (Testimony of Thomas George)

5. Sunila Thomas George is currently MCAD's Chairwoman. Ms. Thomas George's office is located in the MCAD's Boston office. In her capacity as Investigating Commissioner, Ms. Thomas George is responsible for overseeing investigations for all areas south of Boston, including the Cape & Islands region. (Testimony of Thomas George)

6. As Chairwoman of the MCAD, Ms. Thomas George also serves as an Agency Head, overseeing staff, the Agency's budget, legislative affairs and overall day-to-day operations. (Testimony of Thomas George)

7. In 2012, Mr. Brislin obtained an internship in the Springfield office of MCAD, earning academic credit while enrolled in law school. (Testimony of Appellant)

8. According to Mr. Brislin, during his internship, he "was certified under Rule 303, and under my Rule 303 certification, I was allowed to assist in representing complainants in...conciliation." (Testimony of Appellant)

9. According to Mr. Brislin, he was "basically the complainant's lawyer. I say 'assist', because the Commission's attorneys assist the complainant with preparing their case rather than representing the complainant. They are representing the Commission itself, but I … basically was the complainant's attorney in these conciliation hearings." (Testimony of Appellant)

10. Mr. Brislin continued working as an intern until July of 2012 when he applied and was hired by the MCAD as a contracted employee on a full-time basis. (Testimony of Appellant)

11. The position for which Mr. Brislin was hired was funded by a United States Department of Housing and Urban Development (HUD) grant awarded to MCAD. Mr. Brislin's contracted role had him involved in conducting investigations into fair housing and housing discrimination cases. (Testimony of Appellant)

12. In 2014, Mr. Brislin transitioned to a new contracted position, funded by a separate HUD grant, as a Fair Housing Policy Analyst. Under this grant, Mr. Brislin dealt with relevant legislation, policy and procedures. (Testimony of Appellant)

13. During a Commissioners' meeting in 2015, Jamie Williamson (Ms. Williamson), the Commissioner who was designated as Chair at the time, and whose office was located in Springfield, stated that she wanted to create a full-time regular employee position for Mr. Brislin to provide Mr. Brislin with the benefits inherent in a full-time position for the Commonwealth. (Testimony of Thomas George)

14. Though she had not yet determined a specific job title for the position, Ms. Williamson shared what she envisioned in terms of the duties to be performed by the Appellant in the new role. He'd be tasked with preparing monthly and annual reports from the MCAD's Case Management System (CMS), assisting the Springfield office's personnel with basic level desktop IT support, in addition to serving as a "legislative liaison." Ms. Williamson further proposed that the position would be assigned to the Springfield office where she was located. (Testimony of Thomas George)

15. Ms. Thomas George had concerns about the proposal. With the State House located in Boston, Ms. Thomas George questioned Mr. Brislin's ability to provide effective legislative liaison services from Springfield. She also shared her doubts that the proposal best served the agency's needs. With the backlog of investigations constantly rising, Ms. Thomas George suggested that perhaps it would make more sense to create a new investigator position instead. (Testimony of Thomas George)

16. In December 2016, MCAD posted the vacancy as a Program Coordinator I (PC I) position. (Joint Exhibit 2)

17. The duties listed in the job posting were identical to those set forth by Ms. Williamson in her meeting with the Commissioners. (Testimony of Thomas George)

18. Mr. Brislin, still employed in a contractor status as the Fair Housing Policy Analyst, submitted an application for consideration. MCAD hired Mr. Brislin for the PC I vacancy in January of 2016. (Testimony of Appellant)

19. Eight (8) duties and responsibilities were contained in the job description (Form 30) for the position:

> 1) Assist, prepare and analyze CMS reports, memoranda, etc. for accuracy, completeness, and content for reporting and to take the appropriate action to resolve problems.
>
> 2) Support and assist department personnel with computer software and hardware issues;
>
> 3) Assist with and provide technical assistance with the present Case Management System (CMS);
>
> 4) Coordinate communication and outreach between MCAD and legislators, community members, elected officials and non-government officials from designated regions of Massachusetts;
>
> 5) Performs, develops and provides research, special data collection, reports and proposals to MCAD Senior Staff.
>
> 6) Actively tracks and reports on legislation and political activity of relevance to the MCAD;
>
> 7) Perform operational risk assessments and reporting;
>
> 8) Provides operation testing and coordination for the field offices including but not limited to the Continuity of Operations Plan (COOP);
>
> 9) Perform other work/projects/tasks as assigned and be an energetic, enthusiastic and committed advocate for all of MCAD's programs.

(Joint Exhibit 1)

20. During the first quarter of 2017, Mr. Brislin began "making waves with Lennie De Souza Smith [former CFO]. I was telling her that it's not fair; that I have far more duties, far more complex duties than people higher classified than me at MCAD and that, you know—and, of course, they kept piling them on and on." (Testimony of Appellant)

21. When Ms. De Souza Smith left MCAD in May 2017, Mr. Brislin continued to "militate" for reclassification with then-Chairwoman Williamson. (Testimony of Appellant)

22. On September 5, 2017, Ms. Williamson, while still occupying the Chairwomanship of the MCAD, emailed Melanie Louie, Fiscal Officer for MCAD, stating:

> "Melanie:
>
> Please be advised that James Brislin has been promoted to PC II Grade 12 Step 7 for an annual salary of $66,142.00 this is effective September 5, 2017. Please make the necessary adjustments and place a copy of this email in his file.
>
> Thank you.
>
> Jamie"

(Joint Exhibit 5)

23. Ms. Louie replied approximately thirty (30) minutes later as follows:

> "Ok, just confirming that James Brislin is currently a PCI Grade 10 Step 4 for an annual salary of $54,687.62 and he is promoting to PC II Grade 12 Step 7 for an annual salary of $66,142.44 which is an increase of $11,484.40 = 21% raise. This is 5 steps higher than our normal practice per Unit 6 contract, section 12.5. (emphasis in original)
>
> Also, based on the union contract, all promotion (sic) must be posted. See below language from Union 6 contract.
>
> …." (Joint Exhibit 5)

24. Ms. Williamson, the same day (September 5, 2017), replied as follows:

> "Dear Melanie,
>
> After I performed a complete review of the body of work (desk audit) that James has been providing the MCAD, I realized that he was misclassified and should have been a PCII. His work on CMS is a critical function of the work we do as outlined in our audit. When the staff have been misclassified it is our obligation to correct the misclassification and that is what is being done. I should not have used the term promotion. He is being reclassified. (emphasis added)
>
> …." (Joint Exhibit 5)

25. At the time of the above-referenced email exchange, Ms. Louie was aware, through conversation with Ms. Williamson, that Ms. Williamson may not be re-appointed as an MCAD Commissioner. Ms. Louie opted not to process Ms. Williamson's request as she believed it was inconsistent with the collective bargaining agreement. Further, Ms. Louie was concerned that the request was more akin to a favor to Mr. Brislin, prior to her departure, as opposed to a bona fide reclassification. (Testimony of Ms. Louie)

26. Ms. Williamson and Ms. Louie spoke by phone later that day on September 5, 2017 at which time Ms. Louie asked Ms. Williamson to produce a copy of the desk audit referenced in her email. Ms. Williamson was unable to produce a copy of it. Instead, Ms. Williamson asked Ms. Louie to forward a blank desk audit form to Mr. Brislin, which Ms. Louie did. (Testimony of Ms. Louie)

27. Ms. Thomas George was designated to succeed Ms. Williamson as Chairwoman of MCAD effective September 12, 2017. (Testimony of Thomas George)

28. Ms. Williamson's tenure on the Commission ended on September 30, 2017. (Testimony of Williamson)

29. Ms. Thomas George, the new Chairwoman, approached Ms. Louie on September 13, 2017 to catch up on ongoing matters of importance. After mentioning items such as the spending plan, Ms. Louie shared the developments related to Ms. Williamson's request to promote/reclassify Mr. Brislin. Ms. Louie mentioned that Mr. Brislin had not yet submitted a complete copy of his Interview Guide. Ms. Thomas George told her to hold off on further discussion until he did. (Testimony of Louie)

30. Approximately three days after her designation as Chairwoman, Ms. Thomas George met with Ms. Williamson to discuss outstanding issues that needed an immediate response. One of the topics raised by Ms. Williamson related to her attempt to reclassify Mr. Brislin. Ms. Thomas George asked if the proper paperwork had been submitted to which Ms. Williamson replied that it hadn't, but that she intended to have it submitted shortly thereafter. (Testimony of Thomas George)

31. On September 18, 2017, Ms. Williamson sent the following email to Melanie Louie, with a copy to Ms. Thomas George:

> "Melanie,
>
> Suni and I discussed James's reclassification that was to be effective September 5. He is expecting to see this reflected in his next paycheck. If this is going to be a problem, he should be notified immediately. Thanks.
>
> Jamie" (Respondent Exhibit 1)

32. On September 18, 2017, Chairwoman Thomas-George sent an email to Mr. Brislin, copied to MCAD General Counsel Connie McGrane and Ms. Louie which stated in part:

> " … Also, I received an email from Jamie requesting a reclassification on your position. I have forwarded her emails regarding your request to Connie at this time and I will wait for her recommendation. If you have a copy of the desk audit that was submitted or completed, please forward to myself, Connie and Melanie." (Respondent Exhibit 2)

33. That same day (September 18, 2017), Mr. Brislin sent the following reply email:

> "Good Evening Chair-

> It is my understanding that the reclassification of my position occurred on September 5, 2017 and thus should be effective for this pay period. I completed the desk audit form with Commissioner Williamson on September 6, 2017[2] (which she was still the Chairwoman) and the completed form is in her possession. I tried calling her earlier today, was unable to reach her, and left her a message. Please reach out to Commissioner Williamson for a copy of the Desk Audit. Beyond the information contained in the Desk Audit form, the necessity of reclassification can be further evidenced by the fact that my immediate predecessor, [JT], was classified as a Program Coordinator III. (See below screenshot of www.massoopenbooks.org) It is my understanding that I am responsible for a far-broader portfolio of duties than he ever was, and thus should not be classified below him.
>
> If you have any questions about this, please do not hesitate to contact me.
>
> Kindest regards,
>
> JBB."

(Respondent Exhibit 2)

34. On September 19, 2017, Ms. Thomas George sent a reply email, adding Ms. Williamson to the distribution list, stating:

> "Thanks for the email James. This is very helpful!
>
> Jamie - when you get a chance, could you please forward a copy of the 9/6/17 desk audit that James is referring to.
>
> Thanks so much!!
>
> Suni" (Respondent Exhibit 2)

35. MCAD did not receive a copy of Mr. Brislin's Interview Guide until early October 2017, after Ms. Williamson's departure. (Testimony of Thomas-George)

36. Joint Exhibit 6 is an Interview Guide that contains Mr. Brislin's signature with a date of September 6, 2017 and Ms. Williamson's signature with a date of September 7, 2017.

Next to "Official Title" on the Interview Guide, it states:

> "Program Coordinator II
>
> Program Coordinator I (Former)"

(Joint Exhibit 6)

37. The Interview Guide, signed by Mr. Brislin, lists the following duties and approximate percentage of time spent on each duty as follows:

> 1. Develops, organizes, and implements the Commission's legislative strategy, with particular focus on budgetary matters. (40%)
>
> 2. Prepares and analyzes CMS data for reports, memoranda, etc. Reviews data for accuracy, completeness, and content. Submits data to federal partners for payment. When necessary takes appropriate action to resolve problems. (40%)
>
> 3. Provides first-level technical support in the MCAD's field offices. (8%)
>
> 4. Recommends actions and strategies to reengineer and optimize agency business processes and practices. (e.g.. Electronic submission of position statements and other documents, backlog and intake strategies, etc. (4%)
>
> 5. Coordinates the MCAD's records management activities, including records destruction project. (4%)
>
> 6. Manages special projects (including the special investigator) and performing other duties as assigned. (4%) (Joint Exhibit 6)

38. Now in possession of the completed Interview Guide, Ms. Thomas George consulted MCAD General Counsel McGrane to discuss their options. For a variety of reasons, Ms. Thomas George suggested to refer the reclassification request to the Commonwealth's Human Resources Division (HRD). First, MCAD had a vacancy in the Chief of Operations and Finance position that would ordinarily handle such a request. Second, Ms. Thomas George was concerned about the timing and circumstances regarding this request. (Testimony of Ms. Thomas George)

39. On November 7, 2017, Ms. McGrane contacted Nancy Daiute, Personnel Analyst III for the HRD's Classification and Compensation unit, to ask if she would take on the responsibility of conducting the review of Mr. Brislin's reclassification. (Respondent Exhibit 4) Ms. Daiute agreed to perform the review, and Mr. Brislin was notified of this development by email on November 9, 2017. (Respondent Exhibit 3)

40. Soon after Ms. McGrane's November 9, 2017 email, Ms. Daiute contacted Mr. Brislin to schedule a meeting (Desk Audit), which is designed to offer him the additional opportunity to expound on his job duties and responsibilities. (Testimony of Ms. Daiute)

41. Due to scheduling conflicts caused by Mr. Brislin's request to have a union representative and/or his personal attorney present at the Desk Audit, it did not take place until February 13, 2018. Ms. Daiute was joined by the then-Director of HRD's Civil Service Unit, George Bibilos. In the meantime, Ms. Daiute read through Mr. Brislin's Interview Guide in order to gain a preliminary understanding of his position. (Testimony of Ms. Daiute)

42. Ms. Daiute didn't glean anything new at the Desk Audit as Mr. Brislin simply confirmed what he had already conveyed in his Interview Guide. (Testimony of Ms. Daiute)

43. Ms. Daiute subsequently conducted a formal review of Mr. Brislin's reclassification by comparing his interview guide against the Classification Specification for the PC Series. Based on her review of the totality of Mr. Brislin's description of his position, Ms. Daiute denied Mr. Brislin's request to be reclassified from PC I to PC II. (Testimony of Daiute)

---

2. September 6, 2017 is one day after the email exchange in which Ms. Williamson told Ms. Louie that a desk audit had already been completed.

44. Mr. Brislin filed a timely appeal of HRD's decision with the Commission. (Stipulated Fact)

45. While Mr. Brislin's appeal was pending with the Commission, he resigned from MCAD to begin employment with a federal agency.

46. Mr. Brislin has also filed a complaint of discrimination with MCAD stating in part that MCAD " … retaliated against him for engaging in protected activity by failing to process his lawfully approved reclassification …". (emphasis added) (Exhibit A)

47. At or around the same time, Mr. Brislin also filed a grievance stating the following:

> "The grievant has not been compensated at the salary rate commensurate with his job classification since September 5, 2017. The grievant was promoted to a PC II on September 5, 2017 but the MCAD has denied compensation at the higher salary rate to the grievant. The Union and the grievant contend that the [MCAD] violated the CBA without just cause." (emphasis added)

(Exhibit A)

48. The Civil Service Commission is responsible for conducting a de novo review of a request for reclassification.

49. As referenced above, the Interview Guide signed by Mr. Brislin stated that he performed the follow job duties:

> 1. Develops, organizes, and implements the Commission's legislative strategy, with particular focus on budgetary matters. (40%)
>
> 2. Prepares and analyzes CMS data for reports, memoranda, etc. Reviews data for accuracy, completeness, and content. Submits data to federal partners for payment. When necessary takes appropriate action to resolve problems. (40%)
>
> 3. Provides first-level technical support in the MCAD's field offices. (8%)
>
> 4. Recommends actions and strategies to reengineer and optimize agency business processes and practices. (e.g.. Electronic submission of position statements and other documents, backlog and intake strategies, etc. (4%)
>
> 5. Coordinates the MCAD's records management activities, including records destruction project. (4%)
>
> 6. Manages special projects (including the special investigator) and performing other duties as assigned. (4%) (Joint Exhibit 6)

50. According to the Program Coordinator Classification Specifications:

> "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." (Joint Exhibit 3)

51. Examples of duties common to all series, including a PC I include:

> 1. Coordinating and monitoring assigned program activities in order to ensure effective operations and compliance with established standards.
>
> 2. Reviewing and analyzing 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. Providing 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. Responding to inquiries from agency staff and others in order to provide information concerning agency programs.
>
> 5. Maintaining liaison with various private, local, state and federal agencies and others in order to exchange information and/or to resolve problems.
>
> 6. Performs related duties such as attending meetings and conferences; maintaining records; and preparing reports. (Joint Exhibit 3)

52. The level-distinguishing duties of a PC II include:

> 1. Providing on-the-job training and orientation for employees.
>
> 2. Developing and implementing procedures and guidelines to accomplish assigned agency program objectives and goals.
>
> 3. Reviewing reports, memoranda, etc. for completeness, accuracy and content.
>
> 4. Conferring 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. Evaluating program activities in order to determine progress and effectiveness and to make recommendations concerning changes as needed. (Joint Exhibit 3)

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." MGL c. 30, § 49.

Mr. Brislin must show that he is improperly classified and to do so, he must show he performs the distinguishing duties of the PC II title more than 50% of the time. *See Gaffey* v. *Dept. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also 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 duties encompassed within the higher level position the majority of the time….").

ANALYSIS

The genesis of this appeal had nothing to do with a bona fide request for reclassification. Rather, a few weeks prior to her anticipated departure, the then-outgoing Chairwoman of MCAD directed a subordinate to "promote" Mr. Brislin from PC I to PC II and increase his pay by 21%. But for the immediate and principled push-back by career state employee Melanie Louie, this impermissible directive may have been implemented. Instead, Ms. Louie reminded the outgoing Chairwoman that promotional vacancies for collective bargaining positions must be *posted*, allowing other candidates to be fairly considered, and, when promoted, the pay increase may not exceed the limits established in the collective bargaining agreement, which the directive here would have done.

Mr. Brislin, in his testimony before the Commission, dismisses the request for a "promotion" in September 2017 as a mere mix-up regarding terminology, stating, " … she (Ms. Williamson) had initially told Melanie that I was being promoted, *which, of course, was erroneous* but Jamie came from the private sector, and she was want to, you know, confuse terminology and whatnot …". Yet, on November 22, 2017, Mr. Brislin filed a grievance stating: "The grievant has not been compensated at the salary rate commensurate with his job classification since September 5, 2017. The grievant was promoted to a PC II on September 5, 2017 but the MCAD has denied compensation at the higher salary rate to the grievant. The Union and the grievant contend that the [MCAD] violated the CBA without just cause." (emphasis added)

Further confirming that this was not a bona fide request for reclassification is that the required interview guide that must accompany a request for reclassification had not been completed at the time Ms. Williamson sent the directive regarding Mr. Brislin's promotion and pay raise to Ms. Louie. Mr. Brislin acknowledges that the interview guide was not completed until after Ms. Williamson sent her directive to Ms. Louie. While Mr. Brislin testified that the interview guide was completed "the next day or the day after", the interview guide was not actually provided to the new MCAD Chairwoman until October 2017.

Notwithstanding the troubling sequence of events that had occurred, the newly-designated Chairwoman asked the state's Human Resources Division to conduct an independent review of Mr. Brislin's job duties and determine whether a reclassification to PC II was appropriate. An experienced HRD employee, Nancy Daiute, who offered credible testimony before the Commission, conducted a thorough review of Mr. Brislin's job duties, which included reviewing the interview guide that was signed by Mr. Brislin, and meeting with Mr. Brislin to do a desk audit. Ms. Daiute, after conducting a thorough review and consulting with the then-Director of HRD's civil service unit, concluded that Mr. Brislin did not spend more than 50% of his time performing the duties of a PC II.

As referenced in the findings, the interview guide signed by Mr. Brislin, and relied upon by Ms. Daiute, states that, as of September 2017, he spent 40% of his time developing, organizing and implementing the Commission's legislative strategy, with particular focus on budgetary matters and 40% of his time spent preparing and analyzing CMS data for reports, memoranda, etc; reviewing data for accuracy, completeness, and content; submitting data to federal partners for payment; and, when appropriate, taking appropriate action to resolve problems. Among the remaining duties listed, Mr. Brislin wrote on his interview guide that he spent 4% of his time "manag[ing] special projects (including the special investigator) and performing other duties as assigned."

The "special investigator" project refers to an MCAD initiative in which MCAD, beginning in 2016, brought on former interns as contract employees to assist with closing out some of the older cases pending at MCAD at the time.

In his direct testimony before the Commission, Mr. Brislin spent considerable time discussing how he, as part of his job duties and responsibilities, created the program "from scratch" stating: "There was nothing like it that had existed before, and I created it from scratch. I built the infrastructure. I recruited the staff. And I managed it to its successful completion." Mr. Brislin went on to state: "I—I ran the onboarding process for them. I created the—I created all the employment documents that they needed to fill out …". During his testimony, Mr. Brislin estimated that, when the project was in "full swing" he spent "half or more" of his time on the project. All of these statements are not accurate and/or not supported by the record.

First, as referenced above, Mr. Brislin stated on his interview guide that he spent 4% of his time managing special projects, including the special investigator project and performing other duties as assigned. During cross examination, Mr. Brislin was asked to explain the discrepancy between his testimony and what he wrote on the interview guide. In response, Mr. Brislin clarified that he spent 30 to 50% of his time on the special investigator project, not more than half. Asked to square that new 30 to 50% estimate with the 4% listed in the interview guide, Mr. Brislin stated: "You know, I prepared it with Chairwoman Williamson, but we didn't have an HR person to help us with it." Mr. Brislin went on to testify that: "But—I have also had nearly a year to think about my duties since that was signed. It has also been a year since that form was signed." Asked why he didn't clarify these percentages when he met with Ms. Daiute, several months after completing the interview guide, Mr. Brislin stated: " .. the reflection that has occurred, occurred primarily after the denial of the reclassification, you know."

Whether the time spent on the special investigator project was 4%, 30-50% or "more than half", other parts of Mr. Brislin's testimony regarding this project were unsupported by the record. A version of the project had been used by MCAD before, Mr. Brislin did not create it from scratch, he did not recruit the contractors and he did not create any of the forms that were used to onboard contractors.

Geraldine Fasnacht has been employed by MCAD for over fifteen (15) years and currently serves as supervisor of the enforcement supervisors. She offered informed, credible testimony regarding similar projects in the past as well as Mr. Brislin's role in the most

recent project. According to Ms. Fasnacht, it was "common practice" to hire contractors to work on the backlog, stating: " … it wasn't a novel idea to get contractors to help with backlog cases." Here, the only variation was that MCAD would focus on contracting with prior interns. In regard to recruiting candidates, Ms. Fasnacht talked with enforcement advisors themselves about which interns they had seen in the past who would be a good fit for this project and who had done an outstanding job in the past. The enforcement advisors talked directly with the contracted special investigators who were assigned to them to see how many cases they could manage. Ms. Fasnacht was the sole person responsible for assigning the contracted special investigators to enforcement advisors. Mr. Fasnacht recounted that Mr. Brislin's role was "administrative" stating: "Any administrative [matters] had to do with making sure they had had contracts and had completed their paperwork and that they were paid for each case." Mr. Brislin was also responsible for creating "drop boxes" so the contracted employees could access the case files. If the contracted investigators experienced issues of availability or inability to complete cases, they would talk directly to Ms. Fasnacht. Mr. Brislin had no role regarding the substance of the decisions that were drafted by the contract employees. Ms. Fasnacht acknowledged that Mr. Brislin had made recommendations regarding assignments, but that some of those recommendations were counterproductive. For example, one special investigator completed over one hundred (100) draft decisions. Since it was impossible to have one enforcement advisor review all of those draft decisions, Ms. Fasnacht assigned those decisions to multiple enforcement advisors. For administrative convenience, Mr. Brislin recommended not assigning more than one enforcement advisor to a contracted employee. For the reasons stated above, Mr. Brislin's recommendation could not be implemented.

Mr. Brislin also did not "create" the forms used to onboard the contracted employees or ensure payment for their services. Rather, he used longstanding, pre-existing forms, including the state's Standard Contract Form and a confidentiality agreement that MCAD had been having contractors sign for years.

The record, including the documents submitted as exhibits, do show that Mr. Brislin had an important role in ensuring that contractors completed all employment paperwork, received assigned cases, got paid for their services and that cases were properly tracked and reported on the CMS report. His role, however, did not constitute program coordination. Rather, the record shows that Ms. Fasnacht, in addition to other supervisory duties, coordinated this project in regard to all substantive matters, with important administrative support being provided by Mr. Brislin.

That turns to the other duties listed in Mr. Brislin's Interview Guide, including his then-estimate that he spent 40% of his time on legislative / budgetary matters and 40% of his time on CMS-related issues. Mr. Brislin effectively argues that he was serving as MCAD's de-facto Legislative Director, "providing political and governmental expertise and serv[ing] as a key advisor to MCAD's Chair / Commissioners / Senior Management" and "develop[ing] and foster[ing] relationships with key policymakers in the Executive and Legislative branches as well as administrative agencies." I credit Ms. Williamson's testimony that, for a period of time in 2016 and 2017, she relied on Mr. Brislin, who worked with her in the Springfield office, to assist her with interactions with legislative matters, including attending legislative meetings with her, tracking MCAD-related legislation and communication with legislators and their staffs. Mr. Brislin's interview guide, however, overstates the role he played, including his written statement that he "focused on budgetary matters." Mr. Brislin's "focus on budgetary matters" was primarily limited to drafting a cover sheet / narrative to accompany MCAD's annual budget requests to the Executive Office of Administration & Finance and the House and Senate Ways and Means Committees. Mr. Brislin had no substantive role in developing the actual budget and/or spending plans by MCAD. Further, while Mr. Brislin did produce an excel spreadsheet used to track MCAD-related legislation, the evidence does not show that he played a substantive role in developing legislation, preparing analyses and recommendations related to MCAD-related legislation and/or any duties that would constitute "coordination" of MCAD's legislative agenda. Importantly, at or around the time that Mr. Brislin completed his interview guide, dated September 6, 2017, but not submitted until October 2017, the bulk of legislative-related duties were about to be or had already been transferred to the incoming Chairwowman who was assigned to the Boston office. To the extent that Mr. Brislin had a supportive role in legislative affairs on or around September 6, 2017, those duties were no longer ongoing shortly after that date.

That leaves the CMS-related duties performed by Mr. Brislin. During his testimony, Mr. Brislin stated: "Gosh, so besides producing reports I was, you know, I produced the monthly enforcement reports, and, you know, particularly with the departure of [JT], as I basically jumped into the *database administrator role* and taught myself SQL …". According to the credible testimony of Chairwoman Thomas-George, MCAD relies on a Case Management System (CMS) that was first developed in 1999 to track cases, produce reports, generate letters, etc. Over the years, the CMS has been maintained by a combination of in-house MCAD employees, contractors working at MCAD offices, outside vendors and the state's IT professionals.

"JT" is a person who first served as a contractor, then as a full-time employee and, after moving out of state, continued for a short period of time serving as a contractor. When contracting with JT no longer became feasible, Mr. Brislin assumed part of his job duties, including printing reports using pre-existing queries and, in certain cases, modifying those reports to include additional information requested by MCAD managers. I credit Mr. Brislin's testimony that he self-taught himself SQL, allowing him to modify reports and perform limited trouble-shooting on CMS. The record does not support his testimony, however, that he was the "database administrator" for MCAD. Unfortunately, during his testimony, he appeared to overreach when describing his duties, at one point stating that he performed "regression analyses" even though he appeared unable to define what a regression analysis is. Chairwoman Thomas-George walked through the various individuals and entities that are responsible for maintaining and up-

grading CMS and the limited, but important role that Mr. Brislin plays in printing pre-existing reports and producing modified reports. These duties do not, however, constitute the role of "database administrator" or program coordination duties.

In summary, this appeal does not involve a bona fide reclassification appeal filed by a state employee or manager. Rather, it is an ex post facto attempt to justify an impermissible request to promote Mr. Brislin without posting the position and grant him a pay raise that was not permitted by the collective bargaining agreement.

Even, however, when viewed as a reclassification appeal, the evidence does not show that Mr. Brislin, while he was employed at MCAD, spent the majority of his time coordinating a program or programs. Rather, while he was employed at MCAD, Mr. Brislin provided important and valued administrative support, particularly to the former Chairwoman.

CONCLUSION

For all of the above reasons, Mr. Brislin's appeal under Docket No. C-18-062 is hereby ***denied.***

For all of the above reasons, Mr. Brislin's appeal under Docket No. C-16-137 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Lan Kantany, Esq.
Connor & Morneau, LLP273 State Street, Second Floor
Springfield, MA 01103

Michael Downey, Esq.
Human Resources Division
The Leverett Saltonstall Building
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

EVAN FERNANDES

v.

TOWN OF WEST SPRINGFIELD

G1-19-008

July 18, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Professional Qualifications-Appointment as Firefighter-Failure to Obtain EMT Certification—The Commission dismissed an appeal from a bypassed candidate for original appointment as a West Springfield firefighter where he failed to produce his EMT certification despite multiple promises to do so.

ORDER OF DISMISSAL

The Appellant, Evan Fernandes, filed this appeal with the Civil Service Commission (Commission) pursuant to G.L. c.31, § 2(b) when he was bypassed for the position of permanent full-time firefighter in the Town of West Springfield (Town)'s Fire Department.

On January 31, 2019, the Commission, accepting a joint request of the parties and, 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, ordered the following:

- Mr. Fernandes shall obtain his EMT certification on or before April 27, 2019.
- Thereafter, Mr. Fernandes shall have one (1) week to provide the Town with verification that he has obtained his EMT certification.
- Upon receiving verification that Mr. Fernandes has obtained his EMT certification, the Town shall notify the Commission forthwith.
- The Commission will then order the Human Resources Division to place the name of Evan Fernandes at the top of the next Certification for permanent, full-time firefighter in the Town of West Springfield until such time as he has been appointed or bypassed.
- Should Mr. Fernandes not obtain his EMT certification on or before April 27, 2019, this appeal shall be dismissed forthwith.

On May 6, 2019, the Town notified the Commission that they had not received any evidence from Mr. Fernandes that he had obtained his EMT certification.

That same day, counsel for Mr. Fernandes filed a motion to extend time the time to obtain the EMT certification stating that Mr. Fernandes had completed the EMT course; was scheduled to take the examination on June 5, 2019; and anticipated receiving his EMT certification on or before June 15, 2019, at which time he would notify the Town within one week.

On June 24, 2019, the Town notified the Commission that they had not received any evidence from Mr. Fernandes that he had received his EMT certification.

For this reason, Mr. Fernandes's appeal under Docket No. G1-19-008 is hereby ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Thomas Kenefick, III, Esq.
[No Listing]

Kate O'Brien, Esq.
Town of West Springfield
26 Central Street - Suite 23
West Springfield, MA 01089

Mark Detwiler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

JOHN P. McDONALD

v.

HUMAN RESOURCES DIVISION, CITY OF BROCKTON
and MICHAEL McKENNA

B2-18-246

July 18, 2019
Christopher C. Bowman, Chairman

Examination Appeals-Training and Experience Credits-Municipal Firefighter-"Acting" Position—The Commission turned down an appeal from a Brockton firefighter seeking a ruling denying the inclusion of time as an "acting" lieutenant in the calculation of a competitor's score for promotion to Fire Lieutenant. The Commission recently rebuffed an attempt by HRD to deny E&E credit for time spent in an "acting" position since to do so went against 20 years of HRD practice and, more importantly, would contradict the compelling logic of awarding more points for previous experience in the sought-after position.

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

PROCEDURAL HISTORY

On December 18, 2018, the Appellant, John P. McDonald (Lt. McDonald), a lieutenant in the Brockton Fire Department, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to award certain employment/experience (E/E) credits to another candidate (Brockton Fire Lt. Michael McKenna) regarding a Fire Captain examination.

2. On February 5, 2019, I held a pre-hearing conference via phone; participating were Lt. McDonald, his counsel and counsel for HRD. As Lt. McDonald's appeal also referenced a recent Commission decision regarding *Borjeson et al* v. *HRD* [31 MCSR 267, 31 MCSR 294], counsel for the Appellants in that appeal also participated.[1]

3. On February 6, 2019, I issued a Procedural Order that, among other things, joined the City of Brockton as a party to this appeal.

4. That same day, Lt. McKenna sought to be joined as a party to this appeal. That request was allowed.

5. On March 8, 2019, Appellant John McDonald filed a Motion for Summary Decision, asking the Commission to order HRD to rescind certain E/E credit awarded to Lt. McKenna.

6. On April 5, 2019, HRD filed a Motion for Summary Decision to dismiss Appellant McDonald's appeal.

7. On April 8, 2019, Lt. McKenna filed an opposition to Lt. McKenna's Motion for Summary Decision.

1. I have deemed the Appellants in *Borjeson et al* as Participants in the instant appeal.

8. Also on April 8, 2019, the Participants submitted correspondence to the Commission opposing Lt. McDonald's Motion for Summary Decision.

9. On April 24, 2019, I held a motion hearing at the offices of the Commission. That motion hearing was held concurrently with a pre-hearing and show cause conference regarding another appeal and request for investigation in which the underlying issues relate to the instant appeal.

BACKGROUND

10. HRD is responsible for administering civil service examinations in Massachusetts, including public safety promotional examinations.[2]

11. The promotional examination consists of two (2) portions: a written portion and a portion rating the candidates' education and experience (E&E).

12. G.L. c. 31, § 22 states in part:

> "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." (emphasis added)

13. Personnel Administration Rule 06, Section C (PAR.06 (b)): states:

> "The grading of the subject of training and experience as a part of a promotional examination shall be based on a schedule approved by the administrator which shall include credits for elements of training and experience related to the position for which the examination is held."

14. HRD has had a longstanding practice (or schedule), in place for at least twenty (20) plus years, regarding the related experience that is included in the E&E component of a promotional examination. That related experience has, for at least twenty (20) plus years, included: a) hours worked *in the position* for which the examination is given (including in a permanent, temporary, provisional, or "acting" capacity); and b) hours worked *in lower positions* (including in a permanent, temporary, provisional or "acting" capacity.)

15. For example, a candidate taking a Fire Captain examination has, based on HRD's longstanding practice, received credit for: hours worked as: a) a *Fire Captain* (including in a permanent, temporary, provisional or "acting" capacity) and: b) hours worked as a *Fire Lieutenant and Firefighter* (including in a permanent, temporary, provisional or "acting capacity").

16. On November 18, 2017, HRD administered a statewide promotional examination for Fire Captain and Fire Lieutenant which includes the written portion and an E&E portion.

17. Consistent with HRD's longstanding practice, the E&E schedule included credit for: a) hours worked *in the position* (of either Fire Captain or Lt.) and b) hours worked *in lower titles* (i.e.—Fire Lt., Firefighter, etc.)

18. Although HRD's schedule included credit for hours in the position and lower positions, HRD, contrary to its longstanding practice, did not provide credit for any hours worked in an "acting capacity" (either in title or in lower positions) for this promotional examination.

19. The Appellant (Lt. McDonald) and the Intervenor (Lt. McKenna), both Brockton Fire Lieutenants, took the promotional examination for Brockton Fire Captain that was administered by HRD on November 18, 2017.

20. Pursuant to PAR.07(4), " … examination marks shall be presented on eligible lists in whole numbers." For example, a candidate who receives a score of 81.15, would receive a score of 81.0.

21. In whole numbers, both Lt. McDonald and Lt. McKenna received a score of 81, resulting in them being tied for 5th on the eligible list established by HRD for Brockton Fire Captain.

22. The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass. *See Edson* v. *Reading*, 21 MCSR 453 (2008) (upheld by Superior Court; *Edson* v. *Civil Service Comm'n*, Middlesex Sup. Ct. No. 08-CV3418 (2009); *Bartolomei* v. *Holyoke*, 21 MCSR 94 (2008); *Coughlin* v. *Plymouth*, 19 MCSR 434 (2006); *Kallas* 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); *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates); *Cotter* v. *Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing HRD's guide), *rev'd in part on other grounds*, 323 F.3d 160 (1St Cir. 2003) ("when a civil service exam results in a tie -score, and the appointing authority ... promotes some but not all of the candidates, no actionable ` bypass ' has taken place in the parlance of... civil service").

23. Based on the above, if Brockton were to promote Lt. McKenna to Fire Captain, there would be no bypass that Lt. McDonald could appeal to the Commission. Similarly, if Brockton were to promote

2. HRD may also delegate responsibility for conducting examinations, including "Assessment Center" examinations to Appointing Authorities. No such delegation was involved in this appeal. Rather, this was a "traditional" written examination administered by HRD, which included credit for a multiple choice component and an education / experience component.

Lt. McDonald to Fire Captain, there would be no bypass that Lt. McKenna could appeal to the Commission.

24. In Brockton, when candidates on an eligible list are tied, the City uses a tie-breaking method based on the examination score broken down to the second decimal point (i.e.—a candidate with a score of 81.15 would be appointed over a candidate with a score of 81.10.). While HRD provides this information to the City upon their request, it does not change the ranking of the candidates on the eligible list established by HRD.

25. Based on the information that HRD provided to the City, Lt. McDonald received a score, broken down to the second decimal point, of 80.82 on the November 18, 2017 examination and Lt. McKenna received a score of 80.72 on the same examination.

26. As referenced above, in calculating the E&E portion of the scores for all candidates who took the November 18, 2017 examination, *HRD continued its longstanding practice of giving credit for hours worked in the title and in the lower titles*, but chose not to include time spent in an "acting capacity", either in-title or in a lower title.

27. On March 2, 2018, four (4) individuals who took the statewide examination for Fire Lt. and Fire Captain filed an appeal with the Commission, contesting HRD's decision to end its longstanding practice of counting "acting" time, both in-title and in the lower titles. Those appeals were not related to whether HRD would continue its longstanding practice of providing credit for hours worked in-title and in lower titles (which it did). Rather, those appeals were limited to the question of whether HRD was justified in no longer providing credit for hours worked in an acting capacity, whether in-title or in a lower title.

28. After two (2) days of hearing, which included testimony from various witnesses, the Commission, on August 30, 2018, issued a twenty-two (22)-page interim decision, concluding that HRD's decision to no longer count acting time in the E&E portion of the score was arbitrary and capricious and inconsistent with basic merit principles. (*See Borjeson et al* v. *HRD*, 31 MCSR 267 (2018). Further, the Commission, consistent with prior decisions, concluded that, in order to be fair and equitable, any relief, including the re-scoring of examinations, would need to be applied statewide. Recognizing the logistical challenges associated with any such relief, the Commission provided the parties with additional time to propose mutually acceptable relief that may minimize those logistical challenges.

29. After providing the parties with an opportunity to consult regarding the appropriate relief, the Commission, on September 17, 2018, issued a final decision effectively restoring the status quo (statewide) on a prospective, going-forward basis, by ordering HRD to return to its longstanding practice of counting hours worked in an acting capacity in the E&E portion of the examination score. The Commission's final decision did not order any other changes to the grading process, at the time or going-forward. Rather, the decision's relief was solely related to the only issue brought forward by the Appellants—whether acting time should continue to be counted in the E&E component of the score.

30. Consistent with the Commission's final decision, HRD re-scored the Fire Captain and Lt. examinations statewide, provided candidates with credit for hours worked in an acting capacity, and established a new eligible list that would be used on a going forward basis of January 3, 2019. In short, HRD did precisely what the Commission ordered: restored the status quo in regard to giving credit for acting time.

31. As a result of the restoration of the status quo, the new eligible lists established by HRD on January 3, 2019, resulted, in some cases, in a change in ranking on the eligible lists that were first established for Fire Captain or Fire Lt.

32. The restoration of the status quo did not change the civil service ranking of either Lt. McDonald or Lt. McKenna. Rather, they remained tied on the eligible list for Fire Captain in the fifth position.

33. As referenced above, Brockton uses a tie-breaking method that relies on examination scores broken down to the second decimal point. Upon the establishment of the new eligible list, the City asked HRD for a list of scores broken down to the second decimal point. Lt. McDonald score remained at 80.82, but Lt. McKenna's score rose from 80.72 to 81.08, .26 points higher than Lt. McDonald.

34. Lt. McDonald filed the instant appeal with the Commission, effectively seeking to overturn the Commission's decision in *Borjeson* and order HRD to rescind the credit given to Lt. McKenna for hours worked as an Acting Lt.

Lt. McDonald's argument

Lt. McDonald relies on the second sentence of G.L. c. 31, § 22 to argue that the civil service law does not allow HRD the authority to grant Lt. McKenna with credit for hours worked *in an acting capacity* in any position other than Captain.

As referenced above, G.L. c. 31, § 22 states:

> "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." (emphasis added)

ANALYSIS

Lt. McDonald presents a literalist, illogical and result-driven interpretation of the statute that is inconsistent with commonsense and the Personnel Administration Rules. Further, it is contrary to how HRD has awarded E&E points for over two (2) decades. The granting of his motion by the Commission would result in Lt. McDonald's examination being scored differently than all other statewide exam applicants.

Lt. McDonald's argument is illogical. As noted by the Participants:

> "Lt. McDonald's literalist interpretation of the statute might have more force if he was asserting that HRD, based on the second sentence of Section 22, cannot grant any credit for any experience in a lower title, whether that time is acting, temporary, provisional or permanent. But because Lt. McDonald is not making such an argument, the actual issue presented to the Commission is: *when* HRD credits experience in a title other than that for which the examination is held, is HRD permitted to exclude (or not credit) time in a non-permanent capacity, whether temporary, provisional … or acting? The answer clearly is no, as *Borjeson* established that there is no reasonable basis to distinguish between experience pursuant to an RD certification and "acting" or other time in a title that is not pursuant to an HRD certification …".

Lt. McDonald's argument is inconsistent with the Personnel Administration Rules. As referenced above, Personnel Administration Rule 06, Section C (PAR.06 (b)): states:

> "The grading of the subject of training and experience as a part of a promotional examination shall be based *on a schedule approved by the administrator* which shall include credits for elements of training and experience ***related to the position*** for which the examination is held." (emphasis added)

This rule, which has been in place since at least 2002, clearly establishes that, pursuant to the second sentence of G.L. c. 31, s. 22, in addition to the statutory mandate in the first sentence of the paragraph, HRD has the discretionary authority to grant credit for "such" other training and experience as HRD deems to be *related to the position*, which include hours served as Acting Lieutenant.

Lt. McDonald's argument is contrary to HRD's logical application of the statute for over twenty (20) years. Put simply, HRD has reasonably concluded that a candidate applying for Fire Captain should be given more credit for hours worked as an Acting Fire Lieutenant as opposed to hours worked as a Firefighter. Acceptance of Lt. McDonald's interpretation of Section 22 would prohibit HRD from making this logical distinction.

Finally, the actions taken by HRD, per Order of the Commission, did not change Lt. McDonald's ranking on the civil service eligible list for Fire Captain. Rather, he remained tied with Lt. McKenna. While the re-scoring may impact the tie-breaking method used by City, his non-selection by the City would not constitute a bypass appealable to the Commission, either before or after the re-scoring that he is contesting.

For all of the above reasons, Appellant McDonald's Motion for Summary Decision is denied and his appeal under Docket No. B2-18-246 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice:

Gregory V. Sullivan, Esq.
Malloy & Sullivan
59 Water Street
Hingham, MA 02043

Mark P. Detwiler, Esq.
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

Karen A. Fisher, Esq.
City of Brockton
45 School Street
Brockton, MA 02301

Joseph G. Donnellan, Esq.
Rogal & Donnellan PC
100 River Ridge Drive, Suite 203
Norwood, MA 02062
Appears for Intervenor

Patrick N. Bryant, Esq.
Pyle Rome Ehrenberg PC
2 Liberty Square, 10th Floor
Boston, MA 02109
Appears for Participants (Appellants in Borjeson et al)

* * * * * *

JAMES McINNIS

v.

TOWN OF IPSWICH

G2-17-083

July 18, 2019
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Promotion to Ipswich Fire Lieutenant-Poor Interview-Disciplinary Record—The Town of Ipswich established by a preponderance of the evidence that it was justified in bypassing a candidate for promotion to Ipswich Fire Lieutenant because of his poor interview that reflected his inadequate communication skills and difficulty in expressing himself coherently. In addition, the Appellant was bypassed because of his disciplinary record that included two suspensions and a written warning. The successful candidate who bypassed him had no disciplinary record.

DECISION

The Appellant, James McInnis (Mr. McInnis or Appellant), filed a timely appeal with the Civil Service Commission (Commission) on May 12, 2017, under G.L. c. 31, s. 2(b), appealing the decision of the Town of Ipswich (hereinafter Town or Respondent) to bypass him for promotion to the position of permanent Fire Lieutenant in Ipswich. A prehearing conference

was held in this case on June 12, 2017. A full hearing was held on July 17, 2017 and September 12, 2017. [1] The hearing was digitally recorded and copies of the recording were sent to the parties.[2] After the hearing, the parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

A total of twenty-three (23) exhibits were entered into the record.[3] Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Gregory Gannon, then-Chief of Ipswich Fire Department (IFD)

Called by the Appellant:

- James McInnis (Appellant)

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

1. The Appellant has been a full-time Firefighter in the IFD for more than two (2) decades. He has been a licensed plumber and gas-fitter for many years. He is passionate about his work at the IFD, working on or improving various mechanisms there on his own, offering guidance to new firefighters one-on-one, taking numerous training courses and participating, for example, in the IFD rescues and responses to marine incidents. He frequently calls the Fire Chief with his suggestions or concerns. (Testimony of Appellant) On his own, the Appellant also has followed up on calls to which the Lieutenants have responded. (Testimony of Gagnon)

2. The IFD is comprised of the Chief, a Deputy Chief, five (5) lieutenants (one (1) Administrative Lieutenant and 4 Shift Commanders), and three (3) firefighters per shift. The IFD also employs call firefighters. (Testimony of Gagnon)

3. The Department maintains two (2) fire stations, only one (1) of which is regularly staffed. (Testimony of Gagnon)

4. Gregory Gagnon was appointed the Chief of the Department on June 1, 2014 and was chief at all times pertinent to this appeal. (Testimony of Gagnon)

5. The Town Manager is the appointing authority for all positions within the Fire Department. (Testimony of Gagnon)

6. In 2016, the Town sought to fill two (2) Lieutenant vacancies. As of September 14, 2016, the Town was a party to a Delegation Agreement with the state Human Resources Division (HRD) authorizing the Town to hire a vendor to conduct an assessment center to help the Town identify appropriate candidates for the Lieutenant promotion instead of asking HRD to conduct a written promotional exam. (R.Ex. 1)[4]

7. Pursuant to the Delegation Agreement, the Town was authorized, in part, as follows: "With the exception of additional points as required by statute or rule, including credit for employment or experience in the Fire Lieutenant title, this delegated selection process for Fire Lieutenant will be used as the **sole basis** for scoring and ranking candidates on an eligible list. …" (R.Ex. 1)(emphasis in original)

8. Accordingly, on or about September 29, 2016, the Town entered into a Memorandum of Agreement ("MOA") with the Ipswich Fire Fighters Local 1913 ("Union"), the union that represents the Firefighters and Lieutenants within the IFD. (R.Ex. 2; Testimony of Gagnon)

9. The Town and the Union agreed that the Town would utilize MMA Consulting Group ("MMA") to determine the structure of the assessment center and evaluate the performance of candidates. (Testimony of Gagnon; R.Ex. 2)

10. The parties further agreed that, upon issuance of a certification of candidates after an assessment center, each candidate on the listing would be subject to an interview by an oral interview board (board) comprised of the Town Manager, Fire Chief, Human Resources Director and three outside active and/or retired chief officers or captains to be selected by MMA. (Testimony of Gagnon; R.Ex. 2)

11. Upon execution of the MOA, the Chief posted notice of the assessment center on the fire station bulletin board, informing el-

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

3. Respondent's Exhibits (R.Ex.) 1 - 5, 5A and 6 - 10; Appellant's Exhibits (A.Ex.) 1 - 8; and four (4) exhibits submitted separately by the Appellant post-hearing (in addition to the documents attached to the Appellant's post-hearing brief) (A.Post. Hrg): A - 2015 Investigation Request by Appellant and others; B - Purchase Order of Hats; C - Appellant's 2014 Sick Leave Grievance (5 pages); D - Letters of FFs Dingle and Chapman. The Respondent received such post-hearing submissions and made no comments thereon. As with all evidence, the exhibits are given the weight they are due.

4. In 2015, the Appellant and other members of the IFD submitted a request asking the Commission to conduct an investigation, alleging that the Town was going to conduct a promotional assessment center, in lieu of a civil service promotional exam, without first pursuing a delegation agreement with the state Human Resources Division (HRD). The Commission concluded, "[s]ince the Town has decided to postpone the administration of the assessment center until such time as it receives the appropriate approvals from HRD, there is no need for the Commission to initiate an investigation. For this reason, the request for investigation is denied and this matter is closed." (Request of Gary Chapman and nine (9) others to Investigate the Town of Ipswich, 28 MCSR 540 (2015). As indicated here, the Town had concluded the appropriate delegation agreement with HRD prior to pursing an assessment center.

igible employees of the examination scheduled for November 15, 2016. (Testimony of Gagnon; R.Ex. 2)

12. The Assessment Center, the exercises for which were designed and administered by MMA, was conducted on November 15, 2016. (Testimony of Gagnon; R.Ex. 4)

13. The Center consisted of evaluation of managerial capabilities through scenario questions, presentations, and situations involving employee issues. (Testimony of Gagnon)

14. Chief Gagnon was not present at the assessment center and was not involved in planning for the center. (Testimony of Gagnon)

15. At the conclusion of the assessment center, MMA sent a listing of the seven (7) candidates who participated, ranked by their performance, to the state's HRD and the Town's Human Resource Director. (R.Ex. 4; Testimony of Gagnon) This listing constituted the eligible list for the promotional appointment. (R.Ex. 4) The candidates were ranked as follows for their performance on the assessment center:

1 Candidate A

2 (tie) Candidate B

2 (tie) Appellant, a member of the union executive board

4 Candidate C

5 Candidate D, a member of the union executive board

6 Candidate E

7 Candidate F, a member of the union executive board

(*Id.*)

16. Since the IFD wanted to make two (2) Lieutenant promotions, it considered the first five (5) firefighters on the listing, including the Appellant. (Testimony of Gagnon; R.Ex. 3)

17. The Town, pursuant to the terms of the MOA it had entered into with the Union, then conducted separate oral interviews of the five (5) candidates. (Testimony of Gagnon; R.Ex. 2)

18. All interviews were conducted by the interview board on March 6, 2017. (Testimony of Gagnon; R.Ex. 5)

19. The oral interview board (board) consisted of the following seven (7) individuals: Town Manager Robin Crosbie; Human Resources Director, Jennifer Breaker; Chief Gagnon; Mark Morse, President of MMA Consulting Group, Inc. (MMA); and three (3) others selected by MMA: Dennis Fire Chief, Mark Dellner; Wrentham Fire Chief, Mark Pare; and former Framingham Fire Chief, Gary Daugherty. (Testimony of Gagnon; R.Ex. 5)

20. All candidates were asked the same questions by the board, and the board utilized a scoring document to rate each candidate's performance immediately after his interview. The Town's Human Resources Director took notes of the group's observations and recorded these on an evaluation criteria sheet. (Testimony of Gagnon; R.Ex. 5)

21. Each interview lasted between ten (10) and twenty (20) minutes, and an audio recording was made of all of the interviews except the interview of Candidate B.[5] (Testimony of Gagnon)

22. During his interview, the Appellant provided unfocused and erratic answers to the questions asked of him, at times making questionable statements that were not responsive to the questions asked. (Testimony of Gagnon; R.Exs. 5 and 5A)

23. For example, when asked about his relevant experience, the Appellant began telling a childhood story about being on a farm and stated that he had various family members who worked in various law enforcement jobs. Similarly, the Appellant stated during the interview that he should be the Chief of the Department, which was not relevant or responsive to any portion of the interview. Moreover, the board found the latter statement to be inappropriate. The board also concluded that the Appellant's performance during the interview was self-centered in that he repeatedly talked about various mechanisms that he had worked on in the Department, of his own choosing, and about the one-on-one help or guidance he had provided to individual new members of the IFD. (Testimony of Gagnon; R.Exs. 5 and 5A)

24. The Chief found that the Appellant's responses did not reflect someone who was focused, clear and concise. The Appellant's answers included references to peripheral subjects not germane to the Lieutenant position for which he was being interviewed. (Testimony of Gagnon; R.Exs. 5 and 5A)

25. Candidate D, who was ultimately selected despite his lower rank on the Certification, provided confident, direct and strong responses to questions posed during his interview. He displayed a strong understanding of the role of a lieutenant as a group leader and the associated duties, demonstrating a disciplined approach to the position, and he presented as a professional who is competent to hold a leadership position within the IFD. (Testimony of Gagnon; R.Exs. 5 and 5A)

26. At the conclusion of each interview, the seven (7) members of the board discussed the candidate's performance based on the following four (4) evaluation criteria: communication, supervision, teamwork, and technical competence and together they determined each candidate's interview score. (Testimony of Gagnon; R.Ex. 5)

27. The seven (7) candidates' scores for a particular category were then averaged, which became the candidate's score for that category. The average scores for each category were then combined for a total score. (Testimony of Gagnon; R.Ex. 5)

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5. Counsel for the Respondent indicated that Mr. B's interview was conducted via online meeting because he was out of the country at the time of the interviews. Counsel advised that the Respondent had been unable to produce an audio recording of the online meeting but indicated that it would attempt to make such a recording and submit it to the Commission. I did not receive such a recording. Candidate B was not selected for promotion.

28. The five (5) interviewed candidates had the following scores:

> Candidate A 35.8
>
> Candidate B 32.7
>
> Appellant 27.4
>
> Candidate C 35
>
> Candidate D 35.5

(R.Ex. 5)

29. In addition to the candidate's total score, the board came to a consensus with regard to its comments on each candidate's overall performance. The Human Resources Director wrote down these comments in the section titled "additional comments" on the candidate's score sheet. (Testimony of Gagnon; R.Ex. 5)

30. On the scoring sheets for each of the candidates, the board commented in writing as follows:

> Candidate A - "Understands position and draws/applies experiences gained through acting officer roles."
>
> Candidate B - "Communicates very well but didn't communicate technical knowledge/capabilities"
>
> Appellant - "Communication was weak and hard to follow. Too self-oriented in answers." (R.Ex. 5)
>
> Candidate C - "Good communication: answers responsive to questions; understands concepts of leadership and teamwork"
>
> Candidate D - "Practical sense of job requirements and understands role of supervisors. Understands teamworks (sic)."

(R.Ex. 5)

31. Prior to making a final promotional decision, Chief Gagnon and the Town Manager reviewed the employment histories of all five (5) candidates. This included a review of each employee's personnel file, including their disciplinary history. (Testimony of Gagnon)

32. At the time of the promotional decision, the Appellant's personnel file contained three (3) disciplinary incidents, including two (2) suspensions and one (1) written warning. (Testimony of Gagnon)

33. The Chief and Town Manager also reviewed the personnel files and disciplinary histories of the other candidates. (Testimony of Gagnon)

34. The review showed that Candidate C had received a verbal warning in 2010 for failing to wear a seatbelt. (Testimony of Gagnon)

35. The review further showed that Candidate D had no disciplinary history. (Testimony of Gagnon)

36. Candidate A, who was ranked higher than the Appellant on the Certification, was suspended without pay for a period of approximately 25 calendar days more than twenty (20) years ago. (Testimony of Gagnon)

37. Based on consideration of these factors, including each candidate's ranking on the Certification, their interview performance and their disciplinary histories, the Town Manager selected Candidates A and D to fill the promotional vacancies, with only Candidate D bypassing the Appellant. (R.Ex. 7; Testimony of Gagnon)

38. On or about March 22, 2017, the Town Manager sent correspondence to the Appellant stating that he had been bypassed for the promotional appointment in favor of a lower-ranked candidate. As grounds for the bypass decision, the Town Manager cited the Appellant's poor interview performance and his disciplinary record within the Department. (R.Ex. 6)

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

40. At the Commission hearing, the Appellant's testimony was difficult to comprehend at times in that his responses to questions were sometimes indirect, missed the mark, or he referenced matters unrelated to the question posed to him. The Appellant did not intentionally refuse to answer questions. Rather, the Appellant's manner of speaking can be confusing. In addition, at times, I needed to convey the meaning of the Appellant's cross-examination questions (more often than usual with other pro se appellants) because the Appellant's questions were unclear. (Testimony of Appellant; Administrative Notice)

APPLICABLE LAW

The authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides, in part:

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

(*Id.*)

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing the civil service competitive examination or an assessment center is not absolute and is subject to review by the Commission. The appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "reasonably thorough review" and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. *See, e.g.*, *Brackett* v. *Civil Service Comm'n*, 447 Mass. 233, 543 (2006) and cases cited; *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182 (2010); and *Commissioners of Civil Service* v. *Municipal Ct.*, 359 Mass. 211, 214 (1971), citing *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928).

In reviewing a bypass decision, "[t]he commission's primary concern is to ensure that the appointing authority's action comports with 'basic merit principles,' as defined in G.L.c.31, §1." *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 688 (2012) citing *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission "finds the facts afresh", and is not limited to the evidence that was before the appointing authority. *E.g*., *Beverly* v. *Civil Service Comm'n*, 78 Mass. App. Ct. 182 (2010); *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003); *Tuohey* v. *Massachusetts Bay Transp. Auth*., 19 MCSR 53 (2006) (appointing authority must proffer "objectively legitimate reasons" for the bypass).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. While the Appellant was tied for second on the Certification, he ranked at the bottom among the five (5) candidates that the Respondent interviewed. I repeatedly and carefully listened to the recorded interviews of the four (4) candidates for whom a recording is available. Although it is problematic that the interviewers collectively scored each candidate, undermining the purpose of having multiple interviewers scoring the candidates individually, the recordings provide the Commission with the opportunity to review the interviews directly. In addition, three (3) members of the board were from other municipalities, giving at least the appearance of a relatively objective assessment of the candidates' interviews.

There is a clear distinction between the interviews of Candidates A and D, whom the Respondent selected, only one (1) of whom bypassed the Appellant, and the Appellant. Both Candidates A and D responded knowledgably, directly, confidently and without hesitation to the questions they were asked at their interviews. In addition, their responses clearly exhibited their leadership abilities, explicitly and promptly indicating how they would respond to various challenges that may arise in supervising IFD personnel. By comparison, the Appellant's responses to the interview questions were sometimes hard to follow, he referenced unrelated topics in response to some questions, he spent considerable time talking about the many mechanical problems he has addressed at the IFD over the many years of his tenure, and he offered little information to show the board that he was ready and able to supervise the IFD firefighters as a Lieutenant. At the Commission hearing, I also found it difficult to comprehend aspects of his testimony and could not follow his train of thought on multiple occasions. A Lieutenant must be able to communicate clearly, quickly and directly with the firefighters, most critically when they are actively fighting fires. While it is clear that the Appellant has many professional skills that he has honed over the many years of his dedicated service to the IFD, the Respondent had reasonable justification to decide that the Appellant's communication skills were not at the level needed to be able to communicate commands effectively, especially in the midst of a fire fight. Lacking sufficient communication skills, a Lieutenant's efforts to lead members of the IFD would be hampered, increasing the risk of harm to the firefighters and the public.

In addition, the Respondent bypassed the Appellant based as he had a disciplinary record at the IFD and Candidate D, the one (1) candidate selected who was named below him, had no disciplinary record.

Finally, the Appellant argues that Candidates A and D were unfairly promoted, alleging that, as members of the union executive board, they were involved in negotiations leading to the Memorandum of Agreement between the union and the Town that provided that interviews would be conducted after the assessment center. However, the Appellant also said that he was a member of the union executive board at the time. There is no indication in the record that some members of the union executive board had access to material that could have given them an unfair advantage in the subsequent assessment center and interviews. The Appellant also questioned the need for interviews. I find nothing in the delegation agreement between the Town and HRD, or the MOA between the Town and the union, that precludes the Town from conducting interviews.

CONCLUSION

For all of the foregoing reasons, the appeal of Mr. McInnis, docketed as G2-17-083, is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

James McInnis
[Address redacted]

Timothy D. Zessin
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110-1109

* * * * * *

Request by: JUSTIN ALBANO & JOSHUA COLBY TO INVESTIGATE THE DECISION BY THE CITY OF MEDFORD TO REDUCE THE NUMBER OF CANDIDATES TO BE APPOINTED AS FIREFIGHTERS FROM CERTIFICATION NO. 04954

I-19-096

July 18, 2019
Christopher C. Bowman, Chairman

***Commission Practice and Procedure-Request for Investigation-Reduction in the Number of Medford Firefighters to Be Appointed From Certification-Political Influence-Nepotism-Appointment of Mayor's Son*—**Commission Chair Christopher C. Bowman declined to initiate an investigation into the reduction in the number of Medford firefighters appointed from an eligibility list after two candidates claimed they had been disadvantaged because of nepotism. The two appellants claimed that the City's decision to only appoint 11 rather than 13 candidates from a 2018 list was to favor the candidacy of the Mayor's son, who had scored highly on a more recent eligibility list. Chairman Bowman found that the reason that Medford had appointed fewer candidates than anticipated was due to scheduling issues and incomplete background investigations rather than any favoritism for the Mayor's son.

RESPONSE TO REQUEST FOR INVESTIGATION

On April 19, 2019, the Petitioners, Joshua Colby and Justin Albano (Petitioners), filed a Petition with the Civil Service Commission (Commission), asking the Commission to exercise its discretion under G.L. c. 31, s. 2(a) to initiate an investigation into the City's November 7, 2018 decision to reduce the number of firefighters to be appointed from Certification No. 04954, which was set to expire on November 30, 2018, from 13 to 11.

2. On April 30, 2019, I held a Show Cause Conference at the offices of the Commission which was attended by the City's Mayor, co-counsel for the City; the Petitioners; their counsel; and counsel for the state's Human Resources Division.

3. As part of the show cause conference, I reviewed a timeline prepared by the City, heard argument as to why an investigation is not warranted; and then heard argument from the Petitioners why an investigation is warranted.

4. The following was not disputed, unless otherwise noted:

A. The Petitioners were tied for 20th on Certification No. 04954

B. As of November 7th, the City had already selected eleven (11) out of a maximum thirteen (13) candidates, including at least one (1) candidate ranked in the 19th tie position.

C. According to the City, the Fire Chief was recommending that two (2) of the candidates ranked in the 20th tie position (only one of whom is a Petitioner) be appointed.

D. Appointing candidates in the 20th tie position would result in a bypass of at least one candidate ranked 19th.

5. At the show cause conference, the City argued that the decision to not appoint any candidate in the 20th tie position was solely related to time constraints related to the pending expiration of the list (November 30th); vacation schedules; and the need to do a thorough review regarding whether the City had sufficient reasons to bypass candidate(s) ranked in the 19th tie group, which the City argued could not be completed by the November 30th deadline.

6. The Petitioners argued that the Commission should review whether the City's decision was related to the fact that the scores for the new eligible list (to be established December 1st) were released on October 30th and the Appointing Authority's son received a high score, which could potentially place him in a relatively high position on the new eligible list that was eventually established on December 1st, 2018.

7. Prior to determining whether an investigation was warranted, I requested the following information:

I. An affidavit from the City's Fire Chief, who was unavailable to attend the show cause conference, regarding any discussions, emails, text messages, correspondence, etc. between himself, the Mayor and any other individuals regarding his initial recommendation to appoint two (2) candidates from the 20th tie group and the subsequent decision to appoint 11, as opposed to 13 candidates from the eligible list that expired on November 30th.

II. Any correspondence, including, but not limited to: letters, emails, text messages, etc. from / to the Mayor directly or indirectly related to the decision to appoint 11, as opposed to 13 candidates, from the eligible list that expired on November 30th.

III. Upon submission of such information, the Petitioners had ten (10) days to submit a reply, both to the information, and the City's prior submission, explaining why an investigation by the Commission, in their opinion, is warranted.

8. I subsequently received: a) the affidavit of the City of Medford's Fire Chief; and b) the Position Statement of the Petitioners.

9. Based on a review of the record as of that point, there was insufficient information for me to determine whether "time constraints" (related to the review of candidates to be bypassed) was the primary reason for reducing the total number of candidates to be appointed from Certification No. 04954 from 13 to 11 on November 7, 2018.

10. In order to obtain additional information, I scheduled a status conference and asked the City to make available any persons who could address: a) whether the City's Appointing Authority, at the time, did (or did not) reference time constraints as a reason for reducing the number of candidates to be appointed from 13 to 11; b) the process used to review bypass reasons in May 2018, including the amount of time required by the Appointing Authority regarding that review.

11. Further, I asked the Petitioners and the City to provide the Commission with any information regarding whether the Petitioners (or the other candidate recommended by the Fire Chief in November 2018) had any personal or family connections to any person employed by the City.

12. On June 25, 2019, I held a status conference that was attended by the City's Mayor, co-counsel for the City; the Petitioners; their counsel; and the City's Fire Chief at which time I received responses to the above-referenced issues.

APPLICABLE CIVIL SERVICE LAW AND RULES & 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).

After careful review and consideration of the entire record in this matter, I have concluded that an investigation is not warranted.

It is undisputed that the name of the Mayor's son appears on the current eligible list for Medford firefighter, established on December 1, 2018. It appears that the Mayor has taken all appropriate actions to fully recuse herself from any future hiring cycles in which her son could be a candidate.

The issue here is whether, *prior to the establishment of the eligible list*, on November 7, 2018, the Mayor took action that could potentially benefit her son, to the detriment of the two (2) Petitioners.

As part of the status conference, the Fire Chief walked through the well-established process for reviewing firefighter candidates in Medford which includes: a) the Fire Chief's detailed review of each candidate's employment application; b) the Fire Chief developing a list of questions about each candidate that he would like addressed in the background investigation, in addition to the standard background questions; c) completion of background investigations by the Medford Police Department, including recorded interviews; d) review of the background investigations by the Fire Chief; and e) Fire Chief makes recommendations to the Mayor regarding the appointment of candidates.

When the Fire Chief met with the Mayor on November 7, 2018 and recommended the appointment of one of the Petitioners and one other candidate, the Medford Police Department had not completed the background investigations of the candidates and, thus, the Fire Chief had not completed his normal review of those background investigations. In fact, it is unclear whether the Fire Chief, at any point prior to the expiration of the eligible list on November 30, 2018, ever had the opportunity to review the background investigations of all the firefighter candidates.

It would have been inappropriate for the Mayor to make any appointments prior to the completion of the background investigations, particularly considering that the appointment of the candidates recommended by the Fire Chief would have resulted in a bypass of higher ranked candidates, which requires sound and sufficient reasons by the Appointing Authority. Her decision not to go forward with the full complement of appointments that had been authorized from the prior eligible list was justified. Further, after a careful review of all the information presented, including the statements of the Mayor who voluntarily appeared before the Commission on two (2) different occasions regarding this matter, I do not believe that her decision here was based on any personal or political reasons.

For these reasons, I have concluded that an investigation by the Commission is not warranted and this matter, docketed under Tracking No. I-19-096, is closed.

* * *

By a 4-0 vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Not Participating]) on July 18, 2019.

Notice to:

Jillian Ryan, Esq.
Pyle Rome
2 Liberty Square: 10th Floor
Boston, MA 02351

Mark E. Rumley, Esq.
Kimberly Scanlon, Esq.
City of Medford Law Department
85 George P. Hassett Drive
Medford, MA 02155

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street: Suite 600
Boston, MA 02114

* * * * * *

ENXHI QIRICI

v.

BOSTON POLICE DEPARTMENT

D1-19-088

July 18, 2019
Christopher C. Bowman, Chairman

Commission Practice and Procedure-Motion for Reconsideration-Terminated Probationary Police Officer-Lack of Tenure—A probationary candidate with the Boston Police Department could not contest her termination before the Commission where she was terminated several weeks before the expiration of the one-year probationary period. Commission Chair Christopher C. Bowman styled this appeal as a Motion for Reconsideration after the Appellant's attorney had asked the appeal to be dismissed.

DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION

On April 10, 2019, the Appellant, Enxhi Qirici (Ms. Qirici), filed an appeal with the Civil Service Commission, contesting the decision of the Boston Police Department (BPD) to terminate her employment on March 28, 2019. Attached to the appeal form was a notice of appearance from Ms. Qirici's counsel at the time, along with a personal check from Ms.Qirici for the $50.00 filing fee.

2. On April 11, 2019, the Commission notified counsel for the parties that a pre-hearing conference would be held at the offices of the Commission on May 7, 2019 at 10:30 A.M.

3. On May 7, 2019 at 9:47 A.M., Ms. Qirici's counsel at the time sent an email to the Commission stating:

> "Good Morning,
>
> Per my discussion with Ms. Diaz yesterday, please allow this email to serve as notice of Ms. Qirici's voluntary dismissal of her above titled matter before the Civil Service Commission. If you require additional document(s) memorializing this, please let me know. In the meantime, you may remove this matter for the previously scheduled pre-hearing conference.
>
> Thank you for your time and attention to this matter."

4. That same day, at 10:30 A.M., counsel for the BPD appeared at the offices of the Commission and submitted a notice of appearance. Based on the email communication from Ms. Qirici's counsel, and the failure of either Ms. Qirici or her counsel to appear, the pre-hearing did not go forward.

5. Later that day, at 12:53 P.M., I sent an email to Ms. Qirici's counsel at the time, copied to the BPD, stating:

> "Received.
>
> An Order of Dismissal will enter based on the Appellant's voluntary withdrawal of the appeal.
>
> Chris Bowman"

6. On May 9, 2019, the Commission voted to dismiss Ms. Qirici's appeal based on her voluntary withdrawal. Notice of the dismissal was sent to Ms. Qirici's counsel at the time and counsel for BPD the same day via email. The "read receipt" indicates that the email, with the attached dismissal, was read by Ms. Qirici's counsel at the time on May 9, 2019 at 5:20 P.M.

7. The May 9, 2019 decision dismissing Ms. Qirici's appeal, along with the cover email, included language detailing the process and time frame for filing a motion for reconsideration with the Commission and/or an appeal with the Superior Court.

8. On June 14, 2019, the Commission received the following email from Ms. Qirici:

> "Dear Mr. Bowman:
>
> Two days ago, I called and spoke with Ms. Diaz, cc-ed here. I called to insure (sic) about the status of my case. I was informed that the case was closed because my previous attorney had communicated so to the Commission. I was shocked and surprised. Ms. Diaz instructed me to write this email and submit this email and submit whatever request / relief I believe to be appropriate. I am doing so now.
>
> I respectfully request that the matter I filed with the Commission be re-instated to the docket. I hired [former attorney] to represent me in front of the Commission. The case was timely filed, and the proper fee was paid. Due to some miscommunication and misunderstanding, [former attorney] conveyed to the Commission that the case should be closed/withdrawn. This was made in error due to the previously mentioned miscommunication and misunderstanding. I am happy to submit an affidavit to that extent by [former attorney], as he no longer represents me going forward. I intend on retaining different counsel.
>
> I pray that you grant my request. Apart from the matter having been timely filed and the fee having been paid, BPD has not suffered any prejudice or harm and would not suffer such harm by the reinstatement.
>
> Please understand that this is my only course of remedy. Without it, I am left without a fair hearing and without any due process."

9. On June 17, 2019, I issued a reply email to Ms. Qirici and counsel for the BPD stating that I would treat the June 14th email as a motion for reconsideration, allowing the BPD ten (10) days to file a reply.

10. On June 25, 2019, the BPD filed a response to Ms. Qirici's motion for reconsideration, arguing that the motion for reconsideration was untimely filed and, more substantively, that Ms. Qirici, at the time of her termination, was a probationary employee with no right to appeal her termination to the Commission.

11. On July 3, 2019, Ms. Qirici's new (current) counsel submitted a reply to BPD's opposition, effectively arguing that Ms. Qirici was a tenured employee at the time of her termination (March

28, 2019), given that she ***began attending the Boston Police Academy*** on September 11, 2017. Alternatively, Ms. Quirici argues that, even if she was not a permanent, tenured civil service employee, she has the right to appeal "punishment duty" pursuant to G.L. c. 31, s. 62.

12. Subsequent to receiving Ms. Qirici's reply, I forwarded an email to both parties to confirm the date that she graduated from the Boston Police Academy and the date that she was sworn in as a Boston Police Officer.

13. Counsel for Ms. Qirici confirmed that Ms. Qirici "graduated and took the oath" on April 10, 2018.

APPLICABLE LAW / RULES / POLICIES

G.L. c. 31, § 34 states in relevant part:

> "During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.
>
> …
>
> If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period.
>
> If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.
>
> If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as a tenured employee until he has served a full probationary period or the remainder thereof, as the case may be, following the termination of said educational leave and his commencing of or return to employment.
>
> The probationary period of an employee shall not be deemed to be interrupted by his temporary appointment pursuant to section six to a position in a higher title in the same departmental unit, by his temporary promotional appointment pursuant to section seven, or by his provisional promotion pursuant to section fifteen."

G.L. c. 31, § 41 states in relevant part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two."

G.L. c. 31, § 61 states:

> "Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a 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 shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters."

HRD POLICY

Pursuant to a memorandum from the state's Human Resources Division (HRD) dated March 21, 2003 , " … a police officer's twelve-month probationary period begins upon successful completion of the police academy and allowed to perform the duties of a police officer."

ANALYSIS

The above-referenced HRD memorandum clearly states that a police officer's probationary period does not begin until successful completion of the police academy and being actually allowed to perform the duties of a police officer.

In *Patterson* v. *Town of Plymouth*, 21 MCSR 650 (2008), the Commission concluded that Mr. Patterson's probationary period began upon graduating from the Police Academy and being sworn in as a police officer.

In *Board of Selectmen of Brookline* v. *Smith*, 58 Mass. App. Ct. 813, 792 (2003), the Court concluded that time in the Police Academy did not count toward the probationary period.

Consistent with HRD policy and prior Commission and judicial decisions, Ms. Qirici's probationary period did not begin until she graduated from the Police Academy and was sworn in as a police officer on April 10, 2018. Ms. Qirici was terminated on March 28, 2019. Since she had not performed the duties of a police officer for twelve (12) months as of March 28, 2019, she was still a non-tenured probationary employee. Non-tenured probationary employees have no right to contest their termination (or any other discipline, including punishment duty) to the Commission.

For this reason, Ms. Qirici's motion for reconsideration, in which she seeks to re-open an appeal that was dismissed based on a voluntary withdrawal, is ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

Notice to:

Ilir Kavaja, Esq.
Paul Nevins, Esq.
Kavaja Law, P.C.
92 State Street, 8th Floor
Boston, MA 02109

Winifred Gibbons, Esq.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

* * * * * *

STEVEN TOLOCZKO

v.

MassDOT

C-19-086

July 18, 2019
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Appeal from Arbitrator's Decision Under Collective Bargaining Agreement-Civil Engineer with MassDOT—The Commission dismissed for lack of jurisdiction an appeal from a MassDOT engineer unhappy with an arbitrator's decision that went against him on a salary issue.

ORDER OF DISMISSAL

On April 8, 2019, the Appellant, Steven Toloczko (Mr. Toloczko), an employee at MassDOT, filed a reclassification appeal with the Massachusetts Civil Service Commission (Commission).

2. On April 30, 2019, I held a pre-hearing conference which was attended by Mr. Toloczko and counsel for MassDOT.

3. Prior to the pre-hearing, MassDOT filed a Motion for Summary Decision, arguing that the issues underlying the appeal to the Commission have already been fully litigated and resolved by an arbitrator.

4. At the pre-hearing, the parties stipulated to the following:

A. The Appellant, while serving as a Civil Engineer III, filed a request for reclassification to CE IV on December 13, 2013.

B. The Appellant was promoted to the position of CE IV on December 28, 2015.

C. In regard to the time period 12/13/13 - 12/28/15, the Appellant filed a grievance which covered this time period, arguing that he was working in a higher grade without additional compensation.

D. The union, on the Appellant's behalf, filed for arbitration upon the denial of their grievance.

E. On November 14, 2016, an arbitrator issued a decision denying the Union's grievance.

F. The arbitrator's decision addresses the duties and responsibilities performed by the Appellant between 12/13/13 and 12/28/15, the time period that is the subject of the instant appeal before the Commission.

5. The Appellant does not dispute that the same issues were already litigated and decided by an arbitrator. Rather, the Appellant argues that the arbitrator's decision is wrong and pointed to various findings of the arbitrator that he argues are incorrect. He seeks to bring those issues before the Commission as part of the instant

reclassification appeal and receive a different result than he received via arbitration.

6. MassDOT argues that, since the issues underlying the instant appeal to the Commission are identical to those already decided by an arbitrator, the Commission lacks jurisdiction to hear the appeal.

7. The Appellant had thirty (30) days to respond to MassDOT's Motion for Summary Decision. He failed to submit a reply.

ANALYSIS / CONCLUSION

The Appellant, through his union, opted to litigate his request for reclassification through an arbitrator. He candidly acknowledges that his appeal to the Commission is effectively an appeal of the arbitrator's decision. The Commission is not the proper venue to appeal an arbitrator's decision. As this matter has already been adjudicated by an arbitrator, and for all the reasons cited in MassDOT's Motion for Summary Decision, the Appellant's appeal under Docket No. C-19-086 is hereby ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019..

Notice to:

Steven Toloczko
[Address redacted]

Peter M. Mimmo, Esq.
MassDOT
10 Park Plaza, Suite 3740
Boston, MA 02116

* * * * * *

ERIC D. ANTUNEZ

v.

DEPARTMENT OF CORRECTION

G1-19-083

August 1, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Correction Officer-Employment History-Judgment-Failure to De-escalate a Stressful Situation—The Department of Correction was justified in bypassing a candidate for original appointment as a Correction Officer based on his employment history and military disciplinary record. In addition, DOC was not improperly concerned with his failure to de-escalate a recent potentially violent confrontation with a drunken acquaintance where he pulled out a weapon thereby dangerously escalating the event.

DECISION

On April 3, 2019, the Appellant, Eric Antunez (Mr. Antunez), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on April 30, 2019 at the offices of the Commission and I held a full hearing at the same location on June 14, 2019.[1] The hearing was digitally recorded.[2] Prior to the full hearing, DOC submitted a Motion to Dismiss, stating that the Appellant is "not able to satisfy and maintain the eligibility requirements for obtaining a license to carry a firearm which is a requirement to prior to appointment as a Correction Officer." As this was not a stated reason for bypass, the motion is denied.

FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent;
- Danielle R. Connor, Correction Officer II (CO II), Background Investigator;

Called by the Appellant:

- Eric Antunez, 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.

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. Mr. Antunez is thirty-two (32) years old, married and has two (2) children. He resides in Tewksbury, MA and has an Associate's degree in law enforcement. (Testimony of Mr. Antunez & Exhibit 3)

2. Mr. Antunez served in the Unites States Marines from 2005 to 2013 and has served in the Army Reserves since 2013. He was deployed to Iraq in 2007 / 2008 where he performed basic combat duties and he was deployed to Afghanistan in 2011 / 2012 where he performed security / search duties. He achieved the rank of Corporal E4 in the Marines, before being honorably discharged and currently serves in the rank of E5 Sergeant in the Army Reserves. He has received numerous awards and commendations, including good conduct medals while in the military. (Testimony of Mr. Antunez & Exhibit 3)

3. According to his commanding officer in the Army Reserves, Mr. Antunez is hard working, dependable, gets along with his co-workers, is punctual and does not abuse sick time. (Exhibit 3)

4. While serving in the Marine Corps in North Carolina in 2005, Mr. Antunez sought permission for leave after being informed that his mother was very ill. When told that the process to obtain authorization would take two (2) days, Mr. Antunez left without authorization. Although he learned upon returning home that his mother's medical condition was not as serious as he had been lead to believe, he did not return to his base for twenty-seven (27) days. Mr. Antunez received non-judicial punishment for this unauthorized leave. (Testimony of Mr. Antunez)

5. In 2009, Mr. Antunez, while participating in a firearms training exercise for the Marines, was unaware that his firearm was loaded with live ammunition. Believing that his firearm was loaded with "blank" bullets, he fired the firearm into the air. He was disciplined for this error. (Testimony of Mr. Antunez)

6. For approximately seven (7) years, from 2009 to 2016, Mr. Antunez was employed at a security company in Columbus, Ohio. During his seven (7)-year tenure, he had one (1) minor disagreement with a supervisor regarding whether he (Mr. Antunez) could sit down next to a metal detector when no persons were passing through. As a result, he was transferred to another assignment. (Testimony of Mr. Antunez)

7. For approximately seven (7) months, from 2017 to 2018, Mr. Antunez was employed as a correctional officer in Indiana. He received a written warning for taking a day off when he did not have any earned time off available to him. (Testimony of Mr. Antunez)

8. In November 2015, while living in Ohio, Mr. Antunez was arrested for aggravated menacing. A female friend of Mr. Antunez's girlfriend at the time stayed overnight at their home after reporting to them that she was being abused by her boyfriend. (Testimony of Mr. Antunez)

9. Mr. Antunez and his girlfriend drove the female friend home the next day. (Testimony of Mr. Antunez)

10. According to Mr. Antunez's written statement to DOC:

> "When I arrived, her boyfriend came outside drinking an alcoholic beverage with dried blood on his fist and under his nose, yelling profanities and accusing me of being with his girlfriend. He started approaching my vehicle on the street. I observed him reaching in his pocket for his knife, at the time I un-holstered my weapon, directed it down in his direction and advised him to back away. We were separated by his brother, I holstered my weapon, got back in my vehicle and went to the dead end of the street. I then called police on myself and told them what had occurred." (Exhibit 12)

11. During his testimony before the Commission, Mr. Antunez clarified that he did not actually see a knife, but, rather, the outline of what he believed to be a knife. Mr. Antunez further clarified that he pointed the gun at the man's chest. (Testimony of Mr. Antunez)

12. On April 14, 2018, Mr. Antunez took the civil service examination for CO I and received a score in the 80s. (Stipulated Fact)

13. On October 22, 2018, Mr. Antunez's name appeared ranked 27th on Certification No. 05868, from which DOC ultimately appointed one-hundred sixty (160) candidates as CO Is, one-hundred forty-four (144) of whom were ranked below Mr. Antunez. (Stipulated Facts)

14. DOC bypassed Mr. Antunez for multiple reasons, including, but not limited to: his discipline in the military; the two (2) incidents at his former employers; and the above-referenced incident involving a firearm in Ohio. (Exhibit 2)

15. A DOC background investigator met with Mr. Antunez and provided him with the opportunity to respond to the issues raised in the background investigation, including the opportunity to file a written statement with DOC, which he did. (Exhibit 12)

16. The DOC Commissioner and Human Resources Director met with the person responsible for overseeing background investigations to review the background investigations of all candidates, including Mr. Antunez. The DOC Commissioner and Human Resources Director reviewed the positive and negative aspects of the background investigation of Mr. Antunez and decided to bypass him for appointment as a CO I. (Testimony of Jalette)

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. at 259, citing *Cambridge* v. *Civil Serv. Comm'n.*, 43 Mass. App. Ct. at 304. "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 po-

litical 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*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

By a preponderance of the evidence, DOC has shown that it had reasonable justification for bypassing Mr. Antunez for appointment as a CO I.

First, there is no evidence that the decision to bypass Mr. Antunez was due to political considerations, favoritism or bias. The background investigator gathered the facts in an objective manner and prepared an unbiased summary of her findings that was reviewed by the DOC Commissioner and Human Resource Director. In addition to potential concerns, the summary included numerous positive attributes of Mr. Antunez for DOC to weigh in the decision-making process.

Second, the above-referenced review was sufficiently thorough. The background investigator did not simply conduct a document review, but, rather, personally spoke with former employers, military officials, neighbors, references and Mr. Antunez himself before completing her report. Further, she gave Mr. Antunez the opportunity to submit a written statement addressing any negative issues raised in the background investigation. Also, instead of delegating the decision-making process to subordinates, the DOC Commissioner and Human Resources Director personally reviewed the background investigation of Mr. Antunez, which included both positive and negative information for consideration.

Third, the reasons for bypass were legitimate and reasonable, including DOC's concerns related to the relatively recent 2015 incident in Ohio. Based solely on Mr. Antunez's testimony regarding how that event unfolded, DOC was reasonably justified to question his ability to exercise good judgment when confronted with a stressful situation. Mr. Antunez, at a minimum, dangerously *escalated* a situation, a legitimate concern for DOC officials who rely on front-line correction officers to *defuse* and *de-escalate* stressful situations as part of their daily job duties and responsibilities.

As discussed at the conclusion of the full hearing, nothing in this decision should be viewed as permanently disqualifying Mr. Antunez for appointment as a correction officer. Mr. Antunez has (many) positive attributes, including, but not limited to, his honorable military service which includes tours of duty in both Iraq and Afghanistan. He offered candid, forthright testimony at the hearing and poignantly described his sincere desire to pursue a career in law enforcement. With the appropriate passage of time, Mr. Antunez, assuming he ranks high enough to be considered for appointment, warrants a second look by DOC.

CONCLUSION

Mr. Antunez's appeal under Docket No. G1-19-083 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman—Absent]) on August 1, 2019.

Notice to:

Eric D. Antunez
[Address redacted]

Joseph Santoro
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

* * * * * *

SEYED MATOOFI

v.

DEPARTMENT OF CORRECTION

G1-19-094

August 1, 2019
Christopher C. Bowman, Chairman

***Bypass Appeal-Untruthfulness-Failure to Disclose Imprisonment in Iran-Religious Beliefs-Background Investigation-Relying on Incident Reports After Making a Conditional Offer*—**The Commission unanimously adopted Chairman Christopher C. Bowman's decision that voided the bypass by the Department of Correction of a documented Iranian refugee, passed over for untruthfulness and police incident reports that were filed after Quincy police came to his home at the request of his wife. The decision finds that the Appellant had not been untruthful about his incarceration in Iran for religious reasons and that the Department could not bypass him for the police reports after having made him a conditional offer of employment given that these reports had already been considered and not found problematic.

DECISION

On April 16, 2019, the Appellant, Seyed Matoofi (Mr. Matoofi), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on May 7, 2019 at the offices of the Commission and I held a full hearing at the same location on July 22, 2019.[1] The hearing was digitally recorded.[2]

FINDINGS OF FACT:

Nine (9) exhibits were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent;
- Robert Crowell, Correction Officer I (CO I), Background Investigator;

Called by the Appellant:

- Seyed Matoofi, 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. Mr. Matoofi is thirty-three (33) years old; married and resides in Quincy. (Testimony of Mr. Matoofi & Exhibits 3,6)

2. Mr. Matoofi was born in Iran and lived there until he was 21 years old. He is fluent in English, Persian and Malay. (Exhibit 6)

3. While living in Iran, Mr. Matoofi converted to Christianity at the age of 18. For the next three (3) years, he was subjected to persecution by government officials who visited his home, threw out his bible, slapped him in the face, demanded that he "repent" and, at one point, detained him in a lock-up. (Testimony of Mr. Matoofi)

4. At the age of 21, Mr. Matoofi moved to Malaysia and sought asylum through the United Nations. (Testimony of Mr. Matoofi)

5. While in Malaysia, he was detained (twice) in a detention center, based on his failure to show legal residence. The detentions lasted six months and one year, respectively. Mr. Matoofi described the deplorable conditions he and others endured. (Testimony of Mr. Matoofi)

6. Mr. Matoofi and his wife eventually obtained asylum in the United States. He is now a permanent legal resident and is applying for US Citizenship. His wife speaks limited English. (Testimony of Mr. Matoofi)

7. While living in the United States, he has struggled to obtain employment, in part, because of facial tattoos. For financial reasons, he attempted to remove the tattoos on his own using acid. He experienced painful side effects to the chemicals. (Testimony of Mr. Matoofi)

8. Mr. Matoofi is now currently employed. His current employer described Mr. Matoofi as " … a model employee who is always on time … very mature and has good relationships with co-workers." (Exhibit 3)

9. A prior employer described Mr. Matoofi as "very mature" and "responsible" and that he "was always on time and rarely took a day off". (Exhibit 3)

10. Mr. Matoofi took and passed the civil service examination for CO I on April 14, 2018. (Stipulated Fact)

11. On October 22, 2018, Mr. Matoofi's name appeared on Certification No. 05868 from which DOC ultimately appointed one-hundred sixty (160) CO Is. (Stipulated Fact)

12. Mr. Matoofi was ranked 56th among those willing to accept appointment on Certification No. 05868 and four (4) candidates ranked below him were appointed. (Stipulated Facts)

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.

13. Mr. Matoofi completed an application for employment. The following two (2) questions appear on Page 17 of the application:

- "Do you have any family (including in-laws), relatives that have ever been or is currently incarcerated in ANY Federal, State, or County jail/prison?"
- "Do you have any acquaintance(s) or personal friend(s) who are currently OR have been incarcerated in ANY Federal, State or county jail/prison?"

Mr. Matoofi answered "No" to both questions. (Exhibit 6)

14. DOC completed a background investigation of Mr. Matoofi. (Exhibit 3)

15. As part of the background investigation, the background investigator reviewed two (2) Quincy Police Department Incident Reports from 2015 and 2017. (Exhibits 3,4,5)

16. The 2015 Incident Report indicates that Mr. Matoofi called 911 for mental health-related reasons and was transported to a local hospital where he received care for two (2) days. (Exhibit 5)

17. The 2017 Incident Report indicates that Mr. Matoofi's wife called 911. The report states in part: "Female caller States Her Husband is Having a Mental Issue and Is Trbl Breathing. Language Barrier. Caller States Husband is Outside and Will Not Let Her Take Him to Hospital." The reports goes on to state that, after police arrived, the request for police was "S VOIDED". (Exhibit 4)

18. During a home visit, the background investigator questioned Mr. Matoofi about these two reports. Mr. Matoofi acknowledged to the investigator that, at the time, in 2015, he called 911 because he was depressed and anxious about his longer-than-expected recovery from the acidic burns to his face and provided the background investigator with further details. At no time, however, did Mr. Matoofi intend to harm himself. In regard to the 2017 call, Mr. Matoofi explained to the background investigator that he was experiencing breathing issues which prompted his wife to call 911 and that the reference to a "mental issue" was due to a language barrier. (Exhibit 3)

19. As part of the background interview, Mr. Matoofi signed an "initial interview checklist" that was completed in conjunction with the background investigator. Question 5 on that checklist states: "Have you ever been convicted of a misdemeanor and served time in a jail or House of Correction for said conviction?" Question 6 states: Have you ever been convicted of any crime, which resulted in your being imprisoned?" Mr. Matoofi answered "no" to both questions. (Exhibit 9)

20. On December 13, 2018, the background investigator completed his report. On the final page of the report, the background investigator included: "No criminal history; good driving records" under "Positive Employment Aspects" and then wrote: "No college degree; 2 Police Reports on Mental Health" under Negative Employment Aspects." (Exhibit 3)

21. At some point prior to the conditional offer of employment, Mr. Matoofi took and passed the physical abilities test (PAT), which requires medical pre-clearance. (Testimony of Mr. Jalette)

22. At some point prior to the conditional offer of employment, Mr. Matoofi was interviewed by a panel of DOC employees who deemed him suitable to proceed with the hiring process. (Testimony of Mr. Jalette)

23. The background investigator reviewed his report with Mr. Jalette. (Testimony of Mr. Crowell)

24. On January 11, 2019, DOC provided Mr. Matoofi with a conditional offer of employment. (Exhibit 7)

25. On January 29, 2019, Mr. Matoofi completed a psychological evaluation. The cover letter accompanying the report, provided to DOC that same day, stated in relevant part: "This letter is to confirm that Seyed Matoofi **does** possess the psychological qualifications for the position of Correction Officer for the Massachusetts Department of Correction." (emphasis in original) (Exhibit 8)

26. The psychological report, which accompanied the cover letter, stated in part:

> "His refuge (sic) status may make him sensitive to the 'outsider' position of inmates. He has been persecuted, questioned, prohibited from schooling, and has been detained as a part of the immigration process. He was imprisoned for a year in Malaysia, (not for a crime), described it as a 'horrible detention center'."(Exhibit 8)

27. Prior to receiving the results of the above-referenced psychological report, Mr. Jalette met with the DOC Commissioner to discuss Mr. Matoofi's candidacy. The DOC Commissioner was primarily concerned with the 2015 and 2017 calls to 911 and wanted to hold off on any decision until DOC received the results of the psychological evaluation. (Testimony of Jalette)

28. Mr. Jalette had a follow-up meeting with the DOC Commissioner after DOC received the results of the psychological evaluation. Based primarily on concerns related to the 2015 and 2017 incident reports, DOC decided to bypass Mr. Matoofi for appointment. (Testimony of Jalette)

29. On March 7, 2019, DOC notified Mr. Matoofi that he was being bypassed for appointment. The reasons for bypass in the March 7, 2019 letter were:

> "Background investigation: Failed background due to police reports and failure to disclose imprisonment in Malaysia; specifically on 6/13/2015 Quincy Police responded at your request for a well-being check, on 02/06/17 Quincy Police were called to your home for a similar issue; additionally, you failed to disclose to the background investigator that you were imprisoned for a year in Malysia, this fact was only disclosed during a physiological (sic) exam."

(Exhibit 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. at 259, citing *Cambridge* v. *Civil Serv. Comm'n*., 43 Mass. App. Ct. at 304. "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*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

This bypass was not justified for the reasons discussed below.

First, *after* providing Mr. Matoofi with a conditional offer of employment, DOC then bypassed him, in part, for reasons DOC was aware of prior to making the conditional offer. Specifically, DOC was aware that, in 2015 and 2017, Quincy Police responded to Mr. Matoofi's home based on reports of mental health issues. Mr. Matoofi provided a detailed explanation to the background investigator regarding these calls; the background investigator included all of this information in his report; and DOC then granted him a conditional offer of employment.

In *Police Dep't of Boston* v. *Kavaleski*, 463 Mass. 680, 682 fn.5 (2012), the SJC stated, that:

> "to comport with the requirements of the Massachusetts antidiscrimination law, G.L. c. 151B, § 4 (16), and provisions of the Americans with Disabilities Act, 42 U.S.C. § 12112(d) 2006, an employer may not conduct medical or psychological testing prior to making an offer of employment, but may condition an offer of employment on the successful completion of testing."

In *Police Dep't of Boston* v. *Kavaleski and Civ. Serv. Comm'n and Kavaleski* v. *Reade and City and City of Boston*, Suffolk Sup. Crt. No. 09-4978-C (consolidated cases)(August 14, 2014), the Superior Court stated, that:

> "... Apart from this footnote [fn.5 in SJC decision in *Kavaleski*, *supra*], there does not appear to be any Massachusetts case law on this issue. The MCAD guidelines do offer some guidance, however. MCAD Guidelines at V(B). *See Dahill*, 434 Mass. at 239 ('The guidelines represent the MCAD's interpretation of G.L. c. 151B, and are entitled to substantial deference even though they do not carry the force of law.') Specifically, the Guidelines provide as follows: 'An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information. MCAD Guidelines at V(B)."

Applied here, DOC cannot, after granting Mr. Matoofi a conditional offer of employment, then bypass him based on the information in the police incident reports, as it was part of a background investigation completed prior to making the conditional offer.

Second, those police incident reports are not related to any wrongdoing by Mr. Matoofi. Rather, they plainly relate to ***medical*** issues. Thus, they should not be considered by DOC as a part of a background investigation of non-medical information. The fact that Quincy Police, as opposed to or in addition to Quincy EMS, responded to the call, does not give DOC license to question a candidate about ***medical-related*** issues prior to granting him a conditional offer of employment. Applied here, such a practice could lead to a chilling effect that discourages those in need of mental health services at the time from seeking assistance.

Third, regardless of whether and when DOC was permitted to consider these medical-related issues, the mental health professionals who evaluated Mr. Matoofi during the hiring process in 2019 told DOC that: "Seyed Matoofi **does** possess the psychological qualifications for the position of Correction Officer for the Massachusetts Department of Correction."

That leads to the other reason that DOC used to bypass Mr. Matoofi: his alleged untruthfulness for failing to notify DOC that he was "imprisoned" in Malaysia. The word "imprisoned" was first used in the report filed by the mental health professional who conducted Mr. Matoofi's psychological evaluation and stated that Mr. Matoofi had been " … persecuted, questioned, prohibited from schooling, and has been detained as a part of the immigration process. He was imprisoned for a year in Malaysia, (not for a crime)" and that Mr. Matoofi described the facility as a "horrible detention center".

DOC used this statement from the mental health professional to conclude that Mr. Matoofi " "fail[ed] to disclose imprisonment in Malaysia". The only questions posed to Mr. Matoofi that are arguably related to this topic are the following:

- "Do you have any family (including in-laws), relatives that have ever been or is currently incarcerated in ANY Federal, State, or County jail/prison?"
- "Do you have any acquaintance(s) or personal friend(s) who are currently OR have been incarcerated in ANY Federal, State or county jail/prison?"
- "Have you ever been convicted of a misdemeanor and served time in a jail or House of Correction for said conviction?"
- "Have you ever been convicted of any crime, which resulted in your being imprisoned?"

The first two (2) questions do not reference the applicant. The second two (2) questions ask about being incarcerated *after being convicted of a crime*. There is no evidence that Mr. Matoofi was ever convicted of a crime. Yet, DOC, without even consulting with Mr. Matoofi, used this statement from a mental health evaluation to conclude that he was untruthful. DOC's conclusion here is even more troubling when viewed in the proper context. Mr. Matoofi has met the high bar to qualify for asylum, proving that he fled Iran due to religious persecution. The personal, harrowing account of his years-long struggle for freedom, which ultimately led him to Quincy, Massachusetts, the birthplace of John Adams and John Quincy Adams, would leave most people awestruck. In that context, it is difficult to understand DOC's subjective and *unsupported* conclusion that Mr. Matoofi was untruthful regarding an aspect of this ordeal.

Labeling a candidate as untruthful can be an inherently 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. (*See Morley* v. *Boston Police Department*, 29 MCSR 456 (2016) (Based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that Mr. Morley, a federal police officer and a disabled veteran who had been deployed on active duty overseas on four occasions, was untruthful.)

Conclusion For all of the above reasons, DOC has failed to show, by a preponderance of the evidence, that there was reasonable justification to bypass Mr. Matoofi for appointment as a CO I. His appeal under Docket No. G1-19-094 is hereby ***allowed***.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the following relief is ordered:

1. HRD shall place the name of Seyed Matoofi at the top of any current or future certification for appointment of CO I at DOC until he is appointed or bypassed.

2. DOC shall not use the reasons cited in this bypass in any future hiring cycles.

3. If appointed, Mr. Matoofi shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 05868. This retroactive date is for civil service seniority purposes only, and is not meant to entitle the Appellant to any additional compensation or benefits, including creditable time toward retirement.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman—Absent]) on August 1, 2019.

Notice to:

Seyed Matoofi
[Address redacted]

Joseph Santoro
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

DANIEL OTERO

v.

CITY OF LOWELL

G2-14-301

August 1, 2019
Cynthia A. Ittleman, Commissioner

Commission Practice and Procedure-Remand From Judiciary-Promotional Bypass-Retroactive Seniority Date-Placement of Candidate at Top of List—On remand from the Superior Court, the Commission voted to order the placement of the Appellant's name at the top of the promotional list for sergeant but declined to apply a retroactive seniority date, citing case law allowing retroactivity only for original appointments.

DECISION ON REMAND

By decision dated October 27, 2016 in this matter [29 MCSR 519], the Civil Service Commission (Commission) denied the appeal of Mr. Daniel Otero (Appellant), in which the Appellant contested the decision of the City of Lowell (Respondent) to bypass him for promotion to Sergeant. The Appellant appealed the Commission's decision.[1] *Daniel Otero* v. *City of Lowell and Civil Service Commission*, Suffolk Superior Court No. 1681CV03429. On March 18, 2019, the Court (Wilkins, J.) vacated the Commission's decision, finding that G.L. c. 31, s. 27 and Personnel Administrator Rule (PAR).08(4) require an appointing authority to "immediately" notify the state's Human Resource Division (HRD) in writing of the reasons for bypassing a candidate upon its determination to bypass a candidate and that the Respondent did not timely prepare such a writing until the prehearing conference was held at the Commission in response to the Appellant's appeal. Having failed to prepare such writing in a timely manner, the Court further found, the bases for bypass provided by the Respondent were not admissible at the Commission, necessitating vacating of the Commission's decision. The Court went on to address the substantial evidence issue in the case to avoid remanding the matter to the Commission in that regard, stating,

> … the court's alternative holding is that, if the belated letter in fact represents the real reasons for the bypass, then substantial evidence exists to support those reasons and the bypass itself.
>
> The proper remedy in this situation is apparent (though ultimately for the Commission to decide): to require the City to place Otero's name first on the next certification for list for promotion to Sergeant. This remedy grants Otero the protections afforded by statute and regulation for any promotional decision, while avoiding injury to innocent third parties … It is the alternative remedy proposed by the City to the Commission … It is a remedy requested by Otero at the hearing in this court. It preserves the City's authority over promotions and is even consistent with the testimony that the City may consider Otero for future promotional opportunities. Overall, placing Otero's name at the top of the next list of eligible candidates for promotion best implemented the statute and regulation, with the least detriment to all the parties. …

(*Id*. at 14)(citations and footnote omitted)

In response to the Court's remand, the Commission conducted a status conference on June 24, 2019 to hear the parties' comments on the Court's ruling and their suggested remedies At the status conference, the parties acknowledged the Commission's discretion in preparing remedies and the parties were afforded the opportunity to submit their brief recommended remedies in writing by July 17, 2019. On July 17, I received the parties' written recommendations for a remedy. While both parties agree with the Court that the appropriate remedy here would be to place the Appellant's name at the top of the next certification, their agreement ends there.

The Appellant avers that in addition to having his name placed at the top of the next certification, if and when he is promoted, the Commission should order a retroactive civil service seniority date. The Respondent, citing *Bergeron* v. *Town of Falmouth and Human Resources Division*, 29 MCSR 546 (2016), argues that retroactive dates only apply in successful bypass appeals involving original appointments, not promotions.

The Commission noted in *Bergeron*, *supra*, that retroactive seniority is no longer afforded in successful promotional bypass appeals. Specifically, the Commission noted therein,

> [a] promotional bypass appeal is different from an appeal from the bypass of an original appointment. The Commission does order that a candidate for original appointment to a civil service position who was unlawfully bypassed, if later appointed, be given a retroactive civil service appointment date equal to the same appointment date the candidate would have received had that candidate not been bypassed, because the civil service seniority rights (for purposes of 7 layoffs, etc.) turns on an employee's initial appointment date. In the case of a promotional appointment, however, there is no corresponding statutory relevance to the effective date of the promotion for civil service law purposes, as distinguished from the rights, if any, under other laws, such as shift bidding or vacation time prescribed by a collective bargaining agreement). *See, e.g., Town of Dedham* v. *Dedham Police Ass'n*, 46 Mass. App. Ct. 418 (1999), *rev.den*., 429 Mass. 1109 (1999). *See also Sarmento* v. *Town of Carver*, 28 MCSR 249 (2015); *Schifone* v. *Town of Stoughton*, 27 MCWR 543 (2013) (retroactive appointment date does not provide right to retroactive pay or benefits); and *Michel* v. *City of Waltham*, 24 MCSR 452 (2011) (retroactive seniority date applies to civil service

1. At or about the same time as the instant appeal, Mr. Otero (Appellant) appealed the decision of the City of Lowell to suspend the Appellant for five (5) days for conduct unbecoming an officer. The Commission denied the Appellant's disciplinary appeal. (*Otero* v. *Lowell*, 29 MCSR 512 (2016)) The Appellant appealed the Commission's decision and the Court (Wilkins, J.) affirmed the Commission's decision. *Otero* v. *Civil Service Commission*, Suffolk Superior Court No. 16-3751-D) The five (5)-day suspension was one of the reasons the Respondent bypassed the Appellant for promotion.

> rights only and does not affect credible service for retirement purposes) ….

(*Id.*)(citation omitted)[2]

Although the Appellant cites the Commission's decision in *Smith* v. *Town of Billerica*, 31 MCSR 400 (2018), to assert that retroactive seniority (for civil service purposes only) may be ordered in successful promotional bypass cases, his reliance is misplaced. While the Commission mentioned retroactive seniority in *Smith*, the Commission did not order such relief for Mr. Smith.

CONCLUSION

Based on the foregoing, pursuant to the Commission's powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the state Human Resources Division, or the City in its delegated capacity, is ordered to place the name of Daniel Otero at the top of the next certification for the position of police sergeant in the Lowell Police Department.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman-Absent]) on August 1, 2019.

Notice to:

Gary G. Nolan, Esq.
Noland Perroni Harrington, LLP
133 Merrimack Street
Lowell, MA 01852

Kenneth Rossetti, Esq.
Rachel M. Brown, Esq.
City of Lowell Law Department
375 Merrimack Street, 3rd Floor
Lowell, MA 01852

Michael Downey, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

2. In *Bergeron*, the Commission further noted that it previously understood that, "the 'date of promotion' would be relevant to computing the time required to serve in a position for purposes of defining eligibility to sit for the next higher title's promotional examination, but that potential was subsequently eliminated by the paradigm established by the judicial decision in *Weinberg* v. *Civil Service Comm'n*, 72 Mass. App. Ct. 535, *rev.den*., 452 Mass. 1110 (2008). *See generally*, *Dickinson et al* v. *Human Resources Div*., 24 MCSR 200 (2011)(date name appears on a certification is now what measures time required to be eligible to sit for promotional exam)." *Bergeron* v. *Town of Falmouth and Human Resource Division*, 29 MCSR 546 (2016).

BONNIE CURRAN

v.

MEDFORD HOUSING AUTHORITY

D1-17-056

August 15, 2019
Paul M. Stein, Commissioner

Disciplinary Action-Termination of Section 8 Coordinator by the Medford Housing Authority-Bias-Lack of Evidence—On the recommendation of Commissioner Paul M. Stein, the Commission vacated the termination of a Section 8 coordinator working for the Medford Housing Authority, finding that Medford had failed to prove that the Appellant's misconduct had been the effective cause of the resignation of two other employees. The Commission also found that the City's reliance on her prior disciplinary record as a justification for her termination lacked evidentiary support as her prior superior had been biased against her because he feared her reputation as a whistle blower unafraid to bring complaints against management.

DECISION

The Appellant, Bonnie Curran, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.121B,§29 & G.Lc.31,§43, from a decision of the Medford Housing Authority (MHA) discharging her from her position as Leased Housing Specialist.[1]

The Commission held a pre-hearing conference in Boston on March 20, 2017 and held a full hearing at that location, which was digitally recorded,[2] on September 19 & 26, 2017 and October 19, 2017. The full hearing was declared private, with witnesses sequestered. Thirty-nine (39) exhibits were received in evidence at the hearing (JExhs.1-22; AppExhs.14-19, 21-24, 26, 28 & 32-35).[3] Three post-hearing exhibits were received and marked AppPHExh.37, JPHExh.23 & JPHExh.24. The Commission received Proposed Decisions on December 18, 2017.

FINDINGS OF FACT

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

Called by the MFA

- Kathy Fortier, MHA Assistant Director
- Ann Marie Moglia, MHA Leased Housing Director

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.

- Delores Ross, now Delores Brogan, former MHA Leased Housing Specialist
- Kathy Rolli, former MHA Leased Housing Specialist
- John Coddington, former MHA Executive Director
- Kathy Mpelkas, MHA Leased Housing Specialist
- Sam Piri, MHA Leased Housing Specialist

Called by the Appellant

- Bonnie Curran, Appellant
- Lorraine McGrath, former MHA employee

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. MHA is a municipal corporation established under Mass. G.L.c.121B to serve low- and moderate-income, disabled and elderly individuals and families residing in the City of Medford, MA (Medford) by providing them with safe and affordable rental housing. MHA is governed by a five-member board of commissioners (Board), which appoints an Executive Director to oversee approximately 40 employees who perform the day-to-day management, administrative and maintenance services necessary to operate eight (8) MHA properties containing approximately 800 federally-subsidized and state-subsidized elderly, disabled and family housing, as well as supporting tenants placed in private rental units under the federal "Section 8" voucher program and in private rental units receiving state-subsidized vouchers. (*Administrative Notice [http://www.medfordhousing.org]*)

2. The Appellant, Bonnie Curran, was employed in the MHA's Leased Housing Department as a Leased Housing Specialist a/k/a Section 8 Coordinator (LHS) from May 14, 2003 until her termination on March 8, 2017. She was a former public housing resident. (*Stipulated Facts; Testimony of Appellant*)

3. The job of an LHS involved qualifying applicants for Section 8 vouchers that entitle them to receive a subsidy for renting from qualified landlords, calculating the rent that landlords could charge and establishing the subsidies that they would receive, according to the applicable laws and regulations promulgated by the federal Department of Housing and Urban Development (HUD) and the Massachusetts Department of Housing and Community Development (DHCD), which fund the subsidies. This work required frequent interaction with applicants, tenants, landlords and vendors and included interviewing applicants, computing the allowable rents and subsidies, and performing other related tasks. (*Testimony of Appellant, Coddington, Mpelkas, Piri, Fortier & Moglia)*

4. During most of Ms. Curran's tenure with the MHA, the Leased Housing Department was staffed by approximately three to five LHSs who reported to the Director of Leased Housing. At the time of her termination, Ms. Curran was the most senior member of the department (in terms of years of service). (*Testimony of Appellant, Coddington, Mpelkas, Piri, Fortier & Moglia)*

Prior Disciplinary History

5. Prior to June 2009, Ms. Curran had an unblemished employment record reporting to Anne Petras, then the Director of Leased Housing. (*Stipulated Facts; Testimony of Appellant*)

6. In June 2009, the MHA Board hired Robert Covelle to replace John Greene as the MHA's Executive Director. Mr. Covelle had previously worked at the Somerville Housing Authority. (*Stipulated Facts; Testimony of Appellant & Coddington*).

7. From the inception of her contacts with Mr. Covelle, Ms. Curran become wary of Mr. Covelle, including, among other things, his requests to favor applicants, his efforts to hire friends and family, and disparaging her without her knowledge. She made her concerns known to Mr. Covelle and to the MHA Board and, ultimately, filed confidential complaints with state and federal authorities that led to Mr. Covelle's involuntary resignation in 2012. (*Stipulated Facts; AppExhs.1ID through 8ID, J.Exhs.9 & 32; Testimony of Appellant & McGrath*)[4]

8. In particular, in 2010, when Anne Petras retired as Leased Housing Director,, Mr. Covelle, with Ms. Petras's support, offered to appoint Ms. Curran as her replacement but she declined the offer because of conditions that she found unreasonable. (*AppExhs.1ID,2ID,8ID & 32; Testimony of Appellant*)

9. Thereafter, Kathy Mpelkas was appointed to the position of Leased Housing Director and Mr. Piri, a close friend of Mr. Covelle, was hired as a LHS. About a year later, Ms. Mpelkas stepped down and Mr. Piri became the Leased Housing Director, a position he held until 2014. (*Stipulated Facts; Testimony of Appellant; Mpelkas, Fortier & Piri*)

10. The first disciplinary action taken against Ms. Curran was a written warning issued by Ms. Mpelkas, following an argument

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.

3. App.Exhs.1-11, 13, 15, 21, 27, 29-31 & 36 were marked for Identification. AppExs.12, 20, 25 & 26 are duplicates of J.Exhs.17, 15, 16 & 14, respectively.

4. The examples of the problematic behavior by Mr. Covelle and others close to him that Ms. Curran reported to the MHA Board and, later, governmental authorities, include: placing derogatory information in her personnel file without her knowledge and disparaging her to others within the MHA and outside, harassing her for refusing to ignore the waiting list so that certain Somerville employees and other friends and relatives got priority for public housing voucher whether they were qualified or not, widespread favoritism in hiring and contracting (including his Bocci partner—Sam Piri as the Leased Housing Director, and others politically connected individuals), financial improprieties, including fudging of unreporting and underreporting tenant incomes and questionable expenditures that, as reported in the Boston Globe, a federal audit disclosed could involve $1.4 million in unjustified spending on "no-bid" contracts to relatives and uncertified contractors, that the MHA may have to repay to the government.(*AppExh.1ID through 8ID; JExh.9; App.Exh.32*)

between Ms. Mpelkas and Ms. Curran in February 2011, which Mr. Covelle ordered her to issue on pain of him disciplining Ms. Mpelkas instead. Ms. Curran wrote a response to this warning that was placed in her personnel file but it was never produced at the Commission hearing. (*Stipulated Facts; JExhs.1,2,9 & 14; Testimony of Appellant & Mpelkas*)

11. In or about August 2011, a soundproof wall was erected around Ms. Curran's workspace (where a short partition had existed), isolating her from her peers in the Leased Housing Department. The alleged purpose of the wall was described to Ms. Curran as a means to provide a private space for her to meet with applicants. Initially, Ms. Curran reluctantly assented to construction of the wall, after being assured it could be removed "in an hour" whenever she wanted. As it turned out, the enclosed space impeded ventilation and was so small as to be unsuitable for applicant meetings. (*JExhs.16,20 & 21; AppExh.28; AppPHExh.37; Testimony of Appellant & McGrath*)

12. In July 2012, shortly after Mr. Covelle's departure, Ms. Curran met with Interim Director Michael Pacios and Mr. Piri and asked to have the wall removed, noting that the enclosure around her desk had not served the intended purpose. Mr. Pacios rejected the request, stating in an e-mail that he did not have any maintenance men available to remove the wall and that "the wall is not a priority and should be dealt with by the next administration." (*JExhs.18, 20 & 21; Testimony of Appellant*)

13. During Mr. Covelle's tenure, Ms. Curran also received two additional one-day suspensions in March 2012, apparently precipitated by a complaint from Sam Piri at the end of Mr. Covelle's tenure, and one five-day suspension and "final warning" in March 2013, issued by MHA's Director of Finance (who served as interim Executive Director after Mr. Covelle's departure). Ms. Curran received no notice of any right of appeal and took no appeal from these suspensions. (*Stipulated Facts; JExhs.1,9,14 & 34; Testimony of Appellant, Coddington & Piri*).[5]

14. Later that month (March 2013), John Coddington, then Executive Director at Everett Housing Authority became the new MHA Executive Director. (*Testimony of Coddington*)

15. In March 2014, Mr. Piri complained that Ms. Curran had failed to comply with his request that she run a so-called "HAPPY" (a program that computes income and rental subsidy figures) on a prospective tenant. Ms. Curran said the applicant's voucher had expired and she was not comfortable running the report because she did not have the information needed to generate the report, without which inputs the report would not be accurate. She also noted that she was assigned additional duties with some priority, including interviewing several fire victims. Mr. Coddington sided with Mr. Piri, contending that Ms. Curran could have plugged in estimated numbers and given him her "best guess". He imposed a five day suspension and, noting her prior discipline, stated it was another "final warning". Ms. Curran received no notice of her right to appeal the discipline and took no appeal. (*Stipulated Facts*; *JExhs. 3, 9, 14, 19 & 35; Testimony of Appellant, Coddington & Piri*)

16. In January 2015, Ms. Curran complained to Kathy Fortier[6] that she had been working extra hours "for free" to get critical work done, but "will not continue to stay uncompensated going forward, I am sorry." She followed up this complaint with an inquiry to the U.S. Department of Labor and provided Ms. Fortier with the response she received. She was informed that she should be able to complete her work within the regular work week, but MHA did subsequently authorize up to 5 hours overtime per week over the standard 35 hour work week. (*AppExhs.11ID & 13ID; Testimony of Appellant & Moglia*)

17. In July 2015, Ms. Curran gave public testimony to the Massachusetts General Court (which she repeated in April 2017) concerning proposed legislation addressing "constructive discharge" in the form of workplace bullying, mobbing and harassment. (*AppPHExh.37; Testimony of Appellant*)

18. On February 10, 2016, Mr. Coddington issued a third "final warning" to Ms. Curran, citing two incidents: (a) the first incident occurred on or about December 22, 2015 when Ms. Currran walked out of a meeting with Ms. Fortier and went home sick, which Mr. Coddington characterized as "insubordination"[7] ; (b) the second incident occurred on or about January 14, 2016, and concerned a tenant who complained about Ms. Curran after she confronted him with evidence that she believed indicated he had unreported/underreported his income).[8] Mr. Coddington, again, noted her prior disciplinary record, stating that "I have decided to once again forego a harsh disciplinary sanction" and give her "one last chance to contribute to the mission of this Authority." (*Stipulated Facts; JExhs.4 & 9; Testimony of Appellant, Fortier & Coddington*)

19. Ms. Curran did make a written complaint to MHA's "Director of Human Resources (Unknown)" following the February 16, 2016 warning letter, but got no response. No evidence was pro-

5. Ms. Curran contended that the 2012 disciplines involved disputes about the propriety of declining to reinstate an applicant whom she believed had been removed properly from the waiting list and a complaint by a public housing tenant whom Ms. Curran had been investigating for unreported income. The 2013 suspension involved a complaint by Mr. Piri and Barbara Vivian (another acquaintance hired by Mr. Covelle) about Ms. Curran's alleged rude treatment of an MHA client whom she found had been acting irrationally. (*JExh..9 & AppExh..34; Testimony of Appellant*)

6. Sam Piri resigned as Leased Housing Director in October 2014 and resumed his position as an LHS. He was replaced by Ms. Fortier who served as Director until September 2016. (*Testimony of Fortier & Piri*)

7. Ms. Curran believed that the 2015 dispute with Ms. Fortier followed Ms. Curran's earlier reporting of what she believed was neglect of duty and fraudulent behavior by another (contract) employee. (*AppExh.14; JExh.36ID; Testimony of Appellant*)

8. According to Ms. Curran, the 2016 incident was the second such confrontation with this tenant. In the prior confrontation, Ms. Curran sought out her supervisor (Ms. Fortier) who intervened, diffused the situation and obtained an apology from the tenant. Ms. Curran claimed that she similarly sought out Mr. Coddington's assistance in 2016, but he did not respond to her request for help and, in fact, treated her disrespectfully. (*JExh.9;AppExh.14; Testimony of Appellant*)

duced to indicate that anyone at MHA investigated this complaint.. (*JExhs.9 & 12; AppExh.14; Testimony of Appellant*)

20. In August 2016, the MHA conducted an anonymous "Employee Satisfaction Survey", which four members of the Leased Housing Department completed.

- Three of the four responding employees provided very positive opinions about their job, their supervisor and their peers, including, in particular, checking off "Strongly Agree" or "Agree" to statements in the survey such as: "MHA staff has positive professional relationships", "Overall, I am satisfied with my job", "There is good cooperation between my work group and other work groups", "Overall I think management is doing a good job" and "I will probably be working for MHA three years from now."

- Only one survey response was "Neutral" about overall job satisfaction, professional relations at MHA, and whether the employee thought they would be working at MHA for three more years; and "Disagreed" or "Strongly Disagreed" with more than two dozen of the survey statements, including whether management was doing a good job.

(*AppExh.16; Testimony of Appellant*)

Ann Marie Moglia Is Hired as Leased Housing Director

21. In the summer of 2016, Ms. Fortier was promoted to Assistant Executive Director. In September 2016, Ann Marie Moglia, who had over twenty years' experience with the Methuen Housing Authority, was hired as the MHA Leased Housing Director. (*Testimony of Moglia*)

22. Ms. Moglia came to the MHA with specific ideas about how a Leased Housing Department should be run. In particular, soon after she arrived, she changed the prior practice and directed that overtime, which had been routinely allowed, would be curtailed and would need justification and prior authorization by her, stating that the LHSs at MHA handled a smaller workload compared to what she was familiar with and she saw no reason why the staff could not get their work done during regular working hours. She also implemented changes in forms and procedures. (*See AppExhs.22 through 24; Testimony of Appellant &Moglia*)

23. Ms. Curran was critical of the changes in the procedures Ms. Moglia had introduced and a purported lack of consideration given to her in particular [Curran] about how to implement them properly. Ms. Curran has also made her views known at staff meetings. As a result of these circumstances, Ms. Moglia's initial positive impressions of Ms. Curran soon soured. (*JExh.15; AppExhs.15,18,19 & 24; Testimony of Appellant & Moglia*)

24. Ms. Curran also protested that her workload was, in fact, more than she could handle. This issue came to a head after she worked past her regular quitting time of 4:30 on November 22, 2016 (until 5:02) and on November 28 (until 5:01), without obtaining prior authorization. She did not claim or expect to be paid overtime for staying late. On November 30, 2016, Ms. Moglia issued her a written warning for violating MHA overtime rules. (*Stipulated Facts; JExh. 5 & 15; App.Exhs.18, 20, 23 & 24; Testimony of Appellant & Moglia*)

The Events Leading To The Termination of Ms. Curran's Employment

25. In September 2016, John Coddington announced that he was not seeking to renew his employment contract and would be leaving MHA in March 2017. (*Testimony of Coddington*)

26. In October 2016, Delores Ross—who had been Mr. Coddington's administrative assistant at the Everett Housing Authority and whom he recruited to the MHA in 2015 to become an LHC with an increase in pay—announced that she would be leaving MHA and returning to the Everett Housing Authority. (*JExh.23; Testimony of Appellant, Coddington & Ross*)

27. At her exit interview on November 16, 2016, Ms. Ross told Ms. Moglia that she was leaving MHA because of Ms. Curran whom she described as mentally ill, "sometimes on meds" and "you never knew what she's going to be like". She described one incident in September 2016, when Ms. Curran had allegedly told her something to the effect: "You know I wouldn't intentionally hurt you", which she said she considered a threat and became fearful she would be attacked in the parking lot.[9] She said she heard that seven people (whose names she could not identify) left MHA because of Ms. Curran. (*JExhs.6 &.8; Testimony of Moglia & Ross*)

28. Ms. Ross also provided other reasons that explained her decision to leave including: (a) disliking MHA because she found the applicants "difficult", the closing process was "complicated", she was unfamiliar with the computer system, and her supervisor was "busy" and "wasn't always available"; and (b) had she known that she would be working in close quarters in a basement and realized how difficult the "tenant selection" process was, she "may not have accepted [the] position." Ms. Ross had also made this discomfort with her job known to others prior to her resignation. (*JExhs.6, 8, 9, 15 &18; AppExh.20: Testimony of Appellant, Ross & Fortier*)

29. On November 28, 2016 (two days before issuing the overtime discipline warning), Ms. Moglia and Ms. Fortier met with Ms. Curran. The meeting covered Ms. Ross's recent exit interview, including the claim that Ms. Ross's fear of Ms. Curran was the principal reason she gave for her decision to resign and, in particular, that Ms. Ross said she felt threatened by being told by Ms. Curran that she would never intentionally hurt Ms. Ross. The meeting also covered an ongoing issue involving Ms. Curran's concerns that she continued to be harassed by other staff ("the Covelle crowd" as Ms. Curran sometimes called them, among whom she

9. Ms. Ross testified that she got along well with Ms. Curran for the first six months of her employment. The referenced September 2016 remark came after Ms. Curran had mentioned in a meeting with Ms. Fortier and Ms. Ross that Ms. Ross had once confided that she had been "bullied" in her prior job. The statement was made by Ms. Curran as after that meeting in the nature of an apology for breaking Ms. Ross's confidence. Ms. Fortier and Mr. Coddington both knew about the September 2016 remark but it was never known as or considered a threat and no action was taken about it at the time. For these and other reasons, I do not find Ms. Ross's alleged fear of Ms. Curran credible. (*JExh.6; Testimony of Appellant, Ross, Fortier & Coddington*)

counted current MHA employees Sam Piri and Barbara Vivian) with particular focus on a then pending tenant hearing decision in Ms. Curran's "work cue [sic]" that she believed was being unduly delayed. Finally, Ms. Curran was asked about whether she was using MHA time and equipment to record her daily exchanges with other employees. (*JExs.6,9,10 & 15; AppExhs.20, 25 & 28; Testimony of Appellant, Fortier & Moglia*)

30. Ms. Curran was given the opportunity to respond to the allegations made by Ms. Ross. She acknowledged the accuracy of the September 2016 remark to Ms. Ross, but explained that the context was in the nature of an apology, not a threat. Ms. Curran explained that she was only making notes in a personal diary, and did not do so on MHA time. She provided examples of how she believed Ms. Fortier and Ms. Moglia had not been supportive. Ms. Curran also said she felt put on the spot and found it difficult to respond to questions without prior notice. The meeting concluded with Ms. Curran's agreement to follow-up with Ms. Moglia on the tenant hearing issue, which she did by Memo on November 30, 2016. Ms. Curran was not informed at the November 28, 2016 meeting that MHA was taking or contemplating any specific disciplinary action at that time. (*JExhs.9,15; App.Exhs.15,20; Testimony of Appellant*)

31. On December 9, 2016, Ms. Curran was called into another meeting and provided a copy of a Memorandum dated December 8, 2016 drafted by Ms. Fortier entitled: "Memorialize Meeting and Summary/Results—Meeting Date 11/28/2016". After setting forth Ms. Fortier's version of the substance of the meeting, she concluded:

> In concluding our meeting, I conveyed to you that I expect you to never again engage in any conduct or activity that could be construed as direct threats, or veiled threats. You and all employees are responsible for ensuring a friendly work environment. This includes practicing self-awareness with your tone and the language you choose to address your colleagues, tenants and landlords. There are absolutely no excuses or exceptions to this performance expectation.
>
> Additionally, I have reviewed your personnel record and the disciplinary history set forth below.[10]
>
> Based on the current facts and your disciplinary record, your employment with the MHA should be terminated. Nevertheless, I have recommended to the Executive Director that you receive one "LAST CHANCE" to remain employed with the MHA.

(*Stipulated Facts; J.Exh.6; Testimony of Fortier*)

32. Ms. Curran requested an opportunity to review Ms. Fortier's Memorandum and to provide a written response, which she did by Memorandum dated December 12, 2016, to which was attached a six-page single-spaced paragraph-by-paragraph rebuttal. She vigorously disputed a substantial number of Ms. Fortier's characterizations of what transpired at the November 28, 2016 meeting as inaccurate, incomplete or taken out of context. For example:

- In response to the allegation that Ms. Ross heard Ms. Curran "typing immediately after the close [of a tenant's case], Ms. Curran stated she used pens to write her personal notes and suggested the typing Ms. Ross heard probably was creating an e-mail to her supervisor about the "close".
- Ms. Curran specifically acknowledged that she would heed Ms. Fortier's "advice not to use compensated time or MHA resources for personal use".
- Ms. Curran's rebuttal took specific issue with the contention that Ms. Ross was leaving because Ms. Curran made her "walk on egg shells", except that Ms. Curran identified with that condition as she feels the same way. Ms. Curran defended in specific terms the substance and context of the alleged offending colloquy with Ms. Ross as benign and pointed to occasions when Ms. Ross had lost her temper in Ms. Fortier's presence.

(*JExh.6 & 15; AppExh.20; Testimony of Appellant*)

33. In addition, although no mention of the subject had been made in the November 28, 2016 meeting or the December 8, 2016 Memorandum, Ms. Curran's rebuttal anticipated that, Kathy Rolli, another recently hired LHC, who had also recently announced her resignation, would blame Ms. Curran for her decision to quit as well. (*JExhs.6 & 15; AppExh.20*)

34. Ms. Rolli came to work at MHA as a LHS in August 2015, from the Reading Housing Authority, where she had been the Assistant Director, a position that she left due to budget cuts. She testified that the job of LHS was "not what she was expecting." She interviewed for the job of Leased Housing Director that opened up in the summer of 2016 for which Ms. Moglia was selected in September 2016. (*Testimony of Rolli & Coddington*)

35. On January 14, 2016, Ms. Curran wrote to Mr. Coddington to memorialize an incident in which she had asked for his help with an unruly tenant, when others declined to intervene and a meeting the next day with Mr. Coddington during which she said he took away her pen as she was taking notes. (*AppExh.28; Testimony of Appellant, Coddington and Fortier*)

36. In September 2016, Ms. Rolli and Ms. Curran had a confrontation in which Ms. Curran complained that Ms. Rolli was not treating tenants with proper respect, allegedly harassing some elderly and disabled clients, as well as possibly wrongfully terminating some clients. Ms. Rolli counter-complained that Ms. Curran's complaints were unfounded. After speaking to both parties, Ms. Fortier found neither party at fault and took no further action. (*JExh.6,9,10,15; AppExh.20 & 28; Testimony of Appellant, Fortier & Rolli*)[11]

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10. The Memorandum cites discipline dated 1/4/2011, 3/3/2012, 2/22/2013, 4/1/2014 and 2/10/2016. It did not mention the 11/30/2016 "final warning" delivered in the interim between the November 28, 2016 and December 9, 2016 meetings. (*JExh.6; Testimony of Appellant & Fortier*)

11. Ms. Curran acknowledged that she can be particularly "rough around the edges", but as a former public housing resident, she always strives to treat tenants with the dignity she believes they deserve and is quick to admonish anyone who she thinks is not doing so. Ms. Moglia testified that she found Ms. Curran "too friendly" with tenants although she never brought that up with Ms. Curran directly. (*AppExh.28; Testimony of Appellant & Moglia*)

37. On December 12, 2016 (the day Ms. Curran submitted her rebuttal Memorandum to Ms. Fortier), Ms. Moglia conducted an exit interview with Ms. Rolli. Ms. Rolli stated that she was leaving MHA for a job with better pay and "better benefits (all-inclusive insurance and profit sharing)" with a previous private sector employer for whom she worked previously. Ms. Rolli stated that there was much she disliked about MHA, including unrecognized need for overtime pay (forced to leave "abruptly" at 4:30 and "feels she's being thrown out"), the "dirty gloomy environment, overcrowded, loud . . . difficult to concentrate. . . . Air quality poor—no windows—temperature is either hot/cold" and lack of "someone to respond to tenant requests". She also stated that she "doesn't ever want to deal with public housing again", citing specifically the "lack of respect" from "demanding participants" and applicants who are "allowed to be disrespectful to MHA staff". (*JEx.7*)

38. The testimony at the Commission hearing from Lorraine McGrath a former MHA employee, corroborated the reasons stated above that Ms. Rolli was dissatisfied with her job. Ms. McGrath asked Ms. Rolli why she was leaving MHA and Ms. Rolli told her that it was because of the "dirty" work environment, she was not used to not having her own office and she didn't want to do public housing work anymore. She never mentioned Ms. Curran to Ms. McGrath as a reason for resigning. (*Testimony of McGrath*)

39. At her exit interview, however, Ms. Rolli claimed that she had decided to look for another job because Ms. Curran had been giving her a "hard time right at the beginning", calling Ms. Curran a "vicious and vile" person. Ms. Rolli claimed that she decided to leave MHA in September 2016 because of the verbal incident described above with Ms. Curran, which she claimed was the "final straw." (*J.Exh.7*)

40. At the Commission hearing, Ms. Rolli refused to disclose her current employer, asserting that she remained in fear of Ms. Curran and worried that Ms. Curran would show up at her current workplace to intimidate or harass her. (*Testimony of Ms. Rolli*)[12]

41. On January 5, 2017, having no prior communication, verbal or written, in response to her rebuttal Memorandum, Mr. Coddington (with Ms. Fortier and Ms. Moglia present) delivered a letter to Ms. Curran that stated:

> You are hereby placed on administrative leave with pay, effective immediately. The reasons for this action are as follows:
>
> - Your conduct caused a second employee (KR) to leave MHA employment.
>
> - As noted in the disciplinary warning of December 8, 2016, you were given a final LAST CHANCE to reform your conduct.
>
> Please be advised that the MHA Board of Commissioners will meet in an executive session regarding these issues and the possible termination of your employment on a date and at a time to be determined in the near future.
>
> You will receive a notice regarding that executive session and your rights under the state Open Meeting Law. Until that meeting is scheduled, you are directed to remain away from the MHA office and its facilities.

(*Stipulated Facts; JExh.13: Testimony of Appellant, Coddington, Fortier & Moglia*)

- At a meeting of the MHA Board on January 18, 2017, Ms. Curran submitted a written memorandum in support of her position that she was being wrongfully charged. She stated that she was under tremendous stress but would make herself available to answer questions at a later date. (*JExh.10; App.Exh.25; Testimony of Appellant & Coddington*)

- The MHA Board designated Mr. Coddington as hearing officer to conduct an appointing authority hearing on Ms. Curran's contemplated termination, which was held on February 14, 2017. The MHA counsel submitted four exhibits (the charge letter, Ms. Curran's disciplinary record and the written notes of the two exit interviews). Ms. Curran appeared on her own behalf and submitted a written statement under the penalty of perjury as well as copies of the material provided at the MHA Board Hearing on January 18, 2017. No witnesses testified and no other evidence was introduced. (*Stipulated Facts; JExhs.1,9 & 11; Testimony of Appellant and Coddington*)

- At Ms. Curran's request, Mr. Coddington left the record open for Ms. Curran to submit a written objection to the Board assigning Mr. Coddington as hearing officer rather than hold a hearing before the Board and to respond to the information contained in the two exit interviews which she had seen for the first time at the hearing on February 14, 2017. Ms. Curran submitted this post-hearing statement to Mr. Coddington on February 21, 2017. As to her objection, Ms. Curran contended that only a partial Board was present on January 18, 2017 and two of the three members were on the Board when Ms. Curran had reported to federal authorities the misconduct that had been going on at the MHA. As to the written exit interview notes, Ms. Curran pointed to the coincidence that both employees resigned shortly after Ms. Moglia had stopped allowing overtime as well as the specific issues, unrelated to Ms. Curran, that they expressly described in those exit interviews. (*JExhs.11 & 14 [Curran letter dated February 20, 2017, attached]*)

- On March 3, 2017, Mr. Coddington submitted his "Findings and Recommendations of Executive Director John Coddington Acting as Hearing Officer for the Medford Housing Authority Board of Commissioners." Mr. Coddington's findings were divided into two sections: "**Ms. Curran's Disciplinary Record**" and "**Conduct Resulting in Departure of Two Section 8 Employees**". The first section found that Ms. Curran had a "long and highly unsatisfactory disciplinary record", citing the exhibit containing the discipline Ms. Curran had received from 2011 through December 8, 2016. The second section found that the two employees had "expressly affirmed that Ms. Curran was the reason" each had left the MHA. Without identifying specific conduct or when it occurred, Mr. Coddington found that DR (Delores Ross) believed that Ms. Curran was "threatening and stalking" her, her conduct caused poor morale and the MHA would "continue to lose employees due to Ms. Curran." He also found that KR (Kathy Rolli) believed that Ms. Curran's "threatening" conduct (without specifying what the threats were or when they occurred) caused her to "fear for her safety" and that Ms. Curran "was a disturbance" and had "taken over" the workplace.

12. Ms. Rolli provided no additional evidence beyond the conclusory statements in her exit interview to show the basis for her continued "fear" of Ms. Curran.

- Mr. Coddington's findings included noting that Ms. Curran "denies that her workplace conduct resulted in the departure of the two employees"; "believes that she is the victim of workplace 'mobbing' stemming from her *alleged* activities with government agencies . . ." (*emphasis added*); "asserts that her personnel record has been altered to her detriment", and "specific employees of the [MHA] are retaliating against her." He found "no merit" to any of her contentions and, specifically found "no credible evidence" to support her claims of mobbing and retaliation. (*JExh.14*)

- At a MHA Board special executive session on March 8, 2017, the Board asked Mr. Coddington some questions about Ms. Curran's past disciplinary history and, in particular, about the warning for violating the overtime rules, heard from Ms. Curran briefly, and engaged in a colloquy about the procedures for appealing a decision to this Commission. Thereafter, without further deliberation, the Board voted 4-0 (one commissioner absent) "to accept the director's recommendation to discharge Ms. Curran by the end of the day—work day tomorrow." (*J.Exh.12*)

- This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LAW

A tenured housing authority employee (with at least five years' service) may be discharged only for "just cause" after due notice, hearing (which must occur prior to discipline if it involves a suspension of more than five days) and a written notice of decision that states "fully and specifically the reasons therefore." G.L.c.121A,§29; G.L.c.31,§41.[13] An employee aggrieved by that decision may appeal to the Commission, pursuant to G.L.c.31,§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.

The Commission's role 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 Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (1997). *See also 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).

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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den.*, 426 Mass. 1102 (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, *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. 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 "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, Section 43 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") *Id.*, (*emphasis added*). *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

Applying these principles of civil service law to the facts of this appeal, I conclude that the MHA has failed to meet its burden to establish just cause for the decision to discharge Ms. Curran from employment by a preponderance of evidence. The single alleged justification used to support the MHA's decision—that Ms. Curran's misconduct was the effective cause of the resignation of two other MHA employees—was not proved by a preponderance of evidence. In addition, the preponderance of the evidence established that Ms. Curran's prior disciplinary record, especially, but not exclusively, the discipline from 2011 to 2014 that had some nexus to Mr. Covelle's tenure, was more likely than not tainted by animosity against her stemming from her reputation as a "watchdog", and deserves little, if any, weight.

Alleged Substantive Grounds for Termination

The core reason MHA used to justify its decision to terminate Ms. Curran was Mr. Coddington's finding, which the MHAs Board adopted, without deliberation, that Ms. Curran's conduct caused two MHA employees to quit. This finding was based entirely on Mr. Coddington's reliance on a hearsay record containing conclusory statements by the two employees during their exit interviews, as recorded by Ms. Moglia in her exit interview notes. After hearing the evidence and considering this issue "anew", I have concluded that the MHA did not meet it burden of proof to show, by a pre-

13. Ms. Curran never received a "written notice of [its] decision" from the Board, the appointing authority, but the parties have treated the Board's "adoption" of Mr. Coddington's Findings and Recommendations as the equivalent of the required Section 41 written decision. This approach is problematic as the Civil Service Law clearly calls for the appointing authority to articulate in writing the reasons for its decision, but the Appellant does not press this irregularity and the Commission need not address it as a matter of procedure

ponderance of credible evidence, that Ms. Curran caused those employees to choose to leave the MHA for other jobs.

First, the disputed conclusory statements of two former employees, standing alone, deserve little, if any weight and neither employee provided credible specifics, either as recorded in the exit interview notes or through any credible testimony at the Commission hearing, which persuaded me to believe their conclusory statements. To the contrary, I credit the preponderance of evidence of specific facts that these employees acknowledged in their exit interviews, and corroborated by credible testimony from Ms. Curran, Ms. McGrath and other witnesses and documents, which show that other plausible factors were a significant, let alone the primary cause that led these employees to decide to leave the MHA.

The factors that both employees mentioned included the crowded and uncomfortable basement working environment and each employee's dissatisfaction and discomfort with the duties of an LHC. In Ms. Ross's case, as a former administrative assistant, she described the job of LHS as "difficult", "unfamiliar" and "complicated" and that her supervisor was often too "busy" to assist her. I give little weight to the fact that Ms. Ross claimed that she had to take a "cut in pay" to return to her former employer, which was entirely due to the fact that, when Mr. Coddington recruited her to leave her administrative position to come to MHA at an increase in pay. In Ms. Rolli's case, she specifically mentioned the curtailment of overtime, said that she was unaccustomed to not having her own private office, and "was done" with public housing work.

Second, I also find the timing of each employees departure telling. Ms. Rolli, who had left a supervisory position and took a demotion to LHS, began looking for another job soon after she was not selected for promotion to Leased Housing Director in or about September 2016. Similarly, Ms. Ross says she decided to leave MHA at about the same time, which coincides with her mentor, John Coddington, announcing that he would soon be leaving his position as Executive Director.

Third, none of the MHA witnesses were able to provide specific, credible evidence of what Ms. Curran had done that supported the conclusory allegations, that her conduct put other employee in "fear" of their safety or otherwise made for an intolerable working environment. The witnesses called by the MHA was even more vague and lacking in specifics than the original interview notes themselves. The only specifics that were mentioned involved September 2016 incidents that were well-known to MHA management and thoroughly vetted at the time. Neither Ms. Ross nor Ms. Rolli claimed to be in fear before their exit interviews. Ms. Ross's almost slanderous characterization of Ms. Curran's mental status, and her unsubstantiated allegation that seven unidentified employees had been rumored to have left the MHA because of Ms. Curran, also caused me to give less weight to her testimony.. Similarly, I give diminished weight to Ms. Rolli's testimony that, even now, she believes that Ms. Curran will cause her harm as largely subjective fear that she never supported by any specific evidence in the record.

Fourth, I acknowledge and credit Ms. Curran's own self-assessment that, as a former public housing tenant, she was especially sensitive to how others treated public housing participants and may sometimes come off as "rough around the edges". I find, however, that Ms. Curran's critiques of her peers and supervisors, albeit imperfect in some respects, were motivated by her honest belief that she was pointing out irregularities and possible unlawful behavior that deserved to be rectified. To be sure, at times, calling out her peers and her supervisors did cause "friction" and interpersonal conflict, especially, around Ms. Ross's inexperience and Ms. Curran's perception that Ms. Rolli did not respect tenants.[14] I do not find credible evidence, however, that the role she assumed as something of a strict, self-anointed and unpopular "ombudsman" ever turned malevolent or "impaired the efficiency of the public service".

Ms. Curran's Prior Disciplinary Record

The MHA's decision to terminate Ms. Curran was also inexorably tied to the record of prior discipline that she incurred. Ordinarily, reliance on a past history of discipline can be a legitimate factor in selecting the level of future discipline and, as required by basic merit principles, lawfully support a decision to separate an employee "whose inadequate performance cannot be corrected." In the circumstances presented here, however, Ms. Curran's record of past discipline is tainted by factors that make problematic the rote reliance by Mr. Coddington and the MHA Board on that record of discipline.

First, a substantial part of Ms. Curran's disciplinary record (2011 to 2014) was compiled during Mr. Covelle's tenure or can be attributed to input from those who fit Ms. Curran's description of supporters of Mr. Covelle and who remained behind after his departure. The credible evidence showed that Mr. Covelle, and by extension those within his orbit, had formed an animus against her. I am persuaded that the "wall" was erected around Ms. Curran was motivated by this animus; the excuse that it could be used as an interview space and was removable at any time was a pretext to get Ms. Curran's assent to the plan. I also find that Ms. Curran's proclivity to call out irregularities and possible unlawful behavior of her peers and superiors did not stop after the departure of Mr. Covelle but, in fact, she continued bringing complaints to management, which were regularly ignored, all the way through 2015 and 2016 until her termination. I am not certain whether management's animus stemmed from Ms. Curran's refusal to "play along" or from her persistent critiques, or both, but the animus was definitely present.

Second, the decision to terminate Ms. Curran based on the departure of Ms. Ross and Ms. Rolli is flawed because the only specific examples of "misconduct" by Ms. Curran took place long before the warning she received on December 9, 2016 and there was no

14. I note that Ms. Rolli's own testimony tended to confirm her discomfort with interaction with public housing tenants, whom she called "demanding" and who disrespected her, resulting in a decision to leave not just the MHA, but the public housing career field entirely.

proof that Ms. Curran had done anything thereafter to demonstrate that warning had been ineffective. In fact, no one had considered the September 2016 remark to Ms. Ross remark a "threat" at the time and Ms. Curran thought she had smoothed over any ruffled feathers by her apology to Ms. Ross. Similarly, Ms. Rolli's departure on December 12, 2016 was fully known to MHA (and Ms. Curran), probably in October 2016, and certainly before December 9, 2016. Yet, Ms. Rolli had not made her "fear" known until the exit interview and MHA had fully vetted the one incident in September 2016 involving cross-complaints by both Ms. Curran and Ms. Rolli, finding no reason to discipline either one. The fact that MHA saw no reason to take any disciplinary action at the time makes the resurrection of those events problematic, especially so, when they purport to form the core specific incidents now offered to justify a termination decision.

Other Issues

I note, but, in view of the conclusion to allow this appeal, I need not address Ms. Curran's claim that she was denied a right of appeal on the merits from her past discipline. Finally, to the extent I have not addressed any of the other contentions raised by the parties, they "have not been overlooked. . . . [N]othing in them . . . requires discussion." *McCormack* v. *Department of State Police*, 92 Mass. App. Ct. 1103, 2017 WL 3469601 (Rule 1:28), *citing Commonwealth* v. *Domanski*, 332 Mass. 66, 78 (1954).

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Bonnie Curran in Appeal D-17-056 is ***allowed.*** The discharge is vacated and the Appellant shall be restored to all compensation and benefits to which she is entitled.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso (Not Participating], Ittleman, Stein & Tivnan, Commissioners) on August 15, 2019.

Notice to:

Joseph Sulman, Esq.
391 Totten Pond Road, Suite 302
Waltham, MA02451

John Egan, Esq.
Rubin & Rudman LLP
53 State Street
Boston, MA 02109

* * * * * *

ANCEL GILOT

v.

DEPARTMENT OF CORRECTION

G1-19-084

August 15, 2019
Christopher C. Bowman, Chairman

***Bypass Appeal-Original Appointment as a Correction Officer-Poor Interview-Flawed Procedures-Flawed Questions*—**The Commission reversed the bypass of a candidate for original appointment as a Correction Officer in finding the process to be flawed where the candidate was bypassed for appointment without conducting any kind of background investigation and relying solely on the conclusions of the interview panel. In addition, the decision by Commission Chair Christopher C. Bowman takes fault with a flawed interview question that improperly necessitated a candidate's knowledge of DOC policies, and with the divergent testimony from DOC witnesses on why they rated the Appellant poorly on another question.

DECISION

On April 8, 2019, the Appellant, Ancel Gilot (Mr. Gilot), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on May 7, 2019 at the offices of the Commission and I held a full hearing at the same location on July 25, 2019.[1] The hearing was digitally recorded.[2]

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by DOC

- Patricia Malanson, Director of Security, MCI Framingham, DOC (Interview Panelist);
- Melanie Shields, Correction Officer I (CO I), DOC (Interview Panelist);

Called by the Appellant

- Ancel Gilot, 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 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.

1. Mr. Gilot is a twenty-two (22) year-old black male who resides in Ashburnham, MA. (Testimony of Mr. Gilot & Exhibits 1, 3)

2. Mr. Gilot graduated from high school and is currently working toward an associate's degree in criminal justice. (Testimony of Mr. Gilot)

3. After graduating from high school, Mr. Gilot enlisted in the United States Army Reserves. He completed two (2) months of basic training and two (2) months of advanced individual training. He now serves one (1) weekend per month and two (2) weeks per year at Fort Devens. He has never been disciplined and/or cited for poor performance. (Testimony of Mr. Gilot)

4. Mr. Gilot has been employed at a rental car company since August 2018 where he details automobiles and picks up customers. He has never been disciplined and/or cited for poor performance. (Testimony of Mr. Gilot)

5. Mr. Gilot took and passed the civil service examination for CO I on April 14, 2018. (Stipulated Fact)

6. On October 22, 2018, Mr. Gilot's name appeared on Certification No. 05868 from which DOC ultimately appointed one-hundred sixty (160) CO Is. (Stipulated Fact)

7. Mr. Gilot was ranked 51st among those willing to accept appointment on Certification No. 05868 and twenty-eight (28) candidates ranked below him were appointed. (Stipulated Facts)

8. Mr. Gilot completed an application for employment and successfully passed a Physical Abilities Test (PAT). (Testimony of Mr. Gilot)

9. Prior to initiating a background investigation of candidates, DOC convenes three-member interview panels to interview each candidate. Only those candidates recommended for hire by their interview panel go onto the next step of undergoing a background investigation. (Stipulated Fact)

10. On the day of the interview, before meeting with the interview panel, each candidate is required to hand-write the answers to three (3) questions. Mr. Gilot completed that writing sample which was deemed acceptable by the Interview Panel. (Testimony of Ms. Malanson, Ms. Shields and Exhibit 9)

11. The interview panelists are responsible for collectively completing an Interview Evaluation Form that has two (2) parts: "Part A: Experience and Abilities" and "Part B: Points from Interview Questions." (Exhibit 4 and Testimony of Ms. Malanson)

12. Part A includes four (4) categories, each of which can receive a score of 1 to 5 for a total maximum score of 20. DOC describes the ratings as follows:

5 Outstanding

4 Excellent

3 Average

2 Satisfactory

1 Less Than Satisfactory

(Exhibit 4)

13. The Interview Panelists review the candidate's application for employment and, if submitted, a resume, to complete Part A. (Testimony of Ms. Malanson)

14. The four Part A categories, and the scores awarded to Mr. Gilot, are as follows:

- Experience and Competence in Related Work: 2 (Satisfactory)
- Education / Training Related to this Position: 2 (Satisfactory)
- Work History: 2 (Satisfactory)
- Communication / Interpersonal Skills: 1 (Less than Satisfactory)

15. Part B is based on nine (9) interview questions asked of each candidate with the same 1 to 5 rating system as Part A. The maximum Part B score is 45 (9 x 5). (Exhibit 4)

16. For five (5) of the nine (9) questions, the Interview Panel gave Mr. Gilot a rating of "3" which, according to the rating system, is "average". (Exhibit 4)

17. For two (2) of the nine (9) questions, the Interview Panel gave Mr. Gilot a rating of "2" which, according to the rating system, is "satisfactory". (Exhibit 4)

18. For the two (2) remaining questions, the Interview Panel gave Mr. Gilot a rating of "1", which, according to the rating system, is "less than satisfactory". (Exhibit 4)

19. The two (2) questions for which Mr. Gilot received a rating of "1" related to: a) a case scenario in which the candidate is asked about providing extra privileges to inmates who volunteer for extra work details; and b) dealing with conflict. (Exhibit 3)

20. The Interview Panel found Mr. Gilot's answer to the question regarding privileges less than satisfactory because he failed to recognize the need to treat all inmates similarly. (Testimony of Ms. Malanson and Ms. Shields)

21. In regard to the question regarding conflict, Mr. Gilot spoke about an incident in which two superior officers got involved in a physical conflict and he separated them. (Testimony of Mr. Gilot)

22. The Interview Panel found that Mr. Gilot "failed to answer [this] question" because it did not pertain to conflict between himself and another person and how he handled it. (Testimony of Ms. Malanson and Ms. Shields and Exhibit 4)

23. The Interview Evaluation Form completed by the Interview Panel reflects that Mr. Gilot received 7 out of 20 possible points for Part A and 21 out of 45 possible points for Part B for a total of 28 out of 65 points. (Exhibit 4)

24. There is no cutoff score regarding whether or not a candidate has successfully completed this process, allowing him/her to move on to the next step in the hiring process, which, as refer-

enced above, is the background investigation. (Testimony of Ms. Malanson)

25. Rather, the Interview Panelists are asked whether the candidate is "Recommended for Hire? YES / NO." Here the Interview Panelists circled "NO". (Exhibit 4)

26. Under the "comments section", the Interview Panel wrote that Mr. Gilot "shows no self confidence" and that the "panel does not believe the academy would help without …. having more life experience … [candidate] has no basic knowledge of security." (Exhibit 4)

27. On March 22, 2019, DOC notified Mr. Gilot that he was being bypassed for appointment as a CO I because "The Interview Panel did not recommend you for appointment." (Exhibit 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, 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, 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*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

I found no personal bias or favoritism on the part of the interview panelists, two (2) of whom testified before the Commission. They both offered candid, straightforward testimony and appeared to be focused on providing DOC with an informed opinion regarding the suitability of the candidates interviewed.

The decision to bypass Mr. Gilot for the entry-level position of CO I, however, was not justified, for the reasons discussed below.

While years of Commission decisions and precedent-setting judicial decisions have firmly established that appointing authorities can rely upon a candidate's interview performance to justify a bypass, DOC's failure to conduct any background investigation, coupled with flaws in the interview process itself, caused me to conclude that DOC did not conduct the type of reasonably thorough review required to justify the bypass of Mr. Gilot.

In most cases, appointing authorities that utilize interviews in the hiring process *first* conduct a thorough background investigation, which review typically includes such actions as: speaking with current and former employers and/or commanding officers, when applicable; reviewing academic records; speaking with neighbors; conducting a home visit / interview, etc. When utilized, the interview of a candidate typically comes *after* this background investigation is completed. Thus, the appointing authority, having completed a reasonably through review, is able to make an *informed* decision regarding the candidate's suitability for employment. Here, DOC, relying exclusively on the interview panel ratings, bypassed him for appointment prior to conducting any type of background investigation.

The flaws associated with this incomplete review were evident based on the witness testimony. For example, the interview panelists, prior to even meeting Mr. Gilot, and without ever talking with his current and former employers, were asked to assess his work history, his experience and competence in related work and his education / training related to this position. That type of assessment cannot be adequately completed by an interview panel prior to even meeting the candidate. Rather, assessing a candidate's work history requires talking with current and former employers, inquiring about any performance or discipline issues and inquiring about whether the candidate would be eligible for rehire, all inquiries typically associated with a background investigation. Even, however, if the interview panelists could make such an assessment, Mr. Gilot received a "satisfactory" rating in each of these categories.

The one category where Mr. Gilot was given a "less than satisfactory" rating in Part A was "communication / interpersonal skills". There was some divergent testimony regarding whether this rating was based on information gleened solely from the application or if the interview panelists made this assessment after the interview was completed. I credited the testimony of Ms. Malanson, who believes the rating was completed prior to the interview. Even, however, if the rating was completed after the interview, neither witness was able to justify providing Mr. Gilot with a "less than

satisfactory" rating for "communication / interpersonal skills". While even Mr. Gilot acknowledges he did not give the best interview, this broad category encompasses both communication *and* interpersonal skills. Throughout the appeal process at the Commission, both at the pre-hearing and full hearing, Mr. Gilot's strong interpersonal skills have been on full display. His is polite, cordial, friendly and respectful, even offering a sincere handshake to DOC officials present at the hearing, thanking them for their time.

That turns to Mr. Gilot's responses to the actual interview. The interview panelists rated Mr. Gilot's response to seven (7) of the nine (9) questions as satisfactory or average. Only two (2) of his responses were rated as "less than satisfactory". The first unacceptable answer came in response to a question regarding whether an inmate should receive extra privileges for volunteering for extra work details. I listened carefully to the testimony of the two (2) DOC witnesses regarding this question. Notwithstanding their testimony, I have concluded that Mr. Gilot's response to that question does not justify a decision to bypass him for appointment. The question assumes that a candidate is aware of DOC policies and practices in this regard, something that appears to be an unreasonable expectation in regard to an entry level position.

The second answer rated as less than satisfactory regards how Mr. Gilot has dealt with conflict. The DOC witnesses offered divergent testimony regarding Mr. Gilot's response and were not able to adequately justify providing Mr. Gilot with the lowest score.

Finally, there is no cutoff score or firm guidelines regarding whether the information gathered in Part A and Part B of the interview disqualifies a candidate from going forward with the next step of the review process, the background investigation. Even given the inherently subjective nature of the interview process, the lack of any uniform cutoff score or guidelines in this regard calls into question whether all candidates receive fair, uniform and impartial treatment.

In summary, the overall review process here was not thorough enough to support the reasons used by DOC to bypass Mr. Gilot for appointment and the evidence presented did not sufficiently support the limited categories where Mr. Gilot was found to have been less than satisfactory. For these reasons, Mr. Gilot's appeal under Docket No. G1-19-084 is hereby allowed and he shall be afforded the following relief that will allow him to be reconsidered for appointment in a future hiring cycle:

1. HRD shall place the name of Ancel Gilot at the top of any current or future certification for appointment of CO I at DOC until he is appointed or bypassed.

2. If appointed, Mr. Gilot shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 05868. This retroactive date is for civil service seniority purposes only, and is not meant to entitle the Appellant to any additional compensation or benefits, including creditable time toward retirement.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Absent]) on August 15, 2019.

Notice to:

Ancel Gilot
[Address redacted]

Joseph Santoro
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

JOHN MacDONALD

v.

HUMAN RESOURCES DIVISION

B2-19-149

August 15, 2019
Christopher C. Bowman, Chairman

Commission Practice and Procedure-Appeal-Timeliness—An appeal from a Belmont firefighter contesting HRD's denial of E&E credits was dismissed by the Commission as untimely where HRD indicated that the Appellant had filed the initial appeal with the agency six days after the 17-day statutory deadline for examination appeals.

ORDER OF DISMISSAL

On July 16, 2019, the Appellant, John MacDonald (Mr. MacDonald), a firefighter for the Town of Belmont (Town), filed an appeal with the Civil Service Commission (Commission), contesting a determination by the state's Human Resources Division (HRD) to not award him six (6) education and experience (E&E) credits for his bachelors degree on a promotional examination for Fire Lieutenant, administered by HRD on November 17, 2018.

2. On August 6, 2019, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. MacDonald and counsel for HRD.

3. G.L. c. 31, s. 22 states in relevant part that: " … review of the marking of the applicant's answers to essay questions, of the marking of the applicant's training and experience, or of a finding that the applicant did not meet the entrance requirements for appointment to the position shall be filed with the administrator no later than seventeen days after the date of mailing by the administrator of the notice to the applicant of his mark on the examination or his failure to meet the entrance requirements for appointment to the position." (emphasis added)

4. At the pre-hearing conference, HRD indicated that Mr. MacDonald did not file an appeal with HRD until June 3, 2019, six (6) days after the statutory filing deadline of May 28, 2019, which is the first business day occurring seventeen (17) days after Mr. MacDonald received his score, with appeal rights, on May 9, 2019.

5. Mr. MacDonald did not dispute that he failed to file a timely appeal with HRD, but attributed his inaction to his confusion regarding the score notice and a phone call with an HRD representative related to his transcript having been submitted regarding a prior examination cycle.

6. G.L c. 31, s. 24 states in relevant part: " … 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."

The deadline for filing an appeal with HRD is explicitly stated in the score notice, quoting directly from the above-referenced statute. The notice was also sufficiently clear for Mr. MacDonald to understand that HRD was not crediting him with six (6) points for his bachelor's degree based on his failure to upload or send a transcript to HRD as part of the current examination cycle. He then failed to submit an appeal to HRD within the statutory timeframe.

For these reasons, the Appellant's appeal under Docket No. B2-19-149 is ***dismissed***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Absent]) on August 15, 2019.

Notice to:

John MacDonald
[Address redacted]

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street: St #600
Boston, MA 02114

* * * * * *

MICHAEL MARCHIONDA

v.

BOSTON POLICE DEPARTMENT

G1-17-187 and G1-18-228[1]

Stephen J. Delamere, Esq.
Law Office of Stephen J. Delamere, P.C.

Nathaniel R. Beaudoin, Esq.[2]
Boston Police Department

August 15, 2019
Cynthia A. Ittleman, Commissioner

Bypass Appeal-Original Appointment to the Boston Police Department-Lack of Truthfulness and Belligerence Toward Police-Poor Judgment-Disparate Treatment—The appeal of his bypass by a candidate for original appointment to the Boston Police Department was dismissed by the Commission where Boston had legitimate concerns with this candidate's history of untruthfulness and belligerence toward the police. Specifically cited were three unfortunate encounters he had had with various law enforcement authorities and what his comportment during these incidents suggested about his judgment. The Appellant's claim that he had been victimized by a disparately harsh consideration of these incidents was rejected since his comparators involved successful candidates with issues that had arisen many years earlier and who were never shown to have been untruthful to the police or verbally belligerent.

DECISION

The Appellant, Michael Marchionda (Appellant or Mr. Marchionda), filed a timely appeal with the Civil Service Commission (Commission) in G1-17-187 on September 20, 2017 and a timely appeal in G1-18-228 on November 21, 2018 under G.L. c. 31, s. 2(b), appealing the decisions of the Boston Police Department (Respondent or BPD) to bypass him for appointment to the permanent, full-time position of police officer. A prehearing conference was held in G1-17-187 on October 17, 2017 and in G1-18-228 on December 18, 2018 at the Commission's office in Boston. A full hearing was held on G1-17-187 on December 12, 2017 in the same location as the prehearing conferences.[3] The hearing was digitally recorded and copies of the recording were sent to the parties.[4] The witnesses, with the exception of the Appellant, were sequestered. The parties submitted post-hearing briefs. Upon the filing of the 2018 appeal, the parties agreed to consolidate it with the 2017 appeal since the reasons for bypass were essentially the same in G1-18-228 as in G1-17-187 and that they would submit briefs, with additional exhibits, for the Commission to render a decision in lieu of conducting a hearing in G1-18-228. The parties subsequently filed briefs, with exhibits, regarding the 2018 appeal. For the reasons stated herein, the both appeals are denied.

FINDINGS OF FACT

A total of fifteen (15) exhibits[5] regarding the 2017 appeal were entered into the record at the full hearing and a total of thirty-one (31) exhibits[6] regarding the 2018 appeal were entered into the record with the parties' briefs. Based on the exhibits in both G1-17-187 and G1-18-228 and the testimony of the following witnesses who testified regarding case G1-17-187:

Called by the Appointing Authority

- Bryan Rivers, Det., Recruit Investigations Unit (RIU), Boston Police Department (BPD)
- Nancy Driscoll, then-Director of Human Resources (HR), BPD

Called by the Appellant

- Michael Marchionda, Appellant
- Ms. M
- Mr. G

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

BACKGROUND

1. The Appellant has lived at his current Boston address since 2001. He graduated from high school in 2010, attended a Maine preparatory school in 2011 - 2012, and graduated from a New Hampshire college with a B.A. in Criminal Justice in 2016. (R.Ex. 13 (2018))

1. The parties agreed to consolidate these cases after the hearing was conducted in docket number G1-17-187, when the Respondent had bypassed the Appellant again and the Appellant filed docket number G1-18-228. The parties further agreed to waive a hearing in G1-18-228 and to have the Commission instead consider the parties' briefs on G1-18-228, along with their respective additional exhibits, in addition to the record in G1-17-187. (Administrative Notice)

2. The Respondent was represented by Attorney Jaclyn Zawada in the proceedings up to and including the hearing in docket number G1-17-187. Attorney Zawada no longer represents the Respondent, who is here represented by Attorney Nathaniel Beaudoin.

3. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq*., apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

4. 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.

5. The Respondent submitted twelve (12) exhibits and the Appellant submitted three (3) exhibits in the 2017 appeal.

6. The Respondent submitted fifteen (15) exhibits and the Appellant submitted sixteen (16) exhibits in the 2018 appeal.

2. The Appellant worked in security for the Boston Red Sox for several years beginning in 2013. He would drive down from the New Hampshire college for games and ten drive back after the game. (Testimony of Appellant)

3. Working for the Red Sox, the Appellant received training in screening fans, dealing with disorderly fans, looking for suspicious activity, breaking up physical altercations, and interacting with Boston Police. In his security work at Fenway, the Appellant interacted with Boston Police, for example, when pre-entry screening of ticket holders indicated that a person had a firearm, and when the Boston Police Bomb Squad trained Fenway security. The Appellant also has experience writing reports pertaining to incidents of unruly fans and fights at Fenway. The Appellant and other security staff have also received training from the Boston Police Bomb Squad. (Testimony of Appellant)

4. Since the fall of 2016, the Appellant has been a security officer at Brigham and Women's Hospital, where he has received training on de-escalating situations. As a security officer at Brigham and Women's Hospital, the Appellant carries Narcan to allow him to respond to occasional overdoses at the hospital involving visitors. In addition, at the hospital he is also required to deal with persons who may have to be restrained. If there are patients who have been involved in violent crimes, the Boston Police will provide information to hospital security so that security personnel can look out for possible repercussions or reprisals. At the hospital, the Appellant writes incidents reports and he is sometimes supervised by security personnel who are former police officers. (Testimony of Appellant) The Appellant's hospital supervisor reports that Appellant has volunteered for shifts when they were shorthanded and has mentored newer employees. He added that the Appellant stays calm in stressful situations such as patient restraint calls and enforcing the hospital access control policy and that the Appellant has had a calm and level-headed demeanor when dealing with stressful situations. (A.Supp.Ex. 16 (2018))

5. From the fall of 2016 to the spring of 2017, the Appellant was also a Head Hockey Coach in a training program. (R.Ex. 13 (2018))

6. The Appellant has not been reprimanded at Fenway Park, Brigham and Women's Hospital or the hockey training program and he has not had any attendance issues. (Testimony of Appellant; (R.Ex. 13 (2018))

7. The Appellant has excellent professional references and work history. (Testimony of Rivers) The Appellant also received positive neighbor reviews. (A.Ex. 1 (2017); A.Supp.Ex. 16 (2018))

8. The Appellant took and passed the 2015 police officer civil service exam. A number of candidates ranked lower than the Appellant on Certification 04401were selected, bypassing the Appellant, which bypass the Appellant appealed in G1-17-187. (Stipulation) The Appellant took and passed the 2017 police officer civil service exam. A number of candidates ranked lower than the Appellant on Certification 05213 were selected, bypassing the Appellant, which bypass the Appellant appealed in G1-18-288. (Stipulations (2017 and 2018))

9. The Respondent bypassed the Appellant on August 31, 2017 and on November 7, 2018 for the same reasons. (R.Ex. 10 (2017); A.Supp.Ex. 1 (2018))[7]

10. Candidates are told to be truthful during the application process. (Testimony of Driscoll)

11. Rule 102 § 23 requires Employees of the Boston Police Department to be truthful in reports and not provide inaccurate information. (R.Ex. 11)

12. Det. Bryan Rivers conducted the Appellant's 2017 background investigation for the Recruit Investigations Unit (RIU) at the BPD in 2017. (Testimony of Rivers; R.Ex. 1 (2017)) When the Appellant applied to the BPD again in 2018, after being bypassed in 2017, Det. Karyn VanDyke conducted the Appellant's background investigation. (R.Supp.Ex. 13 (2018)) The 2018 report of Det. VanDyke updates the 2017 investigation report of Det. Rivers and relies entirely on Det. Rivers' 2017 report with respect to three (3) incidents that occurred in the following locations: 1) Waltham, 2) Merrimack and 3) NH. (*Id.*)

Waltham Incident

13. The 2009 Waltham incident occurred when the Appellant was in high school, eight (8) years before he applied to become a Boston Police Officer. The incident involved motor vehicle vandalism that occurred during a house party involving a number of teenagers, including the Appellant. This matter was found by the Respondent as a result of an inter-police department name search that showed the Appellant was interviewed; it was not part of a criminal record. (Testimony of Rivers; R.Ex. 5 (2017 and 2018))

14. The Appellant, as well as a number of the approximately nine (9) other high schoolers at the party, were interviewed by Waltham Police concerning the vandalism. Initially, the Police believed that the Appellant knew who caused the vandalism. The Appellant and other teens at the party made various statements to the police at different times about who vandalized the car. (R.Ex. 5 (2017 and 2018))

15. The Appellant knew that a friend of his at the party committed the vandalism and the Appellant tried to coax his friend to come forward but his friend refused to do so. Thereafter, one (1) of the other teens who had been at the party reported that the Appellant's friend was the person who allegedly vandalized the car and the Appellant eventually confirmed the identity of this friend to a Waltham Police Officer. Subsequently, the Appellant spoke with

7. With the exception of the inclusion or exclusion of the word "that" in a couple of places in the bypass letters, a typographical error and, perhaps, one or two other word differences, the two (2) bypass letters are the same.

the District Attorney's office to provide information regarding events at the party and the suspect. (Testimony of Appellant)

16. The Waltham Police Officer wrote in his report that the initial investigating officer reported that the Appellant had been untruthful. After further investigation by a second Waltham Police Officer and the Appellant's confirmation that he knew the person who allegedly vandalized the car, the second Officer wrote, in part, "[d]uring my phone conversations with Mr. Marchionda, I felt that he was genuinely upset about the incident and being truthful as to his own involvement. I also felt that he was torn between his friends and between assisting the innocent victim in this matter." (R.Ex. 5 (2017 and 2018)) Det. Rivers reviewed the Waltham police report and spoke to one (1) of the two (2) officers involved in the case and the teen who was eventually identified as the person who allegedly committed the vandalism. (R.Ex. 1 (2017))

Merrimack College Incident

17. In 2011, when the Appellant was nineteen (19) years old and six (6) years prior to the Appellant's application for Boston Police Officer in 2017, the Appellant attended a preparatory school in Maine. (Testimony of Appellant)

18. One night in October 2011, the Appellant and two (2) friends from the preparatory school went to Merrimack College (Merrimack) in North Andover to visit friends. (Testimony of Appellant)

19. The Appellant had his father's car at the preparatory school. On the way to Merrimack, the Appellant and his friends obtained beer and brought it with them to Merrimack. One (1) of the Appellant's friends volunteered to be the designated driver on the way back to the preparatory school. (Testimony of Appellant)

20. At some time while the Appellant and his friends were visiting Merrimack in the evening, they were in the car in the parking lot when they saw campus police officers. The Appellant's friend who was driving did not want to drive past the officers because there was beer in the car. They parked the car on campus, got out of the car and went to a dorm to visit friends there. (Testimony of Appellant)

21. The Merrimack campus police approached the car when they saw the car's parking lights had been left on. The Officers saw beer in the vehicle and looked up the Appellant's name on the campus sign-in sheet. The campus police contacted the room the Appellant was visiting to have him come down. Thereafter, the Officers saw the Appellant and his friends on campus and approached them. He and his friends ran away. (R.Exs. 3 and 4; Testimony of Appellant)

22. The campus officers subsequently located the Appellant and his friends. The Appellant was intoxicated. The officers asked the Appellant if the car he had been in was his and if he had been driving it. The Appellant answered that his father had dropped him off at the college in the car. However, the officers noted that the Appellant had the car keys and he had signed into campus security when he and his friends arrived on campus. The officers asked the Appellant about the beer in the car and the Appellant initially denied having any knowledge about the beer. Asked again if there was beer in the car, the Appellant answered 'yes'. The officers handcuffed and arrested the Appellant as a Minor in Possession of Alcohol. (R.Exs. 3 and 4; Testimony of Appellant)[8] (Administrative Notice)

23. The officers transported the Appellant to the North Andover Police Department for booking. During this transport, the Appellant stated that his father was a member of the Boston Police Department. While being booked at the North Andover Police Station, the Appellant was repeatedly asked if his father is a Boston Police Officer. A couple of times, the Appellant answered, "[k]ind of" or "[k]ind of, he knows the Commissioner". (R.Ex. 3 (2017)) When asked if his father is a high ranking Boston police official, the Appellant answered, "[k]ind of". (*Id*.) The North Andover police researched online and found that the Appellant's father worked in maintenance for the Boston Police Department. (*Id*.; R.Ex. 1 (2017); Testimony of Appellant)

24. The Appellant did not have a copy of the Merrimack campus police report prior to filling out his BPD employment application and stated that he did not vividly remember the incident. When the Appellant attempted to retrieve the report, he was unable to do so because the Merrimack campus police would not provide it to him even though he appeared in person to retrieve it as requested by Merrimack College. (Testimony of Appellant)

25. The Appellant received Pre-Trial Probation for the Minor in Possession of Alcohol charge and the charge was dismissed six (6) months later. (A.Ex. 2; Testimony of Appellant)\

New Hampshire Incident

26. The Appellant attended a college in New Hampshire in 2013 - 2016, after preparatory school. While at the college, the Appellant was on the varsity Hockey Team. Early in 2014, the Appellant's girlfriend, Ms. M, came to visit him. The Appellant, Ms. M, and another couple went out to dinner at a nearby Pub/Restaurant. At or about this time in 2014, the Appellant was twenty-one (21) years old and it was approximately three (3) years prior to his application to the Boston Police Department. (Testimony of Appellant; R.Ex. 1 (2017); A.Supp.Ex. 13 (2018))

27. On the way back to the college, the Appellant's vehicle was pulled over by a municipal New Hampshire Police Officer. The Appellant's girlfriend was the one who was driving because she

8. Det. Rivers testified that one (1) of the Merrimack campus police officers reported that that the Appellant was "flip" or "arrogant" during the incident. However, Det. Rivers' 2017 investigation report states that BPD Sgt. Det. Dottin is the person who spoke to the Merrimack offer, not Det. Rivers. Det. VanDyke's 2018 report relied entirely on the section of Det. Rivers' 2017 report regarding the Waltham, Merrimack College and New Hampshire incidents. Since neither Det. Rivers nor Det. VanDyke spoke to the Merrimack officer and the Merrimack officer's statement was made approximately eight (8) years after the incident and the Merrimack incident report did not include such allegations, I give no weight to the Merrimack officer's purported statement.

had had the least number of drinks. (Testimony of Appellant; Ms. M and Mr. G)

28. The Appellant asked the Officer why Ms. M was being pulled over. The Officer responded that she had crossed the white line on the road. The passengers denied that Ms. M had done so. (Testimony of Appellant and Mr. G)

29. Ms. M was taken out of the car, questioned, and arrested. The Appellant was told by the Officer that his car would be towed because neither he nor the other occupants were able to drive. The Appellant wanted to have someone pick up the car but his request was denied. (Testimony of Appellant and Mr. G)

30. The Appellant questioned the Officer about the stop and having his car towed and he was upset that Ms. M was being arrested. (Testimony of Mr. G and Appellant)

31. The Officer's police report states that the Appellant was "verbally combative and belligerent" and that he was placed in handcuffs and transported to the Police Station in protective custody. (R.Ex. 8 (2017)) Mr. G and his girlfriend were also handcuffed and transported back to the Police Station and put in protective custody. (Testimony of Mr. G)

32. At the Police Station, the Appellant and Mr. G were placed in the same cell and were given their cell phones to call someone to pick them up. When their ride came to pick them up, all of them, including Ms. M, were released. (Testimony of Appellant and Mr. G)

33. The report of the stop of Ms. M does not state the motor vehicle violation for which she was pulled over, nor does it indicate that the police officer conducted a field sobriety test or the results of such tests. (R.Ex. 8 (2017))

34. The Appellant was not charged with any crimes for his alleged behavior during Ms. M's stop. (Testimony of Appellant and Rivers)

35. The charges against Ms. M were reduced to either a marked lanes violation or negligent operation. (Testimony of Ms. M)

36. Det. Rivers spoke to the reporting New Hampshire municipal Officer involved in this stop. The Officer did not recall anything beyond what was in the report. (Testimony of Rivers)

BPD Roundtable and Interview

37. The BPD conducts a roundtable discussion to review candidates' background investigation results. At the roundtable, the pertinent background investigator presents his or her findings and it is determined if a candidate is to be bypassed, moved forward, or if a discretionary interview is to be held for the candidate to ask about certain information in the candidate's background. (Testimony of Driscoll) Det. Rivers presented the findings of his investigation to the BPD roundtable in 2017. (Testimony of Rivers) Det. VanDyke presented the findings of her investigation to the BPD roundtable in 2018. (Testimony of Driscoll)

38. At the Appellant's 2017 roundtable there were three (3) concerns relating to poor judgment: 1) the Waltham incident where the Appellant was a possible witness and did not immediately provide his friend's name to the police; 2) the Merrimack College arrest for Minor in Possession of Alcohol and providing untruthful statements to police; and 3) the New Hampshire incident where the Appellant was taken into protective custody and was belligerent toward an officer. (Testimony of Driscoll)

39. Det. Rivers was present during the roundtable discussion relating to the Appellant's application. (Testimony of Rivers) For the Appellant's 2018 application, Det. Karyn VanDyke was the investigator and she presented her report to the roundtable. (R.Ex. 13 (2018); Testimony of Driscoll)

40. The members of the 2017 roundtable decided to give the Appellant a discretionary interview regarding the Appellant's 2017 application. (Testimony of Driscoll)[9]

41. Any concern that the Respondent has about a candidate they are investigating would be raised during the discretionary interview. The reason for raising the issues of concern during the interview is that the candidate can address such concerns. The persons conducting the discretionary interview would be aware of the issues of concern. (Testimony of Driscoll)

42. Det. Rivers told the Appellant the subjects that he would be questioned about at the discretionary interview. (Testimony of Rivers)

43. Lt. McEachern, former head of the RIU, provided a summary of the Appellant's background for the discretionary interview. That summary contained inaccurate information relating to the Appellant's NH incident. (R.Ex. 9) Specifically, Lt. McEachern erroneously stated in his report to Dep. Supt. Walcott that the New Hampshire incident involved the Appellant's arrest for purchasing alcohol for a minor when there is no indication that he was arrested and charged with purchasing alcohol for a minor. (Testimony of Rivers)

44. During the Appellant's discretionary interview in 2017, he was asked some questions about the Merrimack College incident. The Appellant stated that he was intoxicated at that time. However, the Appellant was not asked about statements that he made during this incident that his father was a Boston Police Officer, that his father had dropped him off at Merrimack College, and that he did not know about the beer in his car. (A.Ex. 3, Testimony of Appellant)

45. At the discretionary interview, the Appellant was also asked some questions about the New Hampshire incident and he acknowledged that he could have used better judgment. He was not

9. There is no indication in the record that the Appellant was afforded a discretionary interview in the 2018 application process. (Administrative Notice)

asked specifically what he said or did that led the police to handcuff him. (A.Ex. 3; Testimony of Appellant)

46. The Appellant was not asked about his statements to Waltham police about the identity of the person who reportedly vandalized a car. (A.Ex. 3 (audio-visual recording of discretionary interview); Testimony of Appellant)

Appellant's 2017 and 2018 Bypasses

47. Ms. Driscoll and Dep. Supt. Walcott made the decision to bypass the Appellant in 2017. (Testimony of Driscoll) Ms. Driscoll drafted and signed the Appellant's 2017 bypass letter. (R.Ex.10; Testimony of Driscoll) Ms. Mary Flaherty, Deputy Director of Human Resources, signed the Appellant's 2018 bypass letter. (Appellant's Supplemental Exhibit (A.Supp.Ex.) 1)

48. Both bypass letters state that the Appellant:

- was "untruthful to police" investigating the vandalism incident in Waltham;
- told Merrimack College Police that his father dropped him off at the campus, that he didn't know about the beer in his car, that his father was a Boston Police Officer and that the Appellant was intoxicated;
- was "verbally combative and belligerent" towards a New Hampshire municipal police officer and he was placed in hand restraints and protective custody during the New Hampshire police stop of the Appellant's girlfriend; and
- used poor judgment in these incidents and provided untruthful information to police on two (2) of these three (3) occasions, adding, in part,

  "your untruthfulness renders you unsuitable for employment as a Boston police officer.

  … the Boston Police Department finds you ineligible for appointment as a Boston Police Officer at this time …" (R.Ex. 10; A.Supp.Ex. 1)(emphasis added)

49. The Appellant has not had any further incidents since the 2017 bypass and no additional reasons for bypass have been provided by the BPD. (A.Supp.Ex. 1)

Other Applicants in 2018[10]

50. The Respondent will consider candidates who have been convicted of driving while under the influence of alcohol if the conviction is more than ten (10) years old because people can learn from their mistakes after the passage of time and they overcome their prior mistakes. (Testimony of Driscoll)

51. Thirty-one (31) other BPD applicants who were given conditional offers of employment had some alcohol related incident in their background investigations. (A.Supp.Exs. 3-16)

52. For example, Applicant 5 had three (3) separate Minor in Possession of Alcohol charges between 2010 and 2012. On the 3rd incident, which occurred 2 months after the 2nd incident, the Applicant was arrested at a New Hampshire college after being reported as an intoxicated individual who was not a student and was no longer welcome on campus. (A.Supp.Ex. 3, (Privileged and Confidential Memorandum of Applicant (PCM) 5))

53. In April 2011, Applicant 10 was found to be in violation of the Uniform Code of Military Justice by consuming alcohol within eight (8) hours of duty and being outside liberty limits. Applicant 10 forfeited pay and had extra duties imposed upon him and was restricted to barracks for thirty (30) days. In October 2013, Applicant 10 was arrested for public intoxication and he pleaded guilty, paid a fine, he was restricted to base for thirty (30) days and he forfeited a half month's pay along with being required to attend counseling. (A.Supp.Ex. 5 (PCM of Applicant 10))

54. In 2003, Applicant 16 was arrested for operating a vehicle while under the influence of alcohol. The Applicant admitted to sufficient facts pursuant to a Continuance Without a Finding. No report on the facts of the incident was included in the Privileged and Confidential Memorandum. (A.Supp.Ex. 7 (PCM of Applicant 16))

55. Applicant 17 was disciplined three (3) times at a Massachusetts college for drinking and giving a false name to a Resident Advisor, being in the presence of alcohol while under 21, and he was suspended from living on campus for eight (8) months for being so intoxicated that he could not remember what he did. Following another incident, Applicant 17 was required to see an on-campus alcohol assessment/recommendation counselor. (A.Supp.Ex. 8 (PCM Applicant 17))

56. Applicant 19 was placed into protective custody in July 2011 when he stopped his vehicle on the road and was honking repeatedly. The Applicant stopped his vehicle within inches of a police officer's knee. The officer smelled alcohol on the Applicant, the Applicant was noted to have bloodshot eyes and was unsteady on his feet. The Applicant admitted to consuming alcohol hours before. The Applicant was arrested and placed in protective custody and charged with operating to endanger. The Applicant admitted to sufficient facts and a CWOF was entered. In December 2010, Police responded to a report of intoxicated youths getting into a vehicle to drive. Officers arrived and observed a bottle of alcohol in the Applicant's car, located a nip bottle in the Applicant's pocket and the Applicant admitted to having had a few beers. The Applicant refused to notify the officers where his keys were located, requiring the Applicant's car to be towed. (A.Supp.Ex. 9 (PCM of Applicant 19))

57. Applicant 26, while serving in the Marine Corps and on duty overseas, was charged with disorderly conduct/drunkenness and destruction of property when he picked up a wet floor sign in a restaurant and threw it. The Applicant's explanation differed from the report, stating that he picked up a wet floor sign over his head and by accident hit a light fixture and broke it. The Applicant

10. The record does not include information concerning the background of candidates selected in connection with the Appellant's 2017 bypass appeal.

was reduced in pay grade, forfeiting $1,099 per month for two (2) months, restricted to base and given extra duties. Applicant 26 was also arrested for Illegal Transportation of Alcohol and was issued a summons for Unlawful Possession when a police officer observed him drinking beer out of a cup behind a restaurant. The Applicant admitted having alcohol in his car and the officer observed numerous empty beer cans in the trunk. The Applicant told BPD investigators that he only had only a little beer in a cup. (A.Supp.Ex. 12 (PCM of Applicant 26))

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, 303-05, *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, s. 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.

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant in 2017 and 2018. The Respondent bypassed the Appellant for being untruthful to police regarding the Waltham incident and the Merrimack College incident, he was "verbally combative and belligerent toward police" in the New Hampshire incident, and showed poor judgment in these incidents. The duty imposed upon a police officer to be truthful is one of the most serious obligations he or she assumes. "Police work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." *Falmouth* v. *Civil Service Comm'n.*, 61 Mass. App. Ct. 796, 801 (2004) citing *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997). *See also*, *Desmond* v. *Town of West Bridgewater*, 27 MCSR 645 (2014); *Ung* v. *Lowell Police Dep't*, 24 MCSR 567 (2011); *Gallo* v. *City of Lynn*, 23 MCSR 348 (2010). Untruthfulness also may compromise an officer's credibility as a witness. *See United States* v. *Agurs*, 427 U.S. 97, 108 (1976), citing *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See also Kyles* v. *Whitley*, 514 U.S. 419 (1995); *United States* v. *Bagley*, 473 U.S. 667 (1985). Likewise, an appointing authority is well within its rights to bypass a candidate for police officer who "purposefully" fudges the truth during the application process. *See, e.g.*, *Barbosa* v. *New Bedford Police Dep't*, 29 MCSR 495 (2016) (pattern of inattention to detail and lack of candor regarding prior employment and criminal history); *Minoie* v. *Town of Braintree*, 27 MCSR 216 (2014)(multiple omissions about prior domestic abuse restraining orders and residences); *Noble* v. *Massachusetts Bay Trans. Auth.*, 25 MCSR 391 (2012)(concealing suspension from school for involvement in criminal activity); *Burns* v. *City of Holyoke*, 23 MCSR 162 (2010)(claiming he 'withdrew" from another law enforcement application process from which he was actually disqualified); and *Escobar* v. *Boston Police Dep't.*, 21 MCSR 168 (2008) (misrepresenting residence). The corollary, however, to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g.*, *Boyd* v. *City of New Bedford*, 29 MCSR 471 (2016) (honest mistakes answering ambiguous questions on NBPD Personal History Questionnaire); *Morley* v. *Boston Police Dep't*, 29 MCSR 456 (2016)(candidate unlawfully bypassed on misunderstanding appellant's responses about his "combat" experience); and *Lucas* v. *Boston Police Dep't*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history). The Commonwealth has somewhat different standards for prosecutorial disclosure of exculpatory evidence; facts not generated by "the prosecution team", but unrelated internal affairs investigations, generally, do not come within the "Brady" paradigm. *See, e.g.*, MASS.R.CRIM.P. 14(a)(1)(A) and 2014 Reporters Notes; *Commonwealth* v. *Laguer*, 448 Mass. 585 (2007); *Commonwealth* v. *Tucceri*, 412 Mass. 401 (1992); *Commonwealth* v. *Daye*, 411 Mass. 719 (1992); *Commonwealth* v. *Gallerelli*, 399 Mass. 17 (1987); and *Commonwealth* v. *Wilson*, 381 Mass. 90 (1980). *See also Commonwealth* v. *Wanis*, 426 Mass. 639, 643-44 (1998); and *Commonwealth* v. *Thomas*, 451 Mass. 451 (2008).

In regard to the Appellant's conduct in connection with the Waltham incident, the initial investigating Waltham police officer found the Appellant to be untruthful. The subsequent investigating Waltham police officer added (as noted above), in part, "[d]uring my phone conversations with Mr. Marchionda, I felt that he was genuinely upset about the incident and being truthful as to his own involvement. I also felt that he was torn between his friends and between assisting the innocent victim in this mat-

ter ….” (R.Ex. 5 (2017 and 2018)) The Appellant knew that it was one of his friends who vandalized a car and yet he initially told Waltham Police that he did not know who did it. In fact, the Appellant did not tell Waltham Police that his friend vandalized the car until the police informed the Appellant that another one of the teens at the party had already reported that the Appellant’s friend had vandalized the car. Although this event occurred when the Appellant was a teenager and it was eight years prior to his application for employment at the BPD, it was the first a series of events also showing that the Appellant exercised poor judgment, that the Respondent reasonably found troubling. The Respondent conducted a reasonably thorough review of the Waltham incident, confirming the Waltham report by contacting one of the investigating Waltham officers and affording the Appellant a discretionary interview. The Appellant was informed of the topics of concern to the Respondent. That the interviewers did not ask the Appellant certain specific questions does not undermine the opportunity the Appellant was given to address the Respondent’s concerns.

The Respondent also bypassed the Appellant for untruthfulness and poor judgment in connection with the Merrimack College incident. This incident occurred only three (3) years after the Waltham incident and five (5) years prior to his application for employment at the BPD. The Appellant initially denied to campus police that he arrived at the campus in his (or his father’s) car and that he was unaware that there was beer in the car, he subsequently admitted to both and was arrested for being a minor in possession of alcohol. At some point during his interaction with the campus police, the Appellant stated that his father worked at the BPD, implying that his father is a police officer, no doubt in a foolish, intoxicated attempt to obtain favorable treatment. While being processed at the Andover Police Department, the Appellant was asked if his father was a BPD police officer multiple times and he repeatedly stated “kind of” and said that his father was close to the BPD Commissioner. The Andover police conducted a brief computer search and found that the Appellant’s father works at the BPD in maintenance, not as a police officer. Thereafter, the Appellant was placed on probation for six (6) months, following which the case was dismissed. BPD investigators conducted a reasonably thorough review, confirming the incident with one of the arresting officers and granting him a discretionary interview. The Merrimack incident constitutes the second occasion in which the BPD found that the Appellant was untruthful to police and again showed poor judgment. The Appellant was granted a discretionary interview in which to explain these matters. That the interviewing officers did not ask the Appellant specific questions does not undermine the opportunity he was given to explain these matters.

The Respondent also bypassed the Appellant for being “verbally combative and belligerent toward police” and using poor judgment in connection with the New Hampshire incident. At the time of this incident, the Appellant was twenty-one (21) years old, attending college, and it occurred just three (3) years prior to his application for employment at the Boston Police Department. The Appellant admitted that he questioned the arresting officer and that he was upset that his girlfriend was being arrested, that he was not allowed to have a friend pick up the car instead of having it towed, and that he did not believe that his girlfriend, who had been driving, crossed the white line. The arresting officer’s report states that the Appellant was verbally combative and belligerent, in fact, so much that the arresting officer found it necessary to handcuff the Appellant. That the other passengers were handcuffed to be put into protective custody does not mitigate the Appellant’s poor judgment in being verbally combative and belligerent toward the arresting officer. The BPD conducted a reasonably thorough review of this incident, including confirming the incident with the arresting officer, and granted the Appellant a discretionary interview to discuss these incidents. The Appellant told the discretionary interviewers that he regretted his demeanor during this incident and that he has learned from the experience. The Appellant’s behavior during the New Hampshire incident, in addition to his behavior during the Waltham and Merrimack College incidents, establish reasonable justification to bypass the Appellant.

The Appellant argues that in the 2018 hiring process he received disparate treatment because more than thirty candidates were given conditional offers of employment notwithstanding their various problems involving alcohol. Two candidates’ backgrounds were particularly troubling. Specifically, one of the candidates was apparently drunk enough while driving that he just missed an officer when he (the candidate) was stopping his car and refused to give police his car keys. However, this occurred approximately seven (7) years prior to the candidate’s application to BPD and he admitted his misconduct, including entering an admission to sufficient facts in court for driving to endanger another, leading to a continuance without a finding. Another candidate was convicted of an OUI but it was more than ten (10) years prior to his application for employment to the BPD. However, there is no indication in the record that these two (2) candidates, or the others who were also given conditional offers of employment, were repeatedly untruthful to police and were verbally combative and belligerent toward police. Thus, it has not been established that the Appellant received disparate treatment. Rather, the Respondent has established by a preponderance that it had reasonable justification to bypass the Appellant. Finally, I note that the bypass letters sent to the Appellant in 2017 and 2018 indicate that the Appellant was being bypassed “at this time”. At the time that the Appellant first applied to the BPD for employment as a permanent full-time police officer, he had only been out of college and working full-time in security for a year. Perhaps with the passage of time, continued successful employment experience and no further negative interactions with police, the Appellant’s chances of being given a conditional offer of employment will improve.

CONCLUSION

Accordingly, for the above stated reasons, Mr. Marchionda’s bypass appeals, Docket Nos. G1-17-187 and G1-18-228 are ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan [Camuso—absent], Commissioners) on August 15, 2019.

Notice to:

Stephen J. Delamere, Esq.
Law Office of Stephen J. Delamere, P.C.
839 Washington Street
Stoughton, MA 02072

Nathaniel R. Beaudoin, Esq. (2)
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Melissa A. Thomson, Esq.
Mark P. Detwiler, Esq.
Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street: St #600
Boston, MA 02114

* * * * * *

PHILIP A. MASLON

v.

UMASS AMHERST

C-19-14

August 15, 2019
Christopher C. Bowman, Chairman

Civil Service Commission Jurisdiction-Collective Bargaining Agreement-UMass Electrician—A UMass electrician could not appeal his pay grade allocation as a reclassification as pay grades are a collective bargaining issue over which the Commission lacks jurisdiction.

DECISION ON RESPONDENT'S MOTION TO DISMISS

On January 6, 2019, the Appellant, Philip Maslon (Mr. Maslon), an employee at UMass Amherst, filed an appeal with the Civil Service Commission (Commission), contesting a decision by the state's Human Resources Division dated 10/29/18 regarding his request for reclassification.

2. The 10/29/18 letter from HRD stated in part: "You requested the reallocation of your position from the title of Utility Plant Operator to the title of Utilities Instrumentation and Controls Technician. After reviewing the appeal documentation, we find that the classification of High Voltage Electrician covers the duties being performed by you."

3. Mr. Maslon hand-wrote the following on the HRD letter which was attached to his appeal form to the Commission: " … I was not looking for the title of Utilities Instrumentation and controls but looking for the pay grade 24 or better …"

4. On January 23, 2019, I held a pre-hearing conference at the Springfield State Building which was attended by Mr. Maslon, a union representative, counsel for UMass Amherst and a representative from UMass Amherst.

5. At the pre-hearing conference, it was agreed that: a) UMass appointed Mr. Maslon as an Electrician in 1987; b) Mr. Maslon became a Utility Plant Operator in 2004; and c) on 11/7/17 Mr. Maslon became a High Voltage Electrician I.

6. In regard to the designation of High Voltage Electrician I, the parties agreed that UMass, as a result of the increased complexity of the job duties (including the expansion of high voltage power plants), sought a title that more appropriately matched the job duties.

7. UMass identified the High Voltage Electrician series used by MassDOT and received permission from HRD to use that title at UMass.

8. Since this was a new title, UMass bargained with the local union regarding the appropriate pay grade.

9. UMass and the union reached an agreement that the title would be a "Grade 20".

10. Mr. Maslon does not believe that Grade 20 is the appropriate compensation for this position given his job duties associated with the large, high voltage power plants. Thus, he filed an appeal with the Commission.

11. Rather than reach a conclusion regarding whether the Commission had jurisdiction to hear this appeal, UMass asked for additional time to see if a resolution could be reached regarding this matter.

12. For that reason, Mr. Maslon's appeal was dismissed with a future effective date, to be reinstated only if there was no resolution and Mr. Maslon filed a request to re-open the appeal.

13. On May 31, 2019, Mr. Malson filed a timely request to re-open the appeal.

14. On June 26, 2019, I held a status conference at the Springfield State Building, attended by the same individuals who attended the January 23rd pre-hearing conference.

15. At the status conference, UMass indicated that it had surveyed other entities where the title of High Voltage Electrician is used, including UMass Medical, and concluded that the pay grade (20) was appropriate for UMass Amherst.

16. Mr. Maslon continued to disagree and argue that the position should be a Grade 24.

17. According to UMass, Mr. Maslon did indeed file a request for reclassification with UMass seeking to be reclassified from High Voltage Electrician to Utilities Instrumentation and Controls Technician. According to UMass, Mr. Maslon does not possess a

certification required for that position. Mr. Maslon does not dispute this.

18. Since it is undisputed that Mr. Maslon does not currently meet the minimum entrance requirements of the higher position and because the Commission has no jurisdiction to hear appeals related to collectively-bargained pay grades, I ordered the following:

- UMass Amherst had 30 days to file a motion to dismiss Mr. Maslon's appeal;
- Mr. Maslon had 30 days thereafter to file a reply.

19. On July 25, 2019, UMass Amherst submitted Motion to Dismiss. Mr. Maslon submitted a reply one (1) day later.

ANALYSIS/CONCLUSION

This is not a reclassification appeal under G.L. c. 30, s. 49. Rather, as stated by Mr. Maslon: … "I was not looking for the title of Utilities Instrumentation and controls but looking for the pay grade 24 or better." (emphasis added) Pay grades are a collective bargaining issue for which the Commission has no jurisdiction. In short, Mr. Maslon is not satisfied with the end result of negotiations between the local union and management at UMass Amherst regarding the pay grade for the title he currently occupies. The Commission is not the proper forum for that dispute.

Further, to the extent that this appeal can be construed as a classification appeal, it is undisputed that Mr. Maslon does not possess the minimum entrance requirements of the higher, Utilities Instrumentation and Controls Technician, position.

For these reasons, Mr. Maslon's appeal under Docket No. C-19-14 is hereby ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Absent]) on August 15, 2019.

Notice to:

Philip A. Maslon
[Address redacted]

Helen M. Bowler, Esq.
UMass Amherst
333 Whitmore Administration Building
181 Presidents Drive
Amherst, MA 01003-9313

* * * * * *

GISELLE RODRIGUEZ

v.

MASSACHUSETTS PAROLE BOARD

G1-19-121

August 15, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Field Parole Officer-Driving History—The Commission affirmed the bypass by the Massachusetts Parole Board of a strong candidate for appointment as a Field Parole Officer because of her two recent surchargeable and serious traffic accidents that occurred in 2018. The candidate otherwise had no record of driving infractions during her career in the military and Chair Christopher C. Bowman encouraged her to reapply at a future time when these accidents were more in the past. Field Parole Officers are designated as special police officers by the State Police, carry a firearm and have arrest powers, and are provided with an emergency-equipped state vehicle with domicile privileges to conduct investigations and transport parolees.

DECISION

On May 31, 2019, the Appellant, Giselle Rodriguez (Ms. Rodriguez), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Parole Board (MPB) to bypass her for original appointment as a permanent, Field Parole Officer A/B (FPO A/B). I held a pre-hearing conference on June 25, 2019 at the offices of the Commission and I held a full hearing at the same location on August 7, 2019.[1] The hearing was digitally recorded.[2]

FINDINGS OF FACT

Exhibits 1-9 and A-O were entered into evidence at the hearing by MPB. Based on those exhibits, the stipulated facts, the testimony of:

Called by MPB

- Kevin Keefe, Chief of Field Services, MPB;

Called by the Appellant

- Giselle Rodriguez, 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 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.

1. Ms. Rodriguez is a thirty-four (34) year-old Hispanic female who resides in Abington, MA with her son. (Testimony of Ms. Rodriguez)

2. Ms. Rodriguez has a bachelor's degree in criminal justice. (Testimony of Ms. Rodriguez)

3. Ms. Rodriguez has served for sixteen (16) years in the military, including eight (8) years in the United States Army and eight (8) years in the United States Air National Guard. She was deployed to Iraq for one (1) year in 2009-2010. During her time in the military, she has regularly driven military vehicles without incident. When in Iraq, Ms. was responsible for logistics, including providing replacement equipment to Special Forces, which required driving various military vehicles, including small trucks. (Testimony of Ms. Rodriguez)

4. For the past five years, Ms. Rodriguez has been employed as a Correction Officer I (CO I) at the Massachusetts Department of Correction (DOC). As a CO I, Ms. Rodriguez is occasionally responsible for driving a DOC vehicle to transport inmates to and from the facility. She has had no driving incidents while employed at DOC. (Testimony of Ms. Rodriguez)

5. The MPB is an agency within the Massachusetts Executive Office of Public Safety and Security. It has the responsibility of deciding which prisoners may be released on parole and under what conditions. It also has the responsibility of supervising all prisoners released on parole. (Testimony of Mr. Keefe)

6. FPO A/Bs are assigned to the Field Services Unit for the purposes of providing direct supervision and case management of parolees in the community. They are assigned to one of eight regional field offices, manage a caseload of parolees, conduct risk assessments and work independently every day in the community. FPO A/Bs are designated as special police officers by the Department of State Police; carry a firearm and have arrest powers. (Testimony of Mr. Keefe)

7. FPOs are each provided with an emergency-equipped state vehicle, maintained by the officer with domicile privileges for 24/7 availability to conduct investigations and transport parolees/prisoners. (Testimony of Mr. Keefe)

8. On June 30, 2018, Ms. Rodriguez took and passed the civil service examination for FPO A/B. (Stipulated Fact)

9. On November 1, 2018, Ms. Rodriguez's name appeared on Certification No. 05894 from which the MPB ultimately appointed twenty-one (21) FPO A/Bs. (Stipulated Fact)

10. Ms. Rodriguez was ranked 8th among those willing to accept appointment on Certification No. 05894. Sixteen (16) candidates ranked below her were appointed. (Stipulated Facts)

11. As part of the hiring process, MPB conducts a two-tiered interview process. The first interview is conducted by a three-member interview panel consisting of an assistant parole supervisor and two parole officers. During this first interview, members of the interview panel ask candidates a series of standard job-related questions and grade their responses. Ms. Rodriguez received a score of 37 out of a possible 64, and was recommended for a second interview. (Testimony of Mr. Keefe)

12. Subsequent to the first interview and prior to the second interview, a background investigation is conducted. (Testimony of Mr. Keefe)

13. As part of the background investigation, it was discovered that Ms. Rodriguez had two (2) surchargeable accidents on her driving history within the past five (5) years, both of which occurred in 2018 (April 16, 2018 and August 21, 2018). (Testimony of Mr. Keefe; Exhibits 6, 7)

14. On February 7, 2019, the MPB's Chief of Field Services, Kevin Keefe, along with the Deputy Chief of Field Services, conducted a second interview of Ms. Rodriguez. (Testimony of Mr. Keefe)

15. During this second interview, Ms. Rodriguez attributed the 2018 accidents to road conditions and faulty equipment. Although Ms. Rodriguez told the interview panelists that she was considering an appeal of the surcharges, she indicated that the window in which to do so may have already passed. (Testimony of Mr. Keefe)

16. On March 19, 2019, the MPB notified the state's Human Resources Division (HRD) of its intention to bypass Ms. Rodriguez based on her driving history. (Exhibit 9)

17. On April 2, 2019, HRD approved the reason for bypass. (Exhibit 9)

18. None of the selected candidates ranked below Ms. Rodriguez had a surchargeable accident within the past year. One (1) selected candidate had one (1) surchargeable accident in 2016. (Testimony of Mr. Keefe and Exhibits A-O)

19. As part of the pre-hearing conference held on June 25, 2019, Ms. Rodriguez stated that she had not filed an appeal of the surcharges but was still considering doing so.

20. On July 2, 2019, Ms. Rodriguez sent an email to the Commission stating:

> "I will be putting the appeal for the car accidents in the mail tomorrow morning. I received the forms yesterday. It's a request for a late appeal for both car accidents. I will have to wait for a response once they get it."

21. At the outset of the full hearing on August 7, 2019, Ms. Rodriguez indicated that she ultimately chose *not* to file a request allowing her to file a late appeal regarding the surcharges. (Testimony of Ms. Rodriguez)

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. at 259, citing *Cambridge* v. *Civil Serv. Comm'n*., 43 Mass. App. Ct. at 304. "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*, 60 Mass. App. Ct. 914, 915 (2004).

ANALYSIS

As a preliminary matter, there was no evidence of any personal or political bias regarding this hiring process. The Chief of Field Services, a career state employee with twenty-nine (29) years of service with the MPB described what appeared to be a fair, impartial and thorough review process that was geared toward appointing candidates qualified to serve in the position of FPO.

Through that review process, the MPB identified legitimate concerns related to Ms. Rodriguez's recent driving history. As most recently summarized in *Dorn* v. *Boston Police Department*, 31 MCSR 375 (2018), the Commission, in regard to bypass appeals based on driving histories, generally limits the review to the Appellant's driving history within the past ten (10) years prior to his / her name appearing on a Certification with greater weight given to the most recent five (5) years. Further, the Commission gives more weight to those infractions related to at-fault accidents and other moving violations where the Appellant has been found responsible. 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. The Commission also attempts to put an Appellant's driving history in the proper context, considering such issues as whether he / she is required to drive more for personal or business reasons. Finally, the Commission reviews the driving histories of other candidates to ensure fair and impartial treatment.

Applied here, the MPB, has shown, by a preponderance of the evidence, that Ms. Rodriguez's driving history is a valid reason for bypassing her *at this time*. While her driving history over the most recent five (5)-year period only involves two (2) surchargeable accidents, both of those accidents occurred in 2018, shortly before she was being considered for appointment. The first accident, which occurred in April 2018, resulted in Ms. Rodrigeuz's car hitting the guard rail, causing several thousand dollars' worth of damage. The second accident, which occurred in August 2018, resulted in serious damage to Ms. Rodrigeuz's car.

The MPB did not simply rely on a paper review of Ms. Rodriguez's driving history. Rather, two senior managers at the MPB interviewed Ms. Rodriguez and provided her with the opportunity to explain the circumstances surrounding these two (2) accidents. Even after hearing her version of events, the panelists, including Chief Keefe, had concerns about the these two accidents, both of which are listed as surchargeable events. Importantly, Ms. Rodriguez ultimately chose not to appeal those surcharges and the MPB was justified in relying on these events as part of the hiring process.

I did consider that Ms. Rodriguez has extensive driving experience in the military and DOC and that she has no record of any driving infractions while in those capacities. This does not outweigh the MPB's valid concerns about the two very recent surchargeable accidents, including one that resulted in the total loss of her vehicle.

In regard to the other candidates appointed, the MPB has sufficiently shown that those candidates had more favorable driving histories and none of those appointed had a surchargeable accident within the past year.

CONCLUSION

For all of the above reasons, Ms. Rodriguez's appeal under Docket No. G1-19-121 is hereby ***denied.*** Nothing in this decision, however, is meant to prevent Ms. Rodriguez from future consideration should she be among those candidates eligible for consideration. Ms. Rodriguez has *many* positive attributes, including her ability to balance her duties as a parent with her commendable military service and five (5) years of unblemished service with the Department of Correction. Should Ms. Rodriguez become eligible for consideration in the future, I would anticipate that the 2018 surchargeable accidents, with the passage of time, would be far outweighed by these positive attributes.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso—Absent]) on August 15, 2019.

Notice to:

Giselle Rodriguez
[Address redacted]

Courtney E. Doherty, Esq.
Massachusetts Parole Board
12 Mercer Road
Natick, MA 01760

* * * * * *

OCTAVIUS S. ROWE

v.

BOSTON FIRE DEPARTMENT

D1-18-074

August 29, 2019
Christopher C. Bowman, Chairman

A

SUMMARY OF DECISION

Firefighter Rowe maintained a presence on social media and participated in various podcasts in which he regularly identified himself as a Boston firefighter. As part of those same public forums, he repeatedly spoke, wrote and/or posted bigoted comments that violate the norms of decency and various rules and regulations of the Boston Fire Department, including conduct unbecoming a firefighter, justifying his termination.

Firefighter Rowe's public posts and statements included: referring to the long-time head of the Boston Urban League as a "shoe-shine Negro"; referring to the then-Boston Police Superintendent (now Commissioner) as a "feckless, jolly black face"; a statement that black men should not share their "genetic material" with a "filthy, filthy white woman" and that "laying with white women is like spitting in your mother's womb"; a post listing the date, time and location (including the name of the school and a map) where Firefighter Rowe objects to young boys and girls holding hands with members of the same sex; multiple references to gay men as "homophiles"; a reference to so-called "homophiles" seeking to "normalize homophilia particularly among children in order to GAIN and EASE sexual access to them"; references to lesbians as "lez-beasts"; a reply to a person online stating: "You're QUEER. You're not significant enough for me to troll"; another online reply stating: "Why haven't any homophiles been killed by Police?"; a picture of Firefighter Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking in the groin a stick figure with LGBTQ colors; a reference to the head of the Boston Chapter of Black Lives Matter, a Boston resident, as a person with: "Homophile/Trans/Femm Interests"; a reference to Black Lives Matter as "HOMOPHILES LIVES MATTER"; a reference to the leaders of Black Lives Matter as "slow-witted, uniformed agents of sexuality confusion/cooning" who "cannot have access to our children."; a reference to a black entertainer as a "COM-PLETE bitch"; and a reference to "SmallHats (So-called Jews)".

In addition to violating the norms of decency, these bigoted comments adversely affected the public interest by undermining the Boston Fire Department's ability to serve *all* residents of of Boston, regardless of their race, religion or sexual orientation. Keeping Mr. Rowe as a Boston firefighter would force Boston residents to allow a bigot into their homes in order to receive emergency services, an unacceptable outcome that is not consistent with the civil service law—or good conscience.

DECISION

On May 2, 2018, the Appellant, Octavius Rowe (Firefighter Rowe), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Appointing Authority, the Boston Fire Department (BFD), to terminate him as a firefighter. On June 26, 2018, I held a pre-hearing conference at the office of the Commission. A full hearing was held over five (5) days between October 15, 2018 and November 6, 2018.[1] A stenographer produced the official record of the proceedings by agreement of the parties. The hearing was private and the witnesses were sequestered. Following the close of the hearing, proposed decisions were submitted by the parties on January 19, 2019 (Firefighter Rowe) and February 4, 2019 (BFD).

FINDINGS OF FACT

Eighty-six (86) exhibits were entered into evidence at the hearing (Respondent Exhibits 1-51 (R1-R51) and Appellant Exhibits 1-35 (A1-A35)) Based upon the documents admitted into evidence, the stipulated facts, and the testimony of:

Called by Firefighter Rowe:

- Rayshawn Johnson, Fire Captain, BFD;
- Darrell Higginbottom, Fire Captain, BFD;
- Octavius Rowe, Appellant;

Called by the BFD:

- Connie Wong, Deputy Commissioner, BFD;
- Eduardo Dominguez, Private Investigator;
- Scott Malone, Deputy Chief, BFD;
- Sean O'Brien, Fire Lieutenant, BFD:
- John Walsh, Chief of Operations, BFD;

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.

I make the following findings of fact:

Firefighter Rowe

1. Firefighter Rowe is a black male who resides in Roxbury, Massachusetts. He attended Boston Technical High School and graduated from Snowden International High School. He attended St. Paul's College and was enrolled at UMass Boston for two (2) years. (Testimony of Rowe)

2. Prior to his service as a firefighter, Firefighter Rowe worked at the Comprehensive Health Center and the Shelburne Community Center in Boston. (Testimony of Rowe)

3. On October 31, 2002, Firefighter Rowe was appointed as a firefighter for the Boston Fire Department. (Stipulated Fact and Testimony of Rowe)

4. Since 2007, Firefighter Rowe has been assigned to Ladder 28, Engine 48 in Hyde Park. (Testimony of Rowe)

5. Firefighter Rowe has been a long-time member (and Vice President) of the Boston Society of Vulcans (Vulcans), a non-profit organization of black and Latino firefighters that has advocated, among other things, for more diversity in BFD appointments and promotions. (Testimony of Rowe)

6. In 2015, Firefighter Rowe started "Know Thyself", a nine-week summer program for the "dextoxification of young black males". During a 2017 interview as part of a "podcast", Firefighter Rowe, talking about "Know Thyself", stated:

> "So this is 2017 going into '18. So we started in 2015. This is our third iteration. We had to skip a summer or two as I was—I'm a Boston firefighter for people who may not know, and for a couple of summers I was studying for the lieutenant's exam." (emphasis added)

(Exhibit R29 at 26)

7. For his Know Thyself program, Firefighter Rowe used two (2) different City of Boston facilities (Shelburne Community Center and Mildred Avenue Community Center). (Testimony of Wong)

8. Firefighter Rowe is also the founder of the ten (10)-member Boston chapter of the "Straight Black Pride Movement (SBPM)". (Testimony of Rowe)

9. A website for the "Know Thyself" program, under a photograph of Firefighter Rowe, states: "Founder and Lead Organizer; Octavius Salih Rowe; VP. Boston Society of Vulcans; Chairman, Straight Black Pride—Boston". (emphasis added) (Exhibit R4A at 12)[2]

Events Immediately Preceding BFD's Investigation of Firefighter Rowe

10. In February 2017, the Vulcans, in conjunction with the Lawyers' Committee for Civil Rights and Economic Justice, sent a letter to the Boston Fire Commissioner, protesting the lack of hiring of minorities and women in the BFD. (Testimony of Rowe; Exhibit R11)

11. Also in February 2017, a citizen reported to the BFD that JC, a white Boston firefighter, had posted the following on his personal Facebook page:

> "Rachel Maddow needs to [sic] fucked roughly in the ass by a MAN! …I'm about as sick of her as I am of Lizzy Warren ..and she needs to see the business end of a large strap on in the same fashion! ..They are both revolting."

(Exhibits R20, R37; Testimony of Malone and Walsh)

12. As a result of that posting, the BFD charged JC with violating BFD rules related to: conducting unbecoming, conduct prejudicial to good order; abusive or threatening language and obscene, indecent or profane language. (Exhibit R37)

13. Firefighter JC resigned from his position before a disciplinary interview and a hearing could take place. The charges against JC remain pending should he ever seek to return to BFD employment. (Testimony of Malone and Walsh; Exhibit R37)

14. Fire Lieutenant Sean O'Brien has been employed by the BFD for sixteen (16) years. Lt. O'Brien was appointed as a firefighter by the BFD in 2003 after he and four (4) other white candidates filed a claim of reverse discrimination in federal court, effectively challenging a then-existing federal consent decree that created minority hiring preferences. (Testimony of O'Brien)

15. In July 2017, Lt. O'Brien received a photograph on his phone of Firefighter Rowe wearing a sweatshirt with the word "Caucasians" written across the front and a white cartoon face with blond hair and a dollar sign in place of a feather. (Testimony of O'Brien) The picture was a take-off on the Cleveland Indians baseball club's cartoon logo.

16. Firefighter Rowe wore the sweatshirt as a "parody" while he was off-duty. (Testimony of Firefighter Rowe)

17. When Lt. O'Brien saw the photograph it "made [him think] … It stirred conversation, healthy conversation, about, you know, basically, how a Native American feels when they have—like, they see an Atlanta Braves' shirt or a Cleveland Indians shirt." (Testimony of O'Brien)

18. Lt. O'Brien sent the photograph to Scott Malone, BFD's Deputy Chief of Personnel, because of "concerns" about a race-based double standard regarding social media discipline, given that the BFD had forced a white firefighter—"JC"—to resign over the posting referenced above. (Testimony of Lt. O'Brien)[3]

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2. Firefighter Rowe repeatedly identifies as a firefighter on the Internet as a Boston firefighter and/or Vice President of the Boston Society of the Vulcans, a position that identifies himself as a BFD member in many other occasions as well. (*See* Exhibits R4A at 118, 122; R24 at 42, 47; R27 at 2, 13, 16; *see also* Testimony of Dominguez: "I Google searched Mr. Rowe and came up with that he was a Boston firefighter.")

3. Lt. O'Brien testified that other firefighters had a concern about a race-based double standard. I find that Lt. O'Brien himself had that concern.

19. Deputy Chief Malone concluded that Firefighter Rowe's sweatshirt was "provocative" and "race-baiting" especially after finding online other, similar shirts for the "Detroit Africans" and "San Francisco Asians" [worn by persons not associated with the Boston Fire Department]. As a result, Deputy Chief Malone began reviewing Firefighter Rowe's social media and other online activity. (Testimony of Malone)

20. As a result of his online review, Deputy Chief Malone found other content including comments written by Firefighter Rowe on his Facebook page in response to an article about the murder of a black man, stating about Congressman Steve Scalise, who had just been shot:

> "[a]nd y'all want me to shed tears…send up prayers..for some punk bitch
>
> Senator who stopped a random bullet while enjoying his position in the system of Racism/White Supremacy? G…the ENTIRE… FOH!"

(Exhibit R4A at 29)

21. On August 21, 2017, Firefighter Rowe posted on his Facebook page a caricature of Nat Turner in which Nat Turner is holding in one hand the severed head of a man, and in the other hand, a bloodied 2x4. Next to the caricature are the words "Nat Turner's slave rebellion". When Firefighter Rowe posted this caricature on his Facebook page, he wrote: "PRAISE NAT TURNER #natturnerday". (Exhibit R4A at 89)[4]

22. On October 1, 2017, a member of the public—"JShun" on Twitter—tweeted a *cropped* version of the above-referenced Facebook Post to Boston Mayor Martin Walsh and BFD Commissioner Finn stating: "Ladder28 Hyde Park Octavius Rowe. No double standard for #hate speech." The picture sent to Mayor Walsh and Commissioner Finn had cropped out: a) the face of the caricature of Nat Turner; and b) the words "Nat Turner's slave rebellion". The tweet sent to Mayor Walsh and Commissioner Finn also did not include Firefighter Rowe's written post stating: "PRAISE NAT TURNER #natturnerday". (Exhibit R14)

23. On October 2, 2017, Commissioner Finn placed Firefighter Rowe on paid administrative leave. (Exhibit R12)

24. In a letter to Firefighter Rowe dated October 5, 2017, Commissioner Finn wrote:

> "On Monday, October 2, 2017, you were placed on paid administrative leave with pay pending an investigation relating to your social media activities. You are hereby notified, effective immediately, that you are prohibited from entering any Boston Fire Department firehouse, facility or property without prior authorization from myself or from one of the Chiefs of Operations while you are on administrative leave with pay. This directive shall be in effect until further notice from the Department." (Exhibit R12)

BFD's Review of Firefighter Rowe's Social Media Accounts & Podcasts

25. The BFD retained Eddie Dominguez, a licensed private investigator, to assist them with their investigation of Firefighter Rowe. Mr. Dominguez was formerly employed by the Boston Police Department (BPD) for twenty-nine (29) years, including twenty-two (22) years as a detective. He has also been an investigator for Major League Baseball (MLB). (Testimony of Dominguez)

26. As part of his investigation, Mr. Dominguez reviewed entries from Firefighter Rowe's Facebook account and hours of Internet radio shows / podcasts / videos on which Firefighter Rowe appeared. He provided copies of postings and transcripts of audio recordings that he found "problematic" to the BFD. (Testimony of Dominguez)

27. The City's Office of Labor Relations: a) reviewed the material submitted by Mr. Dominguez; b) interviewed Captains Rayshawn Johnson and Darrell Higginbottom, both Captains in Firefighter Rowe's firehouse; c) interviewed twelve (12) current and former firefighters from Firefighter Rowe's firehouse; d) interviewed three (3) other City employees who had allowed Firefighter Rowe to use City facilities for the Know Thyself program; and e) interviewed Firefighter Rowe for approximately two hours. (Testimony of Wong)

28. The information submitted by Mr. Dominguez involves three types of online/social media activity: postings, where Firefighter Rowe made his own written statements/comments and uploaded his own pictures and videos on publicly accessible social media accounts; re-postings, where Rowe re-posted content from other sources (or links to those sources) often with his own written comments; and radio shows/podcasts/videos on which Rowe appeared, which were publicly available on sites other than Rowe's. (Exhibits R4A, 4B, 4C; Testimony of Dominguez)

29. Statements directly written or spoken by Firefighter Rowe; and/or photographs in which Mr. Rowe personally appears[5] ,include the following, with **emphasis added**:

> I. "Although Marvel has officially said there will be no sexuality in BP, we just can't trust that edit. From the hiring of Ta Nihsi Coates, an admitted feminist who I strongly suspect is a homosexual himself…to Marvel doubling down on this despicable move in **hiring a RAGING lez-beast in Roxanne Gay** to retcon homosexuality into the Wakandan lore, the objective is clear. To INDELIBLY assign homosexuality to Black / Afrikan people…when in actuality, it an INTRINSICALLY European phenomenon. Furthermore, if Wakanda is an ISOLATIONIST culture…and homosexuality is present…that would suggest that

4. "On the evening of August 21-22, 1831, an enslaved preacher and self-styled prophet named Nat Turner launched the most deadly slave revolt in the history of the United States. Over the course of a day in Southampton County, Turner and his allies killed fifty-five white men, women, and children as the rebels made their way toward Jerusalem, Virginia (now Courtland). Less than twenty-four hours after the revolt began, the rebels encountered organized resistance and were defeated in an encounter at James Parker's farm. Following this setback, Turner and other rebels scrambled to reassemble their forces. The next day, a series of defeats led to the effective end of the revolt. Whites quickly and brutally reasserted their control over Southampton County, killing roughly three dozen blacks without trials." (https://www.encyclopediavirginia.org/Revolt_Nat_Turner_s_1831)

5. As part of the full hearing, I had Firefighter Rowe take a yellow highlighter and highlight those statements on that he wrote himself. (Exhibit R4A)

it manifested organically, which is in STARK (no pun) CONTRADICTION to reality. NO homosexuality appeared in Afrika before European infestation. A dozen Black scholars can corroborate that." (Exhibit R4A at 8; Facebook Account)

II. "Someone should teach **homophiles** to kick out somma that good ol' acceptance. Y'know…that stuff that **homophiles** are always crying about NOT getting." (Exhibit R4A at 27; Facebook Account)

III. [*Responding to an article with the headline: "A Boston police officer is suspended for posting a racially offensive video online"*]:

"Breakdown:

'He will undergo significant sensitivity and unconscious bias retraining, said Evans.'

Translation: We'll have some hand-picked inoffensive NEGRO…or some self-styled ineffectual white 'expert on Racism' talk to him for a couple hours.

'Officer Joseph DeAngelo, a four and a half year member of the force, who patrols the Roxbury area.'

4.5 years? This lil punk hasn't been on the job long enough to be mad about nothing.

He (and his pals) are COMING IN..straight from Iraq…with this vitriol. But Veterans Preference, right?

'DeAngelo came forward and owned up to making the video mean to spoof his Buddy and fellow officer, said Evans'

Notice the emphatic tone. Mousey might as well have said 'Hey…Boys will be Boys!'

'The department consulted with members of the black community and agreed upon apunishment : a one year suspension with six months to serve.'

Again, **shoe-shine negroes like Darnell Williams** betray and undersell Black People Again.

'Superintendent in Chief William Gross says his embarrassment and remorse was clear. Not once did I ever hear from him, I'll do anything to save my job. But, what we hear from him is, I want to show everybody I'm not a racist, says Gross.'

Laughable.

Gross, once again, shows why he was selected for that Superintendent position. To be the feckless, jolly black face to coddle enemies of our community and schmooze over instances like this. (Exhibit R4A at 35; Facebook Account)

IV. [*Responding to an article with the headline: "Tanzania's president is cracking down on LGBTQ rights. He says cows would approve*"]:

"Excellent" (Exhibit R4A at 38; Facebook Account)

V. [Responding to a post regarding Black Lives Matters [BLM]:

"Right, Mariano..you're going to remain confused as long as you are under-informed on how Racism / White Supremacy manifests.

Garza was very specific when detailing HER definition of 'Queer'.

She described it as an 'umbrella term' and then strangely included immigrants, the incarcerated and the disabled…whom, apparently, ONLY BLM perceives as 'Queer'

I certainly do not.

She only included those groups in order to shroud her preference for the only group she's concerned with.

Trans-homophiles..who she mentioned FIRST.

The interview is on You Tube. See for yourself.

If BLM wants to be 'unapologetically queer' …

Then their name should reflect that desire." (Exhibit R4A at 48; Facebook Account)

VI. [*Continuing to respond to posts from a user by the name of "Marino"*]:

"We've established who you are.

You're QUEER.

You're not significant enough for me to troll."

……

"Stop begging, Marino []

That's all you've done in this thread.

I can't call it an 'exchange' or 'conversation'…because YOU haven't adequately contributed a THING.

What evidence or proof do YOU have to support the claim that BLM is NOT a party to promulgation of Homosexuality?

Give me an instance where they came out publicly against it.. or even pedophilia.

Why haven't there been any BLM wide-spread demonstrations as a result of the most recent killings?

Why haven't any homophiles been killed by Police?

Get to work. Earn your keep." (Exhibit R4A at 57,61; Facebook Account)

VII. [*Responding to a video of a local television broadcast with the caption "BLM [Black Lives Matters] Discusses Upcoming Protests" and a video picturing MC, a black female Boston resident who is the head of the Boston Chapter of BLM*]:

"THIS (among other items) is PRECISELY why a Straight Black Pride chapter will be commencing in Boston on Saturday, September 16th.

SBPM REFUSES to amalgamate the interests of Black/Afrikan people with Homophile/Trans/Femm Interests, Individuals and 'organizations' like HLM (HOMOPHILE LIVES MATTER) and [MC][6]

Not only will we never consider ANY Queer, Trans, Femm 'leadership' at any point, anyone partnering with these elements on these issues will immediately be attached to them as enemies of the Natural Black Family.

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6. In his post, Firefighter Rowe uses the full first and last name of MC and acknowledged that he was aware that she is a Boston resident.

These slow-witted, uninformed agents of sexuality confusion/cooning will not serve up to their allies (proponents of Racism/White Supremacy) and they cannot have access to our children!" (Exhibit R4A at 85; Facebook Account)

VIII. [*Continuing to respond to posts regarding the topic above*]:

"Yes, ma'am, Ill be BRIEF with the words..And I'll post some corroborating materials….then u can take it further.

BLM was ORIGINALLY a GRASSROOTS org in Ferguson…headed by local strong heterosexual black activists who were working among Black folks LONG before [illegible] During the uprising, the **homophiles ABSCONDED with the name and stuck** 3 homophile females as the founders. George Soros starts funding it with the expressed purpose of merging homophile issues with Black ones to shift / dilute our focus and strength AWAY from our priorities.

BLM is the modern iteration of the NAACP in the sense that it is a force NOT CONTROLLED by uncompromised Black People to DERIDE our trajectory toward liberation." (Exhibit R4A at 86; Facebook Account)

IX. [*Responding to a news article titled: "City employee files sexual harassment complaint against Felix G. Arroyo*"]:

"Ah! The sweetest thing I've ever known.

..is when CHICKENS come home to roost.

Speaking of chickens, **this punk** cowered and whined when I confronted him on other of his subversive and sniveling actions against the citizens of this city..

…yet he can get super aggressive..grabbing on women in threatening manners?

Both he and his baby boy brother are the truest definitions of complete and utter SUCKERS!"

….

[*Responding to a post regarding this same article*]:

"You yourself referred to him as 'Queer'

Now that may have a multi-dimensional meaning among homophiles…but among Straight Black and PROUD individuals…whatever definition you use, it has NO place with us.

Your personal association to Felix or [illegible] bears NO weight on the FACTS that they are both **feckless chumps** … and BOTH have engaged in predatory behaviors." (Exhibit R4A at 91, 92; Facebook Account)

X. [Commenting on the photograph of a black entertainer]:

"He been absorbing.. and is now personifying..the new mantra propagated by the components of the American Social Order (schools, Gay Lives Matter, numerous political entities, hip-hop & movies, church, etc.)

That Black manhood is either 'toxic' or amorphous.

That gender is 'fluid'.

Me?

I say he's COM-PLETE bitch." (Exhibit R4A at 98; Facebook Account)

XI. "No rational person can say that schools are the PROPER place for this type of deposition, even for a proper natural sexual interactions.

But the fact that **homophiles** continue to exhaust every avenue available to them to do is PROOF of their objective.

Normalize homophilia particularly among children in order to GAIN and EASE sexual access to them." (Exhibit R4A at 107A; Facebook Account)

XII." **So…**

I'm driving home from an appointment in [redacted].

Clearly, It's dismissal time for [name redacted] Middle School.

Out of the throngs of largely Black and Brown babies, I see a group of about six walking on the sidewalk, counter traffic.

4 girls, 2 boys.

The two boys were holding hands.

Two of the four girls were holding hands.

There are no longer 'schools', 'ya'll.

These are FACTORIES."

[Firefighter Rowe then posted a map "checking in" of the precise location of the [name redacted] Middle School in [redacted]]. (Exhibit R4A at 117; Facebook Account)

XIII. "In the age of YouTube scholarship, I'm wondering why haven't any **SmallHats (So-called 'Jews')** offered a forensic breakdown refuting any information presented in Min. Farrakhan's speeches that they deem 'anti-Semetic'?

This is a largely rhetorical question…but if such a video exists, please point me to it."

(Exhibit R4A at 119; Facebook Account)

XIV. Photograph of Firefighter Rowe, with a clenched fist, wearing a T-shirt with a stick figure with Pan-African colors **kicking in the groin a stick figure with LGBTQ colors**.

(Exhibit R4A at 120, 120A; Facebook Account)

XV. "Dr. Claud Anderson was here a month or so ago, and he talked about how our problem, the African's problem, is that we don't recognize our exceptionality. When you know you're exceptional, you don't want to share it with nobody, and that's one of the things that I want to infuse into the next generation, to—to keep that, particularly when it comes to them sharing their genetic material and anything else with this **filthy, filthy white woman**." (Exhibit R23 at 17; Podcast)

XVI. "Looking at—Sista Tasha recently posted something about Tyra Banks who has—who is a race trader and has father—has produced a child with this—some—some nameless—I don't even know who he is, but then one of the most egregious acts, as of late, have been Serena Williams and her—and I'm just picking them out because they're visible." (Exhibit R23 at 17; Podcast)

XVII. "Shout out to the elder Ashra Kwesi who said **laying with white women is like spitting in your mother's womb**. (Exhibit R24 at 11)

> XVIII. "Sometimes you have to lose. You know, one team has gotta win, one team has gotta lose. Sometimes you gotta lose, but it's important to factor in how you lose. If you're going to lose, you're going to have to fight. Not only are we setting—are we setting these children up for death and destruction, the position, the posture in which they are taking this helm, they're over scratching where they don't itch, bagging white folks. No, it's—that's too much to ask for. So we're going to die anyway, you might as well fight, and this has been my particular—I would say philosophy in any area I've been in, not just on the Fire Department, not just in the community, but anywhere. **If I'm going to go out, I'm taking someone with me**." (Exhibit R24 at 10)

30. On April 13, 2018, the BFD preferred charges against Firefighter Rowe. Specifically, the BFD charged Firefighter Rowe with violating Rule 18.41 (discrimination and harassment), Rule 18.44(a) (conduct unbecoming), Rule 18.44(j) (conduct prejudicial to good order), Rule 18.44(k) (abusive or threatening language), Rule 18.44(m) (untruthfulness or willful misrepresentation), Rule 18.45(c) (improper or offensive language), the Social Media Policy, the City of Boston's Discrimination and Anti-Harassment Policy, and the City's Zero Tolerance for Violence Policy. (Exhibit R3)

31. On April 20, 2018, the BFD held a local appointing authority hearing before a Hearing Board comprised of a BFD Deputy Chief and two District Chiefs. The Board received into evidence 18 exhibits (Exhibits R1 through R18 of this hearing) and heard approximately nine hours of testimony from seven witnesses, three of whom testified at this hearing (Wong, Higginbottom and Rowe) and four others. (Exhibit R19 at 2-3, 123, 354.)

32. On April 24, 2018, the Hearing Board issued its recommendation that Firefighter Rowe be found guilty of all charges against him with the exception of the charge based on Rule 18.44(m) (untruthfulness or willful misrepresentation). (Exhibit R36)

33. On April 30, 2018, BFD Commissioner Finn accepted the Board's recommendation and, as the Appointing Authority, terminated Firefighter Rowe from his position as a BFD firefighter. (Exhibit R33)

34. Firefighter Rowe timely appealed to this Commission.

Prior Discipline of Firefighter Rowe

35. The BFD reprimanded and suspended Firefighter Rowe for four tours in 2005 for violating Rule 18.44 (k) (prohibiting use of abusive or threatening language) after Firefighter Rowe called another firefighter a "faggot" and then stated "I'll kick your fucking ass you fucking faggot." (Exhibit R9 at 1; R50 at 2)

Allegations of Similar Conduct Regarding Other Firefighters

36. At his April 20, 2018 local hearing, Firefighter Rowe provided the BFD with posts that he alleged represented objectionable conduct by other firefighters, who were white and not disciplined. (Testimony of Walsh)

37. Among those investigated were firefighters MD and MG, both white males. (Testimony of Walsh)

Firefighter MD

38. The BFD's review showed that the following comments were posted by MD on his Facebook account:

> I. Calling former Present Obama an "asshole;"
>
> II. "Houston has a large Black American Population. Has BLM organized any rescue efforts?;"
>
> III. Referring to former President Obama as a "Bastard hypocritical motherfucker!," "hates White America," is a "symbol of racism that I would like removed from my country," is a "cop-hating terrorist" and "a Muslim;"
>
> IV. Below a photo of two black women fighting: "Another day in taxpayer assisted housing!"
>
> V. "White Irish Slaves were treated worse than any other race in the US but you do not hear them bitching how the world owes them a living" because The Irish are not pussies looking for free shit."
>
> VI. "I Never Ever Trust a Dirty Fucking Muslim."

(Exhibit R51)

39. The BFD brought charges against MD on June 20, 2018, for violations of Rule 18.41 (discrimination and harassment), Rule 18.44(a) (conduct unbecoming), Rule 18.44(j) (conduct prejudicial to good order), the Social Media Policy, and the City of Boston's Discrimination and Anti-Harassment Policy. (Exhibit R38)

40. Prior to his disciplinary interview and hearing, MD resigned from his position as a BFD firefighter and is now retired. (Testimony of Walsh) The charges against MD remain pending should he ever seek to return to BFD employment. (Testimony of Malone and Walsh)

Firefighter MG

41. Among the documents that Firefighter Rowe presented to the BFD at the local appointing hearing were two (2) pages that appear to be postings from a Facebook account. Each page has the name of MG as the person who posted the comments. (Exhibit A15 & A16)

42. The posting on the first page states:

> "not sure who to post this to but here it is…today supposedly boston e-37/I26 claimed to have rescued a person from a fire or annunciation red . well guess what? they didn't LADDER COMPANY 4 MADE THE SAVE….ACTUALLY F.F. JAMES CASHINS E-14 DETAILED TO L-4 MADE THE SAVE . this job has denigrated to a bunch of self serving douche bags who would falsify a report so that their useless company can recieve (sic) accolades they didn't earn…these phony fucks are polishing their badges for an award THEY DIDN'T EARN. pass the word LADDER 4 AND F.F. CASHINS FROM E-14 DESERVE THE AWARD NOT THE PHONIES."

(Exhibit A15)

43. The posting on the second page states:

> "all lives matter means shut up nigger????? Hahahahahaha funny i don't see a mark on this man, his t-shirt isn't ripped or slightly

> askew what channel can I follow this on?? cnn… nope msnbc… nope, bet…nope, fox news nope, local channels nope"

(Exhibit A16)

44. The BFD asked Eddie Dominguez to review MG's social media activity. According to Mr. Dominguez's May 14, 2018 report to the BFD:

> "Mr. [G] has a Facebook account and appears to also hold a Pinterest Account.
>
> A review of all publicly available social media on Facebook and Pinterest revealed limited postings, photographs, and other information. There were some indications in Mr. [G]'s profile of his employment with the Boston Fire Department, including photographs of him in his Boston Fire Department uniform [].
>
> His Facebook profile cover photograph [] depicts what appears to be a photograph taken from inside of a vehicle of an older black male standing outside holding his hand up. The hand appears to contain an unknown item. It is unclear what the photograph is depicting and the connection to Mr. [G]. Mr. [G] has used the photograph of this older black male as part of his Facebook profile cover photograph dating back to 2012. Ed Dominguez believes he recognizes this older black male as a homeless person that has panhandled on Morton Street since the early 1990s.
>
> Mr. [G]'s Pinterest account does not appear to be very active and is comprised of photographs of various vehicles. There is a blurry profile photograph which is unclear whether or not it depicts Mr. [G].[]." (Exhibit R51)

45. The BFD brought Firefighter MG in for a "disciplinary interview" at which time Firefighter MG admitted that he wrote and posted the "phony fucks … douchebags" posting. Firefighter MG denied that he wrote and/or posted the posting with the words "shut up nigger". The BFD concluded that it was unable to determine whether MG wrote the second posting or not. Firefighter MG was given a written warning for the first post. (Testimony of Walsh)

BFD / City Rules

46. BFD maintains Rules and Regulations (R 31), policies, general orders and special orders. (Exhibits R7, R41, R42A, R42B) that all govern firefighter conduct.

47. Rule 18.41 broadly prohibits discrimination against and harassment of any person on the basis of race, color, age, disability, national origin, religious creed, sexual orientation, veteran's status, marital status or sex and provides that "[a]ll members shall treat each other and the public in a manner that is non-discriminatory respectful and fair" (Exhibit R31 at 53-54).

48. Rule 18.44(a) prohibits "[c]onduct unbecoming a member, ***whether on or off duty***, which tends to lower the service in the estimation of the public" (Exhibit R31 at 59) .

49. Rule 18.44(j) prohibits "[c]onduct prejudicial to good order" (Exhibit R31 at 60);

50. Rule 18.44(k) prohibits "[a]busive or threatening language" that "interferes with the order and teamwork which is essential to a fire company" (Exhibit R31 at 60).

51. Rule 18.45(c), "[i]mproper or offensive language" (Exhibit R31 at 67).

52. The BFD's Social Media Policy states that "improper usage [of social media] can have instant and long-term damage to the perception of the department and the user" and provides that "Members of the Boston Fire Department shall not use…[c]ontent that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color,…religion, gender, marital status,…national origin…or sexual orientation."[7] (Exhibit R7)

53. Special Order No. 14 (2012), reiterates Rule 18.44(a)'s "conduct unbecoming" standard and its application to social media activity and states that "[m]embers who participate in social media venues…and who identify themselves as members of the Boston Fire Department, must conduct themselves in a respectable and socially acceptable manner" (Exhibit R41 at 2).

54. In addition, some City of Boston ("City") policies also apply to firefighters and require annual confirmation of an employee's understanding. (Exhibit R5, R6, R8)

55. The City's Discrimination and Harassment Policy broadly prohibits discrimination and harassment based on, among other things, race, color, sex, sexual orientation and gender identity, and states "[t]he City expects all employees to conduct themselves in a professional manner with respect and concern for their fellow employees and members of the public. Discrimination, harassment and retaliation are unlawful and will not be tolerated" (R5 at 2) and gives as examples of prohibited harassment comments that are suggestive, offensive, belittling, derogatory or mocking of a person's culture or protected status; "the display of objects, pictures, cartoon, symbols or jokes that have a sexual, racial, ethnic, disability, homophobic, age-ist connotation," or displaying material or verbal or physical conduct that shows hostility or aversion to a person's protected status. (Exhibit R5 at 3).

56. The City's Zero Tolerance for Violence Policy broadly prohibits, among other things, threats of violence by City employees (Exhibits R6 at 5).

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7. All hearing witnesses - including Rowe himself - testified that then-Human Resources Director Robert Moran, in March 2011, distributed the Policy by email to all BFD members (R39; R7) and that, therefore, all members were bound by it as an official BFD policy. *See* Wong (I) at 93; Malone (II) at 215; O'Brien (II) 165-66; Johnson (IV) 73-79; Higginbottom (IV) 138-40; Rowe (V) at 25-26; Walsh (V) at 224-25. Although Rowe attempted to suggest that the policy did not exist based on a December 21, 2016 email from Scott Malone, BFD's then-Deputy Chief of Personnel, to Captain Rayshawn Johnson, that email made clear that firefighters should be disciplined based on their conduct regardless of the venue or method, such as social media, used to communicate the message. A5. Malone conceded that he was not entirely clear in the email, and to the extent that his email was interpreted to mean that BFD had no social media policy, his email was in error. Malone (III) at 128-29.

CIVIL SERVICE LAW / JUST CAUSE STANDARD

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

> " … retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected"; and … 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; "assuring that all employees are protected … from arbitrary and capricious actions." G.L. c. 31, § 1)

G.L. c. 31, § 41 states in part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days …"

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); *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); *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).

G.L. c. 31, § 43 states in part:

> "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission …
>
> 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."

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'," *Id*., quoting internally from *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

First Amendment Protections

In a recent decision regarding First Amendment protections of public employees, the Appeals Court, in *Condez* v. *Civ. Serv. Comm'n & Dartmouth*, 18-P-555 (2019) (Rule 1:28 Decision), wrote:

> "The First Amendment limits the government's authority to restrict and punish public employees' speech. In evaluating a claim that a public employer's disciplinary action was impermissibly made in retaliation for engaging in speech protected by the First Amendment, we employ the framework first articulated in *Pickering* v. *Board of Educ*., 391 U.S. 563 (1968), and later refined in *Connick* v. *Myers*, 461, 138 (1983), and *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006) *See Pereira* v. *Commissioner of Social Servs*., 432 Mass. 251, 256-257 (2000).
>
> We proceed in two broad steps:
>
> "The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the sppech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, supra at 418.
>
> The second step, known as the *Pickering* balancing, requires us to "balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra* at 568. The protected status of speech is a question of law for the court, not a question of fact for the agency.

See Connick, supra at 148 n.7."

Firefighter Rowe's Argument

Firefighter Rowe argues that his termination was not justified because:

> 1. His postings did not constitute misconduct because there is no nexus between his postings and his job as a firefighter.
>
> 2. The BFD's decision to terminate him runs afoul of the United States Constitution. Firefighter Rowe argues that, through his postings, he was speaking on matters of public concern and

therefore these postings were protected expressions. *Pereira* at 257; and there was no evidence presented that his postings harmed the Defendant in any manner.

3. He was treated differently than other employees, including Firefighter MG.

BFD's Argument

The BFD argues that the decision to terminate Firefighter Rowe was justified because:

1. His conduct and statements violated various rules of the Department, including those regarding: conduct unbecoming, conduct prejudicial to good order, abusive or threatening language that interferes with the order and teamwork which is essential to a fire company, and improper and offensive language.

2. While Firefighter Rowe may have a First Amendment right to make the statements he makes, he does not have the right to make those statements as a BFD firefighter. The BFD argues that, under well-settled U.S. Supreme Court precedent, the First Amendment does not protect public employees when the government's interest in providing efficient and effective services to the public outweighs their free speech interests. *Pickering* at 573; *Connick* at 140.

3. The BFD has investigated similar allegations against other firefighters, and when proven, moved forward with disciplinary action against them.

ANALYSIS

The *genesis* of the BFD's investigation into Firefighter Rowe is troubling. A white firefighter, who was appointed years ago after successfully challenging a consent decree that mandated preferences for minority candidates, forwarded a Facebook posting of Firefighter Rowe to the BFD's Deputy Chief of Human Resources. In the posting, Firefighter Rowe is wearing a sweatshirt with the word "Caucasians" written across the front and a white cartoon face with blond hair and a dollar sign in place of a feather. The picture was a take-off on the Cleveland Indians baseball club's cartoon logo. Clearly, Firefighter Rowe, while off-duty, was simply joining a national conversation regarding the topic of professional sports teams using Native Americans in their name and logo, which many find to be racist.

Even the firefighter who forwarded the posting testified that the photograph "made [him think] … It stirred conversation, healthy conversation, about, you know, basically, how a Native American feels when they have—like, they see an Atlanta Braves' shirt or a Cleveland Indians shirt." Yet, this *same* firefighter forwarded the posting of Firefighter Rowe to BFD officials alleging a "double standard", alluding to the disciplinary action taken against Firefighter JC, a white male, for his public posting stating that a national broadcast journalist should be "fucked roughly in the ass by a MAN". Equating the two postings is absurd. Yet, it triggered the BFD's initial decision to begin reviewing Firefighter Rowe's Facebook postings.

Several weeks later, an anonymous Twitter account user, forwarded a cropped picture taken from Firefighter Rowe's Facebook account to Mayor Walsh and Commissioner Finn, showing a black man holding the bloodied head of another man. Laying bare the intent of the anonymous Twitter account user, he/she effectively deleted the words referencing the "Nat Turner's rebellion" which may have resulted in a more measured response by the Mayor and the Fire Commissioner. Instead, Firefighter Rowe was immediately placed on paid administrative leave and, in an extraordinary move, Rowe was barred from entering any BFD facilities. That swift action would be in sharp contrast to the relatively muted reaction of BFD officials, when it was alleged that a white firefighter had authored a Facebook posting containing the words "shut up nigger????". As discussed in more detail below, I carefully considered whether these actions by the BFD showed some type of bias against Firefighter Rowe.

The BFD ultimately completed an investigation of Firefighter Rowe that included a review of public postings from his social media accounts and statements made on various "podcasts" that are available to the public. They also interviewed Firefighter Rowe, numerous BFD firefighters and other City officials as part of the investigation. As part of the de novo hearing before the Commission, which included five (5) days of hearing, I reviewed the testimony of several witnesses and dozens of exhibits.

For the purposes of deciding this matter, I have only given weight to those postings that were actually written by Firefighter Rowe and / or where he is pictured in a photograph on his own Facebook page (as opposed to the postings of others that Firefighter Rowe "liked", "shared", "tagged" and/or posted on his own account.)[8]

The findings provide a list of verbatim statements written and publicly posted by Firefighter Rowe. As referenced above, all of the postings listed in the findings are postings that contain statements personally written by Firefighter Rowe and/or are photographs that he personally appears in.

Statements personally written by Firefighter Rowe and posted to his public Facebook account include:

- A reference to the long-time head of the Boston Urban League as a "shoe-shine Negro";
- A reference to the then-Boston Police Superintendent (now Commissioner) as a "feckless, jolly black face";
- A statement that black men should not share their "genetic material" with a "filthy, filthy white woman" and that "laying with white women is like spitting in your mother's womb".
- A post listing the date, time and location (including the name of the school and a map) where Firefighter Rowe objects to young boys and girls holding hands with members of the same sex.
- Multiple references to gay men as "homophiles".

8. To ensure clarity, I did not ignore or overlook any of the evidence presented, but, rather, gave it all careful review and consideration. For example, I did not overlook that Firefighter Rowe "shared" an abhorrent post discussing anal sex and feces. While it certainly reinforces the sinister intentions of his own posts, I did not find it necessary to give such posts weight to decide this appeal.

- A reference to so-called "homophiles" seeking to "normalize homophilia particularly among children in order to GAIN and EASE sexual access to them."
- References to lesbians as "lez-beasts";
- A reply to a person online stating: "You're QUEER. You're not significant enough for me to troll."
- Another online reply stating: "Why haven't any homophiles been killed by Police?"
- A picture of Firefighter Rowe, with a clenched fist, wearing a t-shirt with a stick figure with Pan-African colors kicking in the groin a stick figure with LGBTQ colors.
- A reference to the head of the Boston Chapter of Black Lives Matter, a Boston resident, as a person with: "Homophile/Trans/Femm Interests".
- A reference to Black Lives Matter as "HOMOPHILES LIVES MATTER".
- A reference to the leaders of Black Lives Matter as "slow-witted, uniformed agents of sexuality confusion/cooning" who "cannot have access to our children."
- A reference to a black entertainer as a "COM-PLETE bitch".
- A reference to "SmallHats (So-called Jews)"

Firefighter Rowe does not dispute that he wrote and posted all of the above on his public Facebook account. He does allege that certain statements, including his use of the term "homophile" is not intended to be derogatory. That is not credible. It is painfully clear that Firefighter Rowe equates homosexuality with pedophilia and his use of the word "homophile" is an amalgam of homosexual and pedophile. Even Firefighter Rowe conceded in his testimony his belief that they are "closely connected" and "[t]hat's why we meld the two" going on to state, *without hesitation*, his belief that 90% of all homosexuals have been "introduced" to homosexuality "through a pedophilia experience, being sexually molested, raped or abused as a child from an adult."

The postings by Firefighter Rowe violate various BFD rules regarding discrimination and harassment; conduct unbecoming; conduct prejudicial to good order; abusive or threatening language; improper or offensive language, the Social Media Policy, the City of Boston's Discrimination and Anti-Harassment Policy, and the City's Zero Tolerance for Violence Policy. *All* of the postings constitute conduct unbecoming a firefighter as it lowers the Fire Department in the estimation of the public when one of their members verbally attacks individuals based solely on their race, religion or sexual orientation, as Firefighter Rowe has done in each of the above-referenced posts. For the same reasons, all of Rowe's posts violate the BFD's policies prohibiting discrimination and harassment. Certain posts, including the post of Rowe wearing a t-shirt of an LGBTQ stick figure being kicked in the groin, violate the BFD's Zero Tolerance for Violence policy, while multiple other posts violate rules relating to abusive, threatening, improper or offensive language.

I considered Firefighter Rowe's argument that there is no relationship between his off-duty online activity and his employment as a firefighter. Of the posts identified in the findings, only one was posted while Rowe was on duty. Generally, when a civil service employee is off duty, his actions cannot be the subject of discipline unless they are work-related. If an employee establishes that his appointing authority's disciplinary action was based "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[.]" *School Comm. of Brockton* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 486,497 (1997). Hence, there must be a nexus between Firefighter Rowe's conduct and his employment with the BFD.

In *Baldasaro* v. *Cambridge*, 10 MSCR 134 (1997), the appellant, an off-duty DPW employee, screamed profanity at an on-duty parking meter maid when she approached him about moving his vehicle. *Id*. at 135. The Commission held that off-duty conduct cannot be punished by an employer unless the conduct is work related. *Id*. The Appeals Court affirmed. The Court noted that the employee had sustained his burden of showing that there was no significant correlation between his conduct and his continuing fitness to perform his job.

Baldasaro differs significantly from this case. First, firefighters, inherent in their duties, enter the homes of Boston residents, often in response to a resident's call for emergency services. That is significant for the following reason. If a local business owner posts bigoted rants on Facebook, customers can choose not to patronize his or her business. If a politician makes racists remarks, voters can choose another candidate. When a resident calls 911 seeking fire or rescue services, however, they don't have the option of denying access to their home to someone like Rowe, who posts bigoted comments to his public Facebook account while off-duty. That is because, until recently, Rowe *wore the uniform of the Boston Fire Department*, which carries with it both respect and authority, including the authority to enter the homes of Boston residents who call for fire and rescue services. Those residents include men and women who are lesbian, gay, bisexual, transgender and those who identify as queer and are questioning their sexual identity—people that Rowe publicly refers to as: "lez-beasts, homophiles and trans-homophiles" who, according to Rowe, are seeking to "normalize homophilia particularly among children in order to GAIN and EASE sexual access to them." Boston residents should not have to allow bigots like Rowe into their home in order to receive emergency services from the Boston Fire Department. For these reasons, I find that that there is a substantial correlation or nexus between Rowe's off-duty conduct and his employment, thus enabling the BFD to discipline him for his off duty misconduct.

I also carefully considered Firefighter Rowe's argument that the discipline imposed here violates his First Amendment rights. While, ultimately, a Court is the proper venue to address Constitutional issues, I concur with the Boston Fire Department's argument that there is no basis for concluding that Firefighter's Rowe's interest in free speech outweighed BFD's interest in providing efficient and effective public safety services. In reaching this conclusion,

I assumed that all of Firefighter's postings and statements were made as a citizen on matters of public concern and I have accepted Firefighter Rowe's assertion that his deep-rooted opposition to homosexuality is based on his religious beliefs.

As argued by the Boston Fire Department, under well-settled U.S. Supreme Court precedent, the First Amendment does not protect public employees when the government's interest in providing efficient and effective services to the public outweighs their free speech interests. *Pickering* at 573; *Connick* at 140. A public employee "by necessity must accept certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006). *See also*, *Pereira* at 251) (citing and following *Pickering* for principle that public employee's right to free speech is limited by public employer's interest "in promoting the efficiency of the public services it performs through its employees"). This is especially true with regard to public safety functions, where government employers traditionally have wide latitude in deciding when employee speech hinders efficient, effective public safety services. Firefighter Rowe's statements frustrated BFD's public safety mission and threatened "community trust" in the department, which is "vitally important" to its function. "[T]he more the employee's job requires...public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy* v. *Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (alteration in original) (internal quotation marks omitted) (quoting Craig D. Singer, Comment, Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation, 59 U. Chi. L. Rev. 897, 901 (1992)). "[F]irefighters...are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of the respect that...firefighters accord the members of that community." *Locurto* v. *Giuliani*, 447 F.3d 159, 178-79 (2d Cir. 2006).

To me, BFD's interest in providing efficient and effective public safety services, by employing Firefighters who do not publicly post bigoted remarks, outweighs Firefighter Rowe's interest in free speech.

Having determined that Firefighter Rowe did engage in the alleged misconduct, I must determine whether the level of discipline (termination) 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).
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> --
>
> "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).

First, my findings do not differ significantly from those reported by the Boston Fire Department. While the BFD relied on a wider group of social media postings, including those that were not personally written by Firefighter Rowe -but, rather, tagged, shared or re-posted by him—I did conclude that the smaller group of social media posts and statements by Firefighter Rowe violated the same rules cited by the BFD.

Second, I considered whether the troubling series of events that triggered the investigation of Firefighter Rowe, previously referenced, was evidence of some type of personal or other bias that warranted intervention by the Commission. The Commission confronted a somewhat similar question in *Carey* v. *Holden*, 31 MCSR 311 (2018). In *Carey*, a disgruntled police officer leveled unfounded charges against a supervisor. As part of an investigation into the unfounded allegations, however, the Town found evidence of other misconduct that warranted Carey's termination. In a concurring opinion upholding the termination, four (4) Commissioners stated:

> "We write to emphasize that the record established that the Town comes before the Commission tainted by problematic origin of the charges and the behavior of certain officers involved has not been overlooked, none of which has any proper place in a public safety organization, and must not be viewed as condoned by this Commission. Nevertheless, the totality of the evidence of misconduct on the part of the Appellant … stand as just cause for the discipline imposed. Indeed, it would discredit the bedrock of civil service law merit principles to excuse such a history of behavior because of the unseemly way in which that history eventually came to light."

The same principle applies here. It is, frankly, unseemly, that the investigation of Rowe began based on a) a post forwarded by a white firefighter questioning whether a race-based double standard existed in the BFD; and b) a cropped (altered) post sent by an anonymous Twitter account user. As in *Carey*, however, the totality of the evidence of misconduct eventually discovered regarding Rowe, standing alone, justifies the BFD's decision to terminate him.

Third, I considered whether the decision to terminate Firefighter Rowe was consistent with progressive discipline, which the Commission has long held to be synonymous with basic merit

principles when it pertains to discipline appeals. While Firefighter Rowe's disciplinary history is limited to one, short-term suspension many years ago, the underlying misconduct in that matter underscores that Firefighter Rowe's homophobic rants appear to have been a longstanding problem, with Firefighter Rowe, true to form, telling another firefighter, "I'll kick your fucking ass you fucking faggot." Even, however, without that discipline, the egregious and multiple instances of misconduct discovered here would, standing alone, justify termination.

Finally, I considered whether there was equitable treatment of similarly situated individuals. Again, I did not ignore or overlook any of the evidence presented regarding various firefighters. After careful review, I found that the alleged misconduct of three (3) other firefighters were potentially comparable to Rowe's misconduct: Firefighters JC, MD and MG.

As previously referenced, Firefighter JC's misconduct occurred prior to the discovery of Rowe's misconduct. He posted vile comments regarding Rachel Maddow and Senator Elizabeth Warren. In the case of JC, the BFD acted quickly to initiate disciplinary action against the firefighter, resulting in Firefighter JC's resignation from the Department.

The alleged misconduct by Firefighters MD and MG came to light at the local appointing authority hearing when Rowe's counsel produced documents purportedly showing offensive Facebook postings of these firefighters. Firefighter MD acknowledged being the author of hateful, bigoted postings, including one stating: "I Never Ever Trust a Dirty Fucking Muslim." The BFD, similar to the matter involving Firefighter JC, took prompt action to initiate disciplinary charges against JC, resulting in his resignation.

That leaves the allegations against, and the BFD's response to, Firefighter MG. As referenced in the findings, Rowe's counsel presented the BFD with two (2) pages that appear to be postings from a Facebook account. Each page has the name of MG as the person who posted the comments.

The posting on the first page stated:

> "not sure who to post this to but here it is…today supposedly boston e-37/l26 claimed to have rescued a person from a fire or annunciation red . well guess what? they didn't LADDER COMPANY 4 MADE THE SAVE….ACTUALLY F.F. JAMES CASHINS E-14 DETAILED TO L-4 MADE THE SAVE . this job has denigrated to a bunch of self serving douche bags who would falsify a report so that their useless company can recieve (sic) accolades they didn't earn…these phony fucks are polishing their badges for an award THEY DIDN'T EARN. pass the word LADDER 4 AND F.F. CASHINS FROM E-14 DESERVE THE AWARD NOT THE PHONIES."

The posting on the second page stated:

> "all lives matter means shut up nigger????? Hahahahahaha funny i don't see a mark on this man, his t-shirt isn't ripped or slightly askew what channel can I follow this on?? cnn… nope msnbc… nope, bet…nope, fox news nope, local channels nope"

In response, the BFD asked Ed Dominguez to review MG's social media activity. Dominguez was unable to find these posts on MG's Facebook account. Rather, he only found limited postings, photographs, and other information. There were some indications in Mr. [G]'s profile of his employment with the Boston Fire Department, including photographs of him in his Boston Fire Department uniform [].

Disturbingly, Dominguez found that MG's profile photograph depicted what appeared to be a photograph taken from inside of a vehicle of an older black male standing outside holding his hand up. According to Dominguez:

> "The hand appears to contain an unknown item. It is unclear what the photograph is depicting and the connection to Mr. [G]. Mr. [G] has used the photograph of this older black male as part of his Facebook profile cover photograph dating back to 2012. Ed Dominguez believes he recognizes this older black male as a homeless person that has panhandled on Morton Street since the early 1990s."

The BFD brought Firefighter MG in for a "disciplinary interview" at which time Firefighter MG admitted that he wrote and posted the "phony fucks … douchebags" posting, but denied that he wrote and/or posted the posting containing the words "shut up nigger". According to the BFD, they were unable to determine whether MG wrote the second posting or not and only gave Firefighter MG a written warning for the first post.

Based on a review of the record currently before the Commission, I am not satisfied that the BFD pursued the same due diligence regarding the allegations against Firefighter MG that it did against Rowe for the following reasons. First, standing alone, the fact that Firefighter MG had, for years, purportedly used the picture of a black homeless man as his Facebook profile photo, should have been a bright red flag to the BFD. I only learned of that information after ordering the BFD to produce all records related to Dominguez's investigations of firefighters other than Rowe. There is nothing in the record to show that Firefighter MG was questioned about this inexplicable observation by Dominguez.

Second, the BFD witnesses stated at the hearing before me that they were unable to research this issue further, in part, because Rowe's counsel refused to produce any further information regarding the source of the postings. At my request, Rowe's counsel produced what was entered, post-hearing, as Appellant Exhibit 35. That document provides the names of two (2) Boston firefighters who, at a minimum, could provide the BFD with additional information as part of a meaningful investigation into whether Firefighter MG posted the second posting. There is no indication that the BFD followed up on that important information.

Third, the BFD's quick acceptance of Firefighter MG's denial regarding the second post is problematic, particularly given that the second post appears to be similar to the first post (which MG admitted to posting) in regard to tone and writing style.

In summary, when the BFD is presented with evidence that a Boston firefighter has allegedly used the n-word in a public post-

ing, they should take every step possible to investigate the allegation and, if proven, take appropriate disciplinary action, up to and including termination. That has not happened here.

G.L. c. 31, § 72 states that:

> "The commission or administrator [HRD], 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." (emphasis added)

Based on the facts presented here, a Section 72 inquiry by the Commission is warranted. By separate order this day, the Commission is opening such an inquiry to ascertain what further action should be recommended by the Commission or taken by the BFD to further investigate the allegation that a BFD firefighter has allegedly used the n-word in a social media posting that has come to the Commission's attention in the course of the present appeal.

This Section 72 inquiry, while designed to ensure the equitable treatment of similarly situated individuals, does not detract from the overwhelming evidence showing that Firefighter Rowe repeatedly made bigoted comments about individuals based on their race, sexual orientation or religion. Put another way, the Section 72 inquiry ordered here is meant to ensure that *any* firefighter, such as Mr. Rowe, who posts bigoted comments about Boston residents based on their race, religion or sexual orientation, should find another occupation, either voluntarily or involuntarily.

CONCLUSION

For all of the above reasons, Firefighter Rowe's appeal under Docket No. D1-18-074 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on August 29, 2019.

I-19-181

Re: *Civil Service Commission inquiry pursuant to G.L. c. 31, § 72 regarding an allegation that a firefighter employed by the Boston Fire Department (BFD) used the racist "n-word" in a social media posting.*

INQUIRY

1. On August 29, 2019, the Civil Service Commission (Commission) issued a decision (*Rowe* v. *Boston Fire Department*, D1-18-074 [32 MCSR 314] (2019)), affirming the BFD's decision to terminate a Boston firefighter (Octavius Rowe) for making bigoted comments on social media and podcasts related to individuals' race, religion and sexual orientation.

2. As part of that appeal, it was alleged that another Boston firefighter, currently employed by the BFD, posted the racist "n-word" on social media.

3. As noted in *Rowe*, the Commission has concluded that the BFD has not taken sufficient steps to investigate this serious allegation.

For these reasons, the Civil Service Commission, pursuant to G.L. c. 31, § 72, opens an inquiry to ascertain what further action should be recommended by the Commission or taken by the BFD to investigate this allegation.

The BFD has thirty (30) days to file a written response to this inquiry which should include recommended steps for conducting a further investigation of the above-referenced allegation.

SO ORDERED.

CONCURRING OPINION OF COMMISSIONER TIVNAN

I concur with the opinion of Chairman Bowman and re-emphasize that, back in 2005, Mr. Rowe was suspended for four (4) tours of duty for his outrageous and vile statement against another firefighter and threatening him with bodily harm. It appears that Mr. Rowe has failed to learn his lesson and correct his deplorable behavior and speech by failing to show care and respect to a fellow firefighter. He failed to work towards making amends by improving his deportment with the general public and all firefighters.

It is an honor to be a public servant for the people of a great metropolitan city of our Commonwealth. The position of firefighter is one of trust and respect, treating all people with kindness, compassion and care in time of difficulty and need.

Mr. Rowe made numerous disparaging, vile, repulsive statements about numerous segments and individuals of our population that were intolerant, hurtful and cruel. His opinions and statements now appear to be beyond remedial corrective assistance, education and retraining, including anger management, counseling and therapy.

Kevin M. Tivnan
Kevin M. Tivnan, Commissioner

Notice to:

Robert Johnson, Jr., Esq.
Johnson & Associates
4238 Washington Street, #307
Boston, MA 02131

Kay H. Hodge, Esq.
John M. Simon, Esq.
Stoneman, Chandler & Miller, LLP
99 High Street
Boston, MA 02110

Barbara Parker, Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

* * * * * *

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LOUIS DeBENEDICTIS

v.

BOSTON FIRE DEPARTMENT

D-18-073

September 12, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-60 Day Suspension of Boston Firefighter-Conduct Unbecoming-Conduct Prejudicial to Public Authority—The Commission affirmed the 60-day suspension of a Boston firefighter who had abused his position of authority for personal advantage when parking his personal vehicle at a construction site and falsely accusing a welding foreman of being drunk on the job. The matter arose from the Appellant's frustration at the lack of public parking spaces near his residence in the North End and the fact that four of the few spaces available were reserved for contractors.

DECISION

On May 2, 2018, the Appellant, Louis DeBenedictis (Firefighter DeBenedictis or Appellant), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (BFD) to suspend him for sixty (60) days for: conduct prejudicial to good order; and conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public.

A pre-hearing conference was held at the offices of the Commission on June 5, 2018 and a full hearing was held at the same location on April 26, 2019. A digital recording was created of the hearing and both parties were provided with a CD of the proceeding.[1] Following the close of the hearing, the BFD submitted a proposed decision on May 29, 2019. The Appellant did not submit a proposed decision.

FINDINGS OF FACT

Based upon the documents admitted into evidence (Exhibits 1-22) and the testimony of:

Called by the BFD:

- Civilian A: Manager at a general contracting company;
- Civilian B: Employee at a general contracting company;
- Lt. William Gillis, Boston Fire Department;

Called by Firefighter DeBenedictis:

- Louis DeBenedictis, Appellant.

I make the following findings of fact:

1. The Appellant has been a Boston firefighter since 2014. He was a firefighter in another community for several years before joining the BFD. (Stipulated Facts) He is currently out on medical leave and does not anticipate returning as a firefighter. (Testimony of Appellant)

2. In October 2016, the Appellant, per his request, was transferred to a fire house in the North End of Boston. He had fond memories of this firehouse, as his grandfather and uncles, who were residents of the North End, would take him there when he was a child to watch the fire apparatus leave the building. (Testimony of Appellant)

3. In December 2016, the Appellant moved from Dorchester, where he had off-street parking, to the North End. Although he obtained a resident parking sticker, parking was always a problem in this congested part of the City, often requiring the Appellant to circle around looking for a parking spot for up to 30-60 minutes and park up to a ¾ mile away from his residence. (Testimony of Appellant)

4. From July 2016 to March 2018, a general contracting company was building a large, single-family residence on Moon Street in the North End, not far from where the Appellant resided. (Testimony of Civilian A)

5. At some point, the general contracting company, at a cost of $668 per month, received a permit from the City to occupy four (4) parking spaces in front of or near the Moon Street project from 7:00 A.M. to 4:00 P.M. Monday through Friday. (Testimony of Civilian A and Civilian B and Exhibit 8)

6. The contracting company was provided signs by the City to place on posts along Moon Street clearly stating that the parking spots were reserved for construction vehicles only from 7AM to 4PM, Monday to Friday. (Testimony of Civilian A and Exhibit 8)

7. The permit, renewed monthly, stated in part: "Stand 2 Trucks at Curb // 7AM - 4 PM". (Exhibit 8)

8. The manager for the contracting company, whose office was only steps away from the construction project, stated that this "stand" language was ambiguous and that he received conflicting information from the City regarding its meaning. At times, he was told that trucks could only park in these spots while loading and unloading and at other times he was told that no such restriction applied. (Testimony of Civilian A)

9. On any given day, several trucks driven by contractors (i.e.—plumbers, electricians, welders, etc.) would come and go, temporarily using the reserved parking spots. (Testimony of Civilian A)

10. The Appellant, who lived nearby, was frustrated that four (4) parking spots were effectively being taken off-line for a long period of time and he questioned whether the general contracting

1. The Commission subsequently had a transcript of the hearing prepared.

company was complying with the "stand" language of the permit. (Testimony of Appellant)

11. From October 2016, when the Appellant began working in the North End, until on or around September 2017, the manager of the general contracting company noticed that a passenger vehicle, not associated with the construction project, was regularly parking in one of the reserved spots prior to 4:00 P.M., usually starting at or around 3:00 P.M. At times, he observed the passenger vehicle parked in a reserved parking spot three (3) times per week. At other times, it was two (2) times per week. Although there may be short periods of time when the vehicle would not be parked there before 4:00 P.M., the practice would resume shortly thereafter. (Testimony of Civilian A)

12. The manager of the contracting company noticed that the passenger vehicle always had a placard on the front dashboard with a Boston Fire Department logo and the words "Fire Detail" typed on it. (Testimony of Civilian A)

13. The Boston Fire Department does not issue placards and/or decals to Boston firefighters who are on details. (Testimony of Lt. Gillis)

14. The manager of the contracting company also observed that the driver of the passenger vehicle was always wearing a Boston Fire Department shirt and hat, along with "swat pants and boots". At the hearing before the Commission, the manager identified the Appellant as the driver of the passenger vehicle that was regularly parking in the reserved spots before 4:00 P.M. on weekdays. (Testimony of Civilian A)

15. Having concluded that the Appellant was a Boston firefighter, the manager of the contracting company instructed contractors to try and work around the Appellant's vehicle because the manager "didn't want any trouble". (Testimony of Civilian A)

16. The manager was told by multiple contractors that the Appellant was harassing them and taking pictures of them and their vehicles. (Testimony of Civilian A)

17. In May 2017, the Appellant was assigned to detail duty for this residential project in order to monitor a welding project. (Testimony of Appellant and Civilian A)

18. While working this detail, the Appellant observed what he described as a "large fabric" being thrown onto the sidewalk from an upper level of the project. [The manager testified that it was a rope being thrown into the back of a contractor's truck.] The Appellant walked across the street from where he was standing, put his hands up and told the construction crew that he was shutting the project down. (Testimony of Appellant)

19. The welding foreman, who had been eating lunch in his truck, got out of his truck and walked over to find out what was going on. Shortly thereafter, the manager of the contracting company walked over and observed a heated conversation between the Appellant and the welding foreman. (Testimony of Civilian A)

20. The manager from the contracting company, concerned that the project would be shut down, asked the welding foreman to walk away so that he could talk to the Appellant privately. At that point, the Appellant told the manager that this was the "worst welding job he had ever seen" and then alleged that the welding foreman was drunk. The manager of the contracting company was shocked by the Appellant's allegation, as he has known the welding foreman for fifteen (15) years and is aware that he doesn't drink alcohol. (Testimony of Civilian A)

21. The construction project was not shut down that day. (Testimony of Civilian A) The Appellant never filed a verbal or written report to anyone at the BFD regarding his allegation that the welding foreman on this construction project was drunk. (Testimony of Appellant)

22. On September 8, 2017, the Appellant opened the front door of the construction company's office in the North End and started screaming, stating that the construction company was abusing the system and that he (the Appellant) was going to get it fixed. (Testimony of Civilian A; Exhibit 5A)

23. After the September 8th incident, the construction manager contacted a longtime friend, and former BFD member, for assistance in resolving the situation with the Appellant. (Testimony of Civilian A)

24. An investigation was conducted by the BFD and the Boston Police Department. (Testimony of Lt. Gillis)

25. On April 9, 2018, the BFD preferred disciplinary charges against the Appellant. After a disciplinary hearing on April 19, 2018, the BFD suspended the Appellant for sixty (60) days. (Exhibits 15A, 16 and 17)

PRIOR DISCIPLINE

26. In 2015, the Appellant was suspended for two (2) weeks for being argumentative in front of a patient during an active emergency call. The Appellant acknowledged violating BFD rules and accepted the suspension. (Exhibit 11)

27. In 2016, the Appellant was suspended for two (2) tours and removed temporarily from details for violating standard operating procedures. (Exhibit 12)

28. In 2017, the Appellant was suspended for thirty (30) days for engaging in an argument outside the fire house (in the North End) with a member of the public over a parking spot. (Exhibit 13)[2]

APPLICABLE CIVIL SERVICE LAW

G.L. c. 31, § 43 provides:

2. The Appellant appealed this discipline to the Commission and the decision is still pending.

> "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); *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); *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

By a preponderance of the evidence, the BFD has shown that the Appellant engaged in substantial misconduct which adversely affected the public interest. Over a period of months, while in uniform, the Appellant repeatedly parked his private vehicle in a parking spot reserved for construction vehicles. When parking there, he displayed an unauthorized BFD decal on his dashboard. Further, he made a false and damning allegation against a member of the construction crew working at this same site, alleging that the contractor was drunk. This misconduct violates BFD rules regarding conduct prejudicial to good order; and conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public.

I am not unsympathetic to the frustration felt by the Appellant regarding the loss of on-street parking spaces in a congested neighborhood of Boston where the number of vehicles greatly outnumbers the number of available spaces. I also find no fault in the Appellant's attempt, as a private citizen, to ensure that the contracting company was abiding by the restrictions on the permit that took four (4) parking spaces off-line each weekday for almost two (2) years to build ***one*** single family residence in the North End. In fact, a review of the record appears to show that the contractor was, at a minimum, interpreting ambiguity in their favor regarding how long construction vehicles could remain parked in one of those reserved spots.

What is not ambiguous, however, is that the Appellant was not permitted to park his private vehicle in those spots from Monday through Friday between the hours of 7:00 A.M. and 4:00 P.M. While the Appellant himself, during this testimony before the Commission, acknowledged that he parked his private vehicle in those reserved spots at least five (5) times during the restricted hours, I credit the testimony of the manager of the construction company that, over a period of months, the Appellant regularly parked in those spots two (2) or three (3) times per week during restricted hours. Importantly, there was no question that the Appellant, when he parked his private vehicle there during restricted hours, was a Boston firefighter. According to the credible testimony of the two (2) civilian witnesses, the Appellant was always wearing a Boston Fire Department shirt and hat. Further, he displayed his own custom-made placard with the BFD insignia with the words "BFD Detail". Not only was this placard unauthorized, it is undisputed that, except on one (1) occasion, the Appellant was *not* on a BFD detail when he parked in these reserved spaces. I reach the reasonable conclusion that the Appellant displayed this unauthorized placard in an attempt to avoid being ticketed and to discourage the contractor from filing a complaint. For many months, this tactic worked. As stated by the manager of the contracting company in his testimony before the Commission: " … you know, my job is to keep that job moving and I didn't—the last thing we wanted was someone from the fire department to shut this job down because God knows how they could shut it—you know, how long it would take to get shut—you know, get back up again." No private contractor in Boston should be forced to tolerate a Boston firefighter who abuses his position for personal advantage in the manner that the BFD proved that the Appellant did in this appeal.

The Appellant took things one step further in May 2017. Regrettably, he accepted a detail to monitor welding work at the same construction site that had been causing him so much consternation as a private citizen. Accepting the testimony of the Appellant, he saw a piece of fabric being thrown on the sidewalk while he was working the detail. He crossed the street, waived

his hands, and announced he would be shutting the project down. When the construction manager arrived and tried to resolve the matter, the Appellant made the damning allegation that the welding foreman was drunk on the job. The construction manager was shocked at the Appellant's allegation, as he has known that foreman for fifteen years and knows that he does not drink alcohol. Importantly, the Appellant permitted the project to go forward that day and never reported his allegation to any BFD officials. Thus, he either made a false allegation against the foreman or he jeopardized public safety by failing to report that a foreman working at a construction with welding going on was drunk. Either way, his actions constitute egregious misconduct.

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).

My findings do not differ significantly from those reported by the BFD. While I have not concluded that the Appellant's complaints to contractors and employees of the general contracting company constituted actionable harassment, I have, similar to the BFD, found that the Appellant repeatedly engaged in misconduct that violated BFD rules regarding conduct prejudicial to good order; and conduct unbecoming a member, whether on or off duty, which tends to lower the service in the estimation of the public.

Further, I considered that the Appellant had engaged in similar misconduct in the past, thus justifying a lengthy sixty (60)-day suspension.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. D-18-073 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 12, 2019.

Notice to:

Louis DeBenedictis
[Address redacted]

Kate M. Kleimola, Esq.
Boston City Hall
Room 624
Boston, MA 02201

* * * * * *

JOHN GESWELL

v.

HUMAN RESOURCES DIVISION

B2-18-235

September 12, 2019
Christopher C. Bowman, Chairman

Commission Practice and Procedure-E&E Appeal-Lack of Timeliness—The Commission dismissed an appeal from a Boston senior fire alarm operator challenging the calculation of his "out-of-grade" E&E credits as the appeal was not filed within 17 days of HRD's denial notice. The Appellant claimed unsuccessfully that the language about appeal rights in the HRD notice was unclear. Chairman Christopher C. Bowman agreed the language might have been more helpful but it was clear enough to meet the minimum statutory requirements.

ORDER OF DISMISSAL

On December 3, 2018, the Appellant, John J. Geswell (Mr. Geswell), a Senior Fire Alarm Operator with the Boston Fire Department (BFD), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny his appeal in which he sought to have time spent "acting, out-of-grade", counted toward the education and experience (E&E) portion of a promotional examination for Principal Fire Alarm Operator.

2. On January 8, 2019, I held a pre-hearing conference which was attended by Mr. Geswell, his counsel, counsel for HRD, and co-counsel for the BFD.

3. At the pre-hearing conference, HRD argued that the Appellant's appeal to the Commission was not timely, as it was not filed with the Commission within seventeen days of HRD's denial notice, as required by G.L. c. 31, s. 24.

4. HRD subsequently filed a Motion for Summary Decision and the Appellant filed an opposition.

5. Based on the briefs, the following appears to be undisputed:

I. On June 8, 2018, the Appellant sat for a promotional examination for the title of Principal Fire Alarm Operator.

II. The examination score was based on the written examination (60%) and education and experience (E&E) (40%).

III. On June 11, 2018, the Appellant timely completed and submitted the E&E portion of the promotional examination.

IV. On July 13, 2018, HRD forwarded the Appellant his examination score.

V. On July 20, 2018, the Appellant filed a timely appeal with HRD, contesting his E&E score.

VI. On July 31, 2018, HRD notified the Appellant that his E&E appeal was denied.

VII. Included in HRD's July 31, 2018 notification to the Appellant was the following statement regarding appeal rights to the Commission:

> "Pursuant to Chapter 31, Section 24 of the Massachusetts General Laws (M.G.L) provides that you 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 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)

VIII. On December 3, 2018, the Appellant filed an appeal with the Commission.

ANALYSIS

The Appellant argues that his appeal to the Commission should not be dismissed on timeliness grounds as the language regarding appeal rights in HRD's July 31, 2018 notification was not sufficiently clear, as, among other things, it did not explicitly state that the applicant could appeal an HRD determination regarding E&E.

I disagree. HRD provided all exam applicants with the statutory language relied on by the Commission to allow applicants to file an E&E appeal with the Commission. While it may be more helpful for HRD to provide more of a lay person explanation of their appeal rights and step-by-step instructions on how to file an appeal with the Commission, providing applicants with the a copy of their statutory appeal rights at least meets the minimum requirements regarding appeal right notification.

Section 24 provides that certain appeals regarding tests may be made to the Commission but "such appeal shall be filed no later than seventeen days after the date of mailing of the decision of the administrator" and "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 frame." Mass. Gen. Laws Chap. 31, § 24 (2014).

The Commission has reasoned, citing the appeals court, that "a fair reading of the entire statute indicated that . . . training and experience scores may be appealed under §24" and the seventeen day time limit should be applied. *Healey* v. *Human Resources Division*, 27 MCSR 610 (2014), *citing*, *O'Neill* v. *Civil Service Commission*, 10-P-384 (February 15, 2011; per Rule 1:28). Therefore, the Appellant is required to file an E&E appeal within seventeen days after receiving notice of HRD's decision.

The Appellant's appeal is untimely because he filed more than seventeen days after receiving notice of his E&E appeal from HRD. The Appellant received notice from HRD on July 13, 2018 of his E&E score and he sent an appeal response on July 20, 2018. After a review, HRD responded on July 31, 2018, noting that they were not going to change his initial score. As such, the Appellant was charged with filing an appeal to the Commission no later than the close of business on August 16, 2018. The Appellant never did so, waiting until December 3, 2018 to finally appeal his score. This makes his appeal untimely by over three months. The Appellant's appeal was not filed within the required seventeen days, and therefore must be summarily dismissed.

CONCLUSION

For all of the above reasons, the Appellant's appeal is hereby ***dismissed***.[1]

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 12, 2019.

Notice to:

1. I did not overlook that HRD and the Appellant raised other issues in their briefs. However, as the Appellant's appeal to the Commission is not timely, and the Commission does not have jurisdiction to hear the appeal, I need not address them.

Brian Simoneau, Esq.
550 Cochituate Road, Suite 25
Framingham, MA 01701

Patrick Butler, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Louis Scapicchio, Esq.
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

* * * * * *

CHRISTOPHER LINK

v.

CITY OF HAVERHILL and HUMAN RESOURCES DIVISION

E-18-188 and E-18-195

September 12, 2019
Christopher C. Bowman, Chairman

Promotional Appointment-Expiration of List-Haverhill Deputy Fire Chief—The City of Haverhill failed to show that the promotional appointment of a candidate to Deputy Fire Chief was made prior to the date that the eligibility list from which he was selected had expired. Chairman Christopher C. Bowman did not void the appointment but gave the parties 60 days to confer regarding the appropriate relief. The appointment was challenged by a fire lieutenant on the new list who had the highest score.

INTERIM DECISION

On September 28, 2018, the Appellant, Christopher Link (Lt. Link), a Fire Lieutenant in the City of Haverhill (City)'s Fire Department, filed an appeal with the Civil Service Commission (Commission), arguing that the City violated Section 25 of Chapter 31 (the civil service law) by promoting Raymond Robinson to the position of Deputy Fire Chief from an eligible list that was scheduled to expire on June 25, 2017.

2. On October 22, 2018, I held a pre-hearing conference at the Mercier Community Center in Lowell, which was attended by Lt. Link, his counsel, counsel for the City, the City's Human Resources Director and counsel for the state's Human Resources Division (HRD) (via phone).

3. As part of the pre-hearing conference, the parties agreed that:

A. On March 21, 2015, HRD administered a promotional examination for Haverhill Deputy Fire Chief.

B. Raymond Robinson took and passed this promotional examination.

C. Lt. Link was not eligible to take the promotional examination as he was not in the next lower title and a sufficient number of candidates in the next lower title signed up for the examination.

D. On June 25, 2015, HRD established an eligible list for Deputy Fire Chief, which included the name of Raymond Robinson.

E. The June 25, 2015 eligible list was scheduled to expire on June 25, 2017.

F. G.L. c. 31, s. 25 states in relevant part: "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 … 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 … "

4. HRD stated that its longstanding practice when no subsequent eligible list has been established is to extend the eligible list to the date that falls on the first day of the month three years after the date of the examination. Here, that date would be March 1, 2018.

5. A scheduled examination for Deputy Fire Chief did not go forward as scheduled because an insufficient number of candidates in the next lower title did not sign up. The examination was re-scheduled to May 19, 2018 and eligibility was opened up to the next lower title (Lt.), allowing Lt. Link to take the promotional examination.

6. The promotion of Deputy Chief Robinson occurred after March 1, 2018.

7. As part of the pre-hearing conference, the City stated that, on February 15, 2018, after consulting with HRD, the City submitted a written request to HRD to extend the life of the eligible list due to the cancellation and rescheduling of the promotional examination. The February 15, 2018 letter from the City to HRD was attached to the Appellant's appeal to the Commission.

8. HRD stated that it never replied to the City's request, but, had HRD replied, the request would have been approved.

9. The City produced email communication between the City and HRD to support its argument that, based on prior communication with HRD, it was anticipated that HRD would approve a request for extension by the City.

10. The Appellant argued that, absent an approval from HRD, the promotional appointment of Mr. Robinson was not permitted, and any promotional appointment to Deputy Fire Chief should be from individuals on the eligible list to be established from the May 19th examination. (The Appellant received the highest score of all applicants on that examination.)

11. At the conclusion of the pre-hearing, I joined HRD as a party and set a briefing schedule for the City and HRD to submit a

Motion for Summary Decision in 30 days and the Appellant to submit a reply / opposition 30 days thereafter, assuming that he wanted to continue with the pursuit of his appeal.

12. On October 23, 2018, upon reviewing recently-filed appeals with the Commission, I became aware that HRD, on October 19th, filed a petition with the Commission, asking the Commission to (retroactively) extend the Deputy Fire Chief eligible list in Haverhill to August 14, 2018 stating, in part that " … the City requested an extension of the eligible list in February 2018 by uploading it into the online system. HRD was unaware of that request prior to the list's expiration on March 1, 2018, but would have approved it and extended the eligible list through August 14, 2018.

13. That Petition was docketed as CSC Case No. E-18-195 and consolidated with this appeal.

14. Via an October 23, 2018 Procedural Order, I ordered the City to provide Deputy Chief Robinson with all communication related to this appeal and Petition, including the Procedural Order.[1]

15. On November 20, 2018, HRD submitted a Motion for Summary Decision.

16. On November 27, 2018, the City "joined" HRD's Motion for Summary Decision

17. On December 20, 2018, Lt. Link filed an opposition to HRD and the City's Motion for Summary Decision.

18. On April 9, 2019, upon review of all of the submissions, including the attachments, I became aware that there appeared to be a dispute regarding whether Mr. Robinson was promoted *before* or *after* the establishment of the new eligible list on August 14, 2018. Specifically, Lt. Link argued that the evidence showed that the Mayor promoted Mr. Robinson to Deputy Fire Chief on July 10, 2018, while Lt. Link argued that the promotional appointment was not made until August 24, 2018. This was a separate issue from what the parties had been disputing: whether or not the prior eligible list should be deemed to have been extended through August 14, 2018.

19. On April 16, 2019, I held a status conference (via phone) with the parties. At the conclusion of that conference, I allowed the parties additional time to submit supplemental briefs to address this second issue.

20. On April 26, 2019 and May 7, 2019, I received supplemental briefs from the City and Lt. Link addressing the new issue.

21. Of most relevance in the City's brief were the following assertions:

> I. Pursuant to certification delegation, the City created a Certification for Deputy Fire Chief on July 10, 2018.
>
> II. That same day, on July 10, 2018, Robinson signed the Certification "noting that he was 'selected for appointment' and 'willing to accept' the appointment."
>
> III. The City's Mayor signed the Notice indicating that he had selected Mr. Robinson for promotional appointment.
>
> IV. By memorandum dated August 24, 2018, the Fire Chief notified the Fire Department that the Mayor had recently made two promotional appointments, including Raymond Robinson to the position of Deputy Fire Chief. The memorandum does not specify the date of the appointment.

22. Of most relevance in Lt. Link's response are two sworn affidavits, one from Lt. Link and the other from the local union President.

23. The affidavit from Lt. Link states in relevant part: "On August 16, 2018, I had a conversation with Chief William F. Laliberty when I was working an overtime shift, and I asked him for an update regarding the promotion to the position of deputy fire chief. He stated to me that Mayor Fiorentini had yet to make a decision."

24. The affidavit from the local union president states in relevant part: "On August 20, 2018, I had a meeting with Mayor Fliorentini to discuss union matters. Present at the meeting beside me and the Mayor was [] another union member. During the course of the meeting, Mayor Fiorentini stated that he was going to fill the captain's position but he wanted my thoughts on the Deputy Chief promotion. I responded by telling the Mayor that it was his appointment to make and I had to stay neutral but the appointment should be made as soon as possible to fill the vacancy."

ANALYSIS

G.L. c. 31, § 25 states in relevant part:

> "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: … (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 …"

In *Callanan and others* v. *Personnel Administrator for the Commonwealth*, 400 Mass. 597 (1987), the SJC stated in relevant part:

> "Effective February 21, 1986, [G.L. c. 31] Section 25 was amended by St. 1985, c. 527, Section 13, ***to extend an expiring list automatically if a new list has not been established***; the extension is terminated, however, upon the establishment of a new list, or upon the decision of the administrator "that the effective maintenance of the merit system so requires such revocation." Not only do the provisions give the administrator substantial discretion over extending eligibility lists, they also reflect the preference for the establishment of new lists. The corresponding provision for extension of a list because of a court order is designed to ensure that those on the list are eligible for the entire period of the list. *Id.* ***Nothing in that provision indicates that a court may extend a list to provide the members of the old list consideration***

1. The Commission has not received a motion to intervene by Mr. Robinson.

> ***for all promotions which might have become available before the list's statutorily prescribed expiration.***" (emphasis added)

This appeal first came to the Commission regarding the question of whether the City could make promotional appointments to the position of Deputy Fire Chief after *March 1, 2018*, the date upon which the eligible list for Deputy Fire Chief was to expire. The Appellant, whose name did not appear on that eligible list, argued that the City failed to receive authorization from HRD to extend the eligible list and, hence, any promotional appointment to Deputy Fire Chief made after March 1, 2018 was invalid.

First, as referenced above, an eligible list is automatically extended if a new list has not been established. Thus, as a new eligible list had not been established as of March 1, 2018, the eligible list, upon which Raymond Robinson's name appeared first, was automatically extended. To the extent that such approval was needed by HRD, HRD and the City have shown that the only reason that formal approval was not given was due to administrative oversight by HRD. For these reasons, the City was permitted to make a promotional appointment to Deputy Fire Chief after March 1, 2018.

Section 25 is equally clear, however, that the City was not permitted to make a promotional appointment to Deputy Fire Chief on or after August 14, 2018, the date upon which a new eligible list for Deputy Fire Chief in Haverhill was established. That turns to the question of when the promotional appointment of Robinson was made. The City argues that the promotional appointment was made on July 10, 2018 and the Appellant (Mr. Link) argues that the promotional appointment of Robinson was not made until August 24, 2018.

Even standing alone, the evidence submitted by the City does not establish that the promotional appointment occurred on July 10th. First, the City submitted a Certification dated July 10, 2018, stating that Robinson "signed the Certification noting that he was 'selected for appointment' and 'willing to accept' the appointment." The City appears to be stating that Robinson promoted *himself* on July 10th, which is illogical and impermissible.

Second, the affidavit from the City's Human Resources Director is, at best, ambiguous on this issue stating: "On the same date, July 10, 2018, the City *completed* HRD's Notice of Employment form to notify HRD of its appointment of Robinson to the position of Deputy Chief." (emphasis added) The next, separate sentence of the affidavit states: "The City's Mayor signed the Notice indicating that he had 'selected the undersigned individuals for appointment (or promotion) …" There is no indication in this second sentence of when the Notice of Employment was signed by the Mayor. Further, the Notice of Employment is not dated and the City opted not to submit an affidavit from the Mayor indicating when he signed the Notice of Employment.[2]

Third, the same affidavit states that: "By memorandum dated August 24, 2018, Chief Laliberty formally notified the Fire Department that Mayor Fiorentini *had recently made* two promotional appointments, including Raymond Robinson to the position of Deputy Fire Chief. The memorandum does not specify the dates of the appointments." (emphasis added) In fact, that memorandum from the Fire Chief makes no reference that the Mayor had *recently made* promotional appointments. Rather, the memorandum, in its entirety states:

> "August 24, 2018
>
> RE: GENERAL ORDER - 2018028
>
> The honorable Mayor James J. Fiorentini has appointed the following men to permanent positions.
>
> Deputy Chief Raymond Robinson to Permanent Deputy Chief.
>
> Captain Peter Schena to Permanent Captain.
>
> Signed
>
> William F. Laliberty
>
> Fire Chief"

Taken together, the evidence presented by the City not only fails to establish that the promotional appointment of Robinson occurred on July 10th, but, rather, suggests that the appointment was not made until August 24, 2018.

The sworn affidavits submitted by the Appellant (Link) and the local union president bolster this conclusion, both referencing conversations which appear to confirm that on dates *after* August 14, 2018, the Mayor had yet to make a final decision regarding the promotional appointment to Deputy Fire Chief.

CONCLUSION

The City has failed to show that the promotional appointment of Mr. Robinson to Deputy Fire Chief was made prior to August 14, 2018, the date upon which the eligible list containing the name of Mr. Robinson expired.

RELIEF

The Appellant, Mr. Link, asks the Commission to vacate the promotional appointment of Mr. Robinson. While that relief may, ultimately, be appropriate here, I am inclined to provide the parties with sixty (60) days to confer regarding the appropriate relief and/or reach an agreement that may forego the need for the Commission to enter a final decision and order of relief.

For these reasons, the parties shall, within sixty (60) days, provide the Commission with a status update regarding attempts to resolve this matter without the need for a final decision and/or order of relief by the Commission.

---

2. In the event that the City is prepared to have the Mayor testify in regard to whether he made the promotional appointment before or after August 14, 2018, the City may file a motion for reconsideration of this Interim Decision.

Based on the information received from the parties, the Commission will issue further orders as appropriate.

SO ORDERED.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 12, 2019.

Notice to:

Stephen C. Pfaff, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Timothy D. Zessin, Esq.
KP Law
101 Arch Street12th Floor
Boston, MA 02110

Melissa Thomson, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

VICTOR PAIVA, B2-18-038 (Paiva)
BRIAN FEGREUS, B2=18-039 (Finkle)
SCOTT FINKLE, B2-18-040 (Fegreus)

v.

HUMAN RESOURCES DIVISION

BRENDAN HARTE B2-18-044 (Harte)

v.

HUMAN RESOURCES DIVISION and DEPARTMENT OF CORRECTION

September 12, 2019
Paul M. Stein, Commissioner

Examination Appeal-Correctional Lieutenants Promotional Examination-Fair Test Appeal—Hearing Commissioner Paul M. Stein ruled that two Department of Correction lieutenants had made a timely "fair test" appeal requiring a full evidentiary hearing on whether the use of a rescaled Technical Knowledge test prejudiced their civil service rights. The Appellants claimed that the rescaling had unfairly resulted in their failure to achieve a passing Overall Test Score, thereby preventing their names from being placed on the current Department of Correction Captain's eligible list. The appeals of two other lieutenants were dismissed summarily as presenting no material issues on which they were likely to prevail.

DECISION

The Appellants, Victor Paiva, Scott Finkle, Brian Fegreus and Brendan Harte (collectively, the Appellants) are Lieutenants employed with the Massachusetts Department of Correction (DOC) who appeal from decisions by the Massachusetts Human Resources Division (HRD) denying their respective requests for review of the results of the 2017 promotional examination for DOC Captain.[1]

The Commission held a pre-hearing conference on March 27, 2018 (Paiva, Finkle & Fegreus Appeals) and on April 17, 2018 (Harte Appeal), after which DOC was added as a party respondent to the Harte Appeal. Pursuant to Notice of Hearing, the Commission held a consolidated hearing before me on February 12, 2019 to consider the following motions from HRD and responses from the Appellants in each respective appeal.[2]

Paiva, Finkle & Fegreus Appeal

- "Respondent's Motion for Summary Decision" dated 4/30/2018 (*HRD Paiva/Finkle Motion re: Timeliness*)

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. The Commission also received certain additional submissions from the Appellants that raised procedural matters which the Commission deferred and, in view of the Decision now being issued, need not address those other matters at this time. (See *Appellants Motions", dated 12/3/18;"Appellants Procedural Motions", dated 12/10/16; "Appellants Procedural Motions", dated12/16/2018; "Appellants Formal Objections", dated 1/21/2019*)

- "Respondent, Human Resource [sic] Division's Motion for Summary Decision" dated May 8, 2018 (*HRD Paiva/Finkle/Fegreus Motion*)
- "Appellants Motion for Summary Decision" dated April 30, 2018" (*Paiva/Finkle Summary Decision Response I*)
- "Appellants Motion for Summary Decision" dated June 14, 2018 (*Paiva/Finkle Summary Decision Response II*)

Harte Appeal

- "Respondent, Human Resource [sic] Division's Motion for Summary Decision" dated May 11, 2018 (*HRD Harte Motion*)
- "Appellants Motion for Both Summary Decision and Evidence Request" dated May 23, 2018 (*Harte Summary Decision Response I*)
- "Appellant Brendan Harte, Summary Decision" dated May 31, 2018 (*Harte Summary Decision Response II*)

In addition to the above materials, at the February 12, 2019 motion hearing, I marked four documents previously received by the Commission at the March 27, 2018 Pre-Hearing Conference related to the Paiva, Finkle & Fegreus Appeals. (*PreHExh.1 through PreHExh.4*). I also received various additional post-hearing submissions from the Appellants and DOC. *("Appellants Response", dated February 27, 2019; "Email Trails" 2/21/19 - 6/19/19*)

In August 2019, I held two status conferences with the parties in all four appeals to provide the parties with a preliminary analysis of my assessment of HRD's motions and to discuss the options for further proceedings, including possible settlement. At the Commission's request, I received a report from the DOC indicating that, as of that date, DOC had already promoted twenty-nine (29) of the original forty (40) names on the current Captain's eligible list. (*SCExh.1*) DOC also provided copies of the final score sheets for these nine remaining candidates which shows each candidate's "Raw" and "rescaled" standardized Technical Knowledge Score, as well as his Assessment Center score and Career Experience scores. (*SCExh. 2*)

FINDINGS OF FACT

Findings Applicable to all Appeals

1. On December 10, 2015, following an investigation by this Commission, and after many years without HRD or DOC having administered a promotional examination for the position of Correction Officer IV (DOC Captain), this Commission ordered, among other things, that: "[f]orthwith, HRD and DOC shall take all necessary steps to: a) create a promotional examination for the positon of Captain at DOC; and b) create an eligible list of candidates for the position of Captain that will be used to make promotional appointments to the position of Captain at DOC." (*See In Re: Mograss et al.*, CSC Tracking No. I-14-304, 28 MCSR 601 (2015))

2. Pursuant to the Commission's orders, HRD delegated the administration of a DOC Captain's promotional examination to DOC, which hired an outside vendor to develop and administer the examination, with HRD's verbal approval but without the execution of any formal written delegation agreement. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response I & II; Appellant's Response [w/attached HRD email dated 5/8/2018]; HRD Harte Motion; Harte Summary Decision Response I & II)*

3. The DOC Captain's Examination consisted of three components: (A) a Technical Knowledge (TK) component consisting of a written multiple-choice test administered on July 22, 2017; (B) an Assessment Center (AC) component consisting of a Written Work Sample (WWS), administered on October 11, 2017 and two (2) Oral Boards (OBs), administered in November, 2017; and (C) a Career Experience Board (CEB) component also administered in November, 2017. (*PreHExh1 through PreHExh.4; SCExh.2; HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response I & II; Appellant's Response [w/attached HRD email dated 5/8/2018]; HRD Harte Motion; Harte Summary Decision Response I & II*)

4. The DOC Human Resources Bulletin announcing the 2017 Captain's Exam stated, in part:

> **WEIGHTS**: Applicants must get a passing mark on each of the weighted components in order to receive an overall (general average) examination score . . . . the examination weights are: 35% Technical Knowledge Examination; 50% Assessment Center; 15% Career Experience Board."
>
> All eligible candidates who sign up to take the DOC Captain promotion exam and remain in good standing will be permitted to attend and complete the Written Technical Knowledge Test. A cut score will be established and candidates who fail to meet that score will not be eligible to proceed to the final two (2) phases of the examination."

(*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion; Harte Summary Decision II*)

5. All candidates received a Candidate ID number for use during all testing components. DOC maintained a master list of candidates' names and Candidate ID numbers but no other form of personal identification was recorded on testing materials or provided to the test vendor until after all test components were administered and scored. In particular, the TK and WWS scores were computed entirely "blindly" by the vendor's assessors. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II*)

6. The TK Test was a closed-book exam consisting of one hundred (100) multiple choice questions designed to assess the candidates' "understanding of job-related technical knowledge of the job [of a DOC Captain]". The 2017 Captain's Examination TK exam preparation guide stated: "Your score on the Closed Book Written Technical Knowledge Test will be based upon the number of test questions/items you answer correctly. Thus, the more items you answer correctly, the higher your Technical Knowledge Test score." No mention of rescaling the numerical scores was mentioned in the pre-test materials. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

7. By form letter from DOC dated August 14, 2017, candidates received notice of their scores on the TK test component (which

ranged from the maximum score of 100 (for 100 correct answers to 46 (out of 100) correct answers. The letter to each candidate stated, in part: "[Y]ou received a [numerical score] on the Technical Knowledge portion of the promotional exam. The result of this exam will serve as 35% of your overall score." All candidates, regardless of score, were allowed to proceed to the next two stages of the examination. No mention of rescaling the numerical scores was mentioned. (*PreHExh.2 through PreHExh.4; HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II; HRD Harte Motion; Harte Summary Decision Response II*)

8. The Appellants were informed that their TK test scores were as follows:

- Brendan Harte - 65 (out of 100)
- Victor Paiva - 59 (out of 100)
- Brian Fegreus - 59 (out of 100)
- Scott Finkle - 56 (out of 100)

(*PreHExh.2 through PreHExh.4; HRD Paiva/Finkle/Fegreus Motion; HRD Harte MotionI*)

9. DOC's August 14, 2017 letter advised candidates that they had seven (7) days to file a "fair test" appeal regarding the TK test. None of the Appellants then filed such an appeal. ((*PreHExh.2 through PreHExh.4; HRD Paiva/Finkle/Fegreus Motion re: Timeliness; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

10. The Writing Sample (WWS) component asked candidates to assume the role of a DOC Captain and prepare a written essay about a hypothetical situation they were given, "typical of those a Captain might encounter" on the job. Four assessors, divided into two-person panels, who were internal DOC employees of Captain's level or above and/or senior level managers selected and trained by the test vendor, scored the essays. The essays were graded for: Written Communication (ability to express ideas), Interpersonal Interactions (establishing constructive working relationships), Analyzing and Deciding (processing information and choosing a plan of action) and Managing Activities (planning and executing activities). (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

11. The Oral Board (OB) component presented candidates with two hypotheticals: an "Incident Supervision" scenario and a "Subordinate Performance" scenario. Candidates reviewed the scenario materials and then gave a verbal response to a panel of three assessors[3] who graded the performance on Oral Communication, Interpersonal Interactions, Analyzing and Deciding and Managing Activities. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

12. The WWS/OB pre-test preparation guide also contained the following notice regarding standardization of scores:

> "A total score will be derived for the WWS Test by computing average ability scores across the two assessors for the abilities rated as part of this test and adding those average ability scores together. A total score will be derived for the OB Test by computing average ability scores across the two OB exercises and adding those average ability scores together. To derive candidate's overall promotion examination scores, the Total Written Work Sample Test score and Total Oral Board Test score (along with the Total Technical Knowledge and Total Career Experience Board score) will be standardized, weighted and added together."
>
> "As just noted, to ensure the weights for each examination component are applied in a fair manner, the total scores on each component will be standardized prior to being weighted. Standardization is used when tests are of different lengths (have different numbers of questions), have different average scores, and/or have differences in standard deviations (the spread or range of scores). By standardizing the total scores, the test components are placed onto the same measurement scale so that they can be added together. This is accomplished by looking at how far a particular score deviates from the average score for that test (either above or below) and dividing by the standard deviation for that test. Although this may seem complicated, it is a procedure that is used quite frequently and is well accepted in the testing field. Tests such as the SAT use a type of standardized score."
>
> "Finally, prior to computing overall component scores for each candidate, [the test vendor's] staff will compare the ratings given out by each of the assessor boards. If there is a significant difference between these ratings (meaning one or more boards gave out significantly higher (easier) ratings or lower (harder) ratings on average compared to other boards), [the test vendor's] analysis staff will standardize the ratings by panel to remove any advantage/disadvantage as a result of the panel ot which the candidate was assigned."

(*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion*)

13. The Career Experience Board (CEB) component was comprised of three stages: (1) preparing a Fact Sheet containing an "abbreviated resume" of the candidate's experience and training; (2) preparing written responses containing three "Key Points" for each of three scenarios provided in advance, to be defended at the third stage oral presentation; and (3) appearance before the CEB for oral presentation of Key Points and responding to a fourth scenario provided to the candidate by the CEB on the spot. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II; Appellants Response; HRD Harte Motion*)

14. The CEB pre-test preparation guide stated that the CEB assessed "attributes founds to be critical to effective job performance by Captains", specifically: Oral Communication; Adaptability (maintaining professional demeanor in routine and stressful situations); Accountability (adhering to policies appropriately by personal example and as applied to problem performance of others); and Professional Development (commitment to improvement and

3. The number of total OB assessors and the credentials of the OB panel members are not specifically described in the record. For purposes of these motions, I infer that the OB panelists had the same or similar credentials as the WWS assessors described above and/or the CEB panel members described below.

constructive criticism). (*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion*)

15. The CEB pre-test preparation guide contained detailed instructions about the information to be included in the Fact Sheet, including work experience within and outside the DOC, Military Service, Education (highest degree) and any Special Training. The guide also stated:

> "Please do not provide any additional details beyond the items listed above. **Remember, your Fact Sheet (abbreviated resume) will NOT be scored**; it is simply being provided so that assessors understand the context in which your Career Experience Board answers are being made. Thus, this is not a point system where you will receive a certain number of points for each experience from your past. **You will be scored solely on your oral responses to the CEB questions** and your ability to indicate that you have learned from your past experiences and are prepared to succeed as a [DOC] Captain."

(*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion*)(**emphasis in original**)

16. The test vendor selected and trained twelve (12) CEB assessors, divided into panels of three (3) assessors each. All CEB assessors were selected from outside the DOC. (*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion*)[4]

17. The CEB pre-test preparation guide also contained the following statement regarding standardization of test results:

> "A total score will be derived for the CEB by computing the average ability scores across the three assessors for the capabilities rated as part of this test and adding those average ability scores together. To derive candidates' overall promotion examination scores, the Career Experience Board Score (along with the TK score, Total WWS score and Total OB score) will be standardized, weighted and added together."
>
> "As just noted, to ensure the weights for each examination component are applied in a fair manner, the total scores on each component will be standardized prior to being weighted. Standardization is used when tests are of different lengths (have different numbers of questions), have different average scores, and/or have differences in standard deviations (the spread or range of scores). By standardizing the total scores, the test components are placed onto the same measurement scale so that they can be added together. This is accomplished by looking at how far a particular score deviates from the average score for that test (either above or below) and dividing by the standard deviation for that test. Although this may seem complicated, it is a procedure that is used quite frequently and is well accepted in the testing field. Tests such as the SAT use a type of standardized score."
>
> "Finally, prior to computing overall component scores for each candidate, [the test vendor's] staff will compare the ratings given out by each of the assessor boards. If there is a significant difference between these ratings (meaning one or more boards gave out significantly higher (easier) ratings or lower (harder) ratings on average compared to other boards), [the test vendor's] analysis staff will standardize the ratings by panel to remove any advantage/disadvantage as a result of the panel to which the candidate was assigned."

(*HRD Paiva/Finkle/Fegreus Motion; HRD Harte Motion*)

18. On or about January 3, 2018, all candidates who took the Captain's Examination received a DOC e-mail with a "CANDIDATE SCORE REPORT", dated December 28, 2017.[5] This document stated, in part:

> "As described in the candidate preparation guide, your score for this examination is comprised of three components with the following weights:
>
> Technical Knowledge (TK) Score: 35%
>
> Assessment Center (AC) Score: 50%
>
> Career Experience Board (CEB) Score: 15%
>
> "You previously received your raw score on the Technical Knowledge Test which corresponded to the number of items correct out of 100. To ensure that each test component carried the proper weight in determining your final position on the promotion list, your component scores (TK, AC and CEB) were rescaled to be out of 35, 50 and 15 points, respectively. The 50 points for the AC was computed as 20 points for the Written Work Sample and 30 points for the Oral Boards. You can confirm your rescaled TK score using the chart on the right side of this page. Simply look up your raw TK score in the first column and find the corresponding scaled TK score in the second column."
>
> . . .
>
> "To pass this test you needed to score 70 or higher on your Overall Test Score."

Candidates had no previous notice that the TK scores would be "rescaled" or that that WWS and OB portions of the AC component would be weighted 30% and 20% respectively. This report was also the first notice that an Overall Test Score of 70 would be required to pass. (*PreHExhs.2 through 4; SCExh.2; Paiva/Finkle Summary Decision Response II; Appellants Response; HRD Harte Motion*)

19. The RAW TK column ran from 100 down to 46; the corresponding RESCALED TK column ran from 35.00 (for a RAW TK of 100) down to 14.19 (for a RAW TK of 46). Thus, a candidate who got all 100 multiple choice questions received 35% of his/her RAW TK included in the Overall Test Score; a candidate with 86 correct answers received 34.4% of his/her RAW TK score; a candidate with 59 correct answers received 32.5% of his/her RAW TK score; a candidate with 46 correct answers received 30.8% of his/her RAW TK score. (*PreHExhs.2 through*

4. The Appellants note that an early notice of the Captain's exam contained the standard boilerplate language that called for candidates to submit the familiar "bubble sheet" listing their experience and education to be entitled to claim additional E&E "points" to be added to their written and/or assessment center scores. This language, however, is patently inconsistent with all other communications with candidates—including the 7/18/17 DOC Bulletin and the August 2017 WWS/OB/CEB pre-test preparation guide—that clearly explained that the Captain's Board would not be using the traditional E&E point system but would be measuring experience in a new way through the CEB. (*E-Mail Trails; HRD Paiva/Finkle/Fegrues Motion; Paiva/Finkle Summary Decision Response II; Appellants Response; HRD Harte Motion*)

5. Hard copy of the CANDIDATE SCORE REPORT was also transmitted by first class mail postmarked 1/3/18. (*Paiva/Finkle Summary Decision Response II*)

4; SCExh.2; Paiva/Finkle Summary Decision Response II; HRD Harte Motion)

20. The CANDIDATE SCORE REPORTS for the Appellants stated their respective scores as follows:

Brian Fegreus

COMPONENT	YOUR SCORE
Technical Knowledge	19.20* out of 35
Assessment Center	41.30 out of 50
Career Experience	12.26 out of 15
Veteran's Points	0 out of 2
Overall Test Score	72.75

* = RAW TK score 59

Victor Paiva

COMPONENT	YOUR SCORE
Technical Knowledge	19.20* out of 35
Assessment Center	37.95 out of 50
Career Experience	11.98 out of 15
Veteran's Points[6]	0 out of 2
Overall Test Score	69.12

* = RAW TK score 59

Scott Finkle

COMPONENT	YOUR SCORE
Technical Knowledge	18.04* out of 35
Assessment Center	39.90 out of 50
Career Experience	10.85 out of 15
Veteran's Points	0 out of 2
Overall Test Score	68.80

* = RAW TK score 56

Brendan Harte

COMPONENT	YOUR SCORE
Technical Knowledge	21.51* out of 35
Assessment Center	36.35 out of 50
Career Experience	10.01 out of 15
Veteran's Points	0 out of 2
Overall Test Score	67.87

* = RAW TK score 65

(*PreHExhs.2 through 4; SCExh.2; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

21. Included with the CANDIDATE SCORE REPORT was a one-page notice describing "your Civil Service rights" and the process to make a "Request for Review" of the results of the 2017 Captain's Exam specified in G.L. c. 31, §22,¶2.. The notice identified three types of review that a candidate was allowed to request from the "administrator" and the "Civil Service Unit", i.e., HRD. The three types of review specified were:

> A. Answer Sheet Reviews: a review of the "marking of your answers to multiple choice questions" but the "statute does not provide for review of the test questions";
>
> B. Education and Experience (CEB) review of the "scoring of your Education & Experience Career Experience Board"; and
>
> C. Essay reviews/Written Work Sample: a review of your "answers to essay questions", i.e., the WSS.

No reference was made to the provision of G.L. c. 31, §22, ¶4 which permits a request to review of whether the examination as a whole or any component was a "fair test". The notice stated that the deadline for seeking a review on each of the three specified grounds was "**no later than 17 calendar days after emailing of this notice**". The notice also stated in bold print: "**NO TELEPHONE INQUIRIES WILL BE ACCEPTED**." (*PreHExhs.2 through 4; SCExh.2; Paiva/Finkle Summary Decision Response II; HRD Harte Motion*)

22. On or about February 22, 2018, the eligible list for DOC Captain was issued, containing forty (40) names. Lt. Brian Fegreus appeared in 32nd place, tied with one other candidate. Lts. Paiva, Finkle and Harte did not appear on the eligible list as their Overall Test Scores were below the required passing Overall Test Score of 70. (*PreHExhs.2 through 4; SCExh.2)*

23. Since the eligible list has been in effect, DOC has promoted twenty-nine (29) candidates to the position of Captain, one candidate declined the promotion and one candidate was promoted to a senior management (non-civil service) position. This leaves the following nine Lieutenants on the eligible list:

- One Lieutenant remaining in 27th place (Rounded Score: 74)
- Two Lieutenants (one being Lt. Fegreus in 32nd place (Rounded Score: 73)
- One Lieutenant in 34th place (Rounded Score: 72)
- Three Lieutenants in 36th place (Rounded Score: 71)
- Two Lieutenants in 39th place (Rounded Score: 70)

(*SCExhs.1 & 2; Representation of DOC at Status Conference*)

Findings Applicable to Appeal of Lt. Fegreus

24. By two separate emails dated January 18, 2018, Lt. Fegreus sought HRD review of the WWS component and the "education and experience" portion of the Captain's examination. He ques-

6. Lt. Paiva, a veteran, did not receive the 2 point veteran's preference because he did not achieve a passing grade on the examination. (*PreHExh.4; Colloquy at Status Conference*). See also PAR.14(2) ("In competitive examinations for promotion to any position in the classified civil service, [HRD] shall add two points to the general average mark obtained by any veteran . . .provided such veteran has first obtained a passing mark in said examination").

tioned the lack of information about "how or who was scoring" the WWS portion and questioned how the CEB score was achieved "without completing an education and experience form" or providing the assessors "information . . . for them to know how much experience or education [he had] in order for them to properly and accurately score this portion." (*HRD Paiva/Finkle/Fegreus Motion*)

25. Upon review, HRD's Director of Test Development performed a review of the test vendor's procedures for selecting and training the assessors for the WWS and CEB components, the scoring of those components and the information in the examination bulletins and pre-test preparation guide provided to the candidates. In particular, she found that the information provided to candidates included appropriate disclosure of the test procedures, assessment and scoring process. She concluded that assessors were thoroughly trained and that the use of DOC personnel as assessors was reasonably justified and did not compromised the integrity of the examination, as no DOC personnel were involved in the design of the test and all candidates' responses were assigned a Candidate ID code and scored blindly. Accordingly, she found no merit to the issues raised by Lt. Fegreus request for review. (*HRD Paiva/Finkle/Fegreus Motion*)

26. On March 2, 2018, Lt. Fegreus duly appealed to the Commission. *(Claim of Appeal; Appellants Response [Commission Procedural Order dated March 30, 2018]*)

Findings Applicable to Appeals of Lt. Paiva & Lt. Finkle

27. A few hours after Lt. Paiva received the email from DOC containing his "CANDIDATE SCORE REPORT", he wrote to Ms. Patricia Snow in the DOC's HR department, stating:

> "Patti. [sic] I receive a score of 59 on the TK part. If you multiply 35% by 59 you get 20.65. Not 19.20. I think this was a mistake. Let me know what you think? Thanks Victor Paiva."

(*Paiva/Finkle Summary Decision Response II*)

28. On January 10, 2018, Ms. Snow replied:

> Good Morning Victor - Any issues or concerns need to be submitted to Civil Service per the information listed below [referencing the Request for Review form included in with the CANDIDATE SCORE REPORT] and noting: "No telephone inquiries will be accepted by Civil Service or the Department of Correction."

(*Paiva/Finkle Summary Decision Response II*)

29. Lt. Finkle also wrote several e-mails to Ms. Snow on January 3, 2018, in which he sought clarification of both the calculation of his TK score and the credits he thought he should be receiving for his college degree. In particular, he queried:

- "Hi Patty, Thank you [for sending the score report]. I just want to know where are the college education points and if it was added."
- "After some review of my score, I did see a calculation error. On the technical knowledge test I got a score of 56. 56 x .35(35%) is 19.6"
- "I would appreciate a clarification score on the written examination. There is a miscalculation. I passed the exam, as a result of the miscalculation. The breakdown in in the below email [herein, the message quoted immediately above]."

(*Paiva/Finkle Summary Decision Response II*)

30. After initially receiving an automatic "out-of-office" reply, Lt. Finkle received email replies from Ms. Snow on or about January 9, 2018, which stated:

- "Hi Scott- please see below response from the test administrators. Any further questions please contact Civil Service directly. Thank you Patty"

  "The Career Experience Board was a different model than the previous point system for Education and Experience. The candidates were asked several questions and they were to base their responses on all of the experience and learning opportunities that they had over their career. It was the candidate's choice as to what they presented to the panel of assessors to demonstrate that they:

  1. Have handled a specific difficult satuation as a Lieutenant
  2. Could describe how they would handle a specific hypothetical situation that a Captain could encounter
  3. Have effectively prepared to take on the responsibilities of a Captain."

  "As part of their response, they could choose to talk about college experience if that was part of their meaningful preparation or part of their planned response tto either situation, but that was not a requirement. In addition, the number of years of college or type of degree did NOT yield specific points."

  "The candidate preparation guide gave detailed information to candidates about the Career Experience Board and what was required."

- Good morning Scott - any further questions or issues you need to submit an appeal to Civil Service directly per the contact information I included on the original results email or visit their website page at www.mass.gov/civilservice ."

(*Paiva/Finkle Summary Decision Response II*)

31. On or about January 18, 2018, Lt. Paiva and Lt. Finkle submitted substantially identical "appeals" to HRD, seeking reviews of the "Answer Sheet, Education and Experience (Career Experience Board) and the [WWS] Essay.". Their narrative included alleged various errors in the "creation, administering, managing, hosting and grading in the examination process", alleged error in "conversion of the RAW TK to the RESCALED TK, and alleged error and violation of civil service law in the failure to award specific "Education and Experience examination points, as well as additional college credits" in a manner consistent with prior examinations. The relief requested was limited to adjustments in the TK and CEB components. The narrative did not identify any specific issues regarding the WWS component and the relief requested did not seek adjustment of their WWS score. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II*)

32. Upon receipt of the requests from Lt. Paiva and Lt. Finkle, HRD performed a review of the two Lieutenant's TK Answer Sheets and confirmed that the answers were accurately scored,

and so informed Lt. Paiva and Lt. Finkle. (*HRD Paiva/Finkle/Fegreus Motion; Paiva/Finkle Summary Decision Response II*)

33. As to the use of a Rescaled TK score, rather than the actual Raw TK score (i.e., number of correct answers), HRD determined:

> "This is done so that it is easier to compare individual scores; critical when using an examination to determine how qualified individuals are, compared to one another for promotion. The . . . argument that the math is incorrect is without merit, because it does not take into consideration the standardization of the scores."

(*HRD Paiva/Finkle/Fegreus Motion*)

34. As to the other issues raised by Lt. Paiva and Lt. Finkle, as noted above in connection with Lt. Fegreus's appeal, HRD's Director of Test Development reviewed the candidate preparation guides, investigated the testing procedures, assessor selection and training process, and scoring methodology used for the WWS and CEB components. She concluded that the candidate preparation guides were sufficiently thorough to provide candidates with the information needed to prepare for the examination and that these test components were appropriately designed, administered and scored. (*HRD Paiva/Finkle/Fegreus Motion*)

35. For example, HRD noted that, as to the CEB component, the test vendor had analyzed the level of agreement between the assessors on a panel and the level of similarity or difference between the ratings given by the four (4) CEB panels, finding that the three (3) assessors on each panel gave consistently similar ratings to each candidate they evaluated and, using a statistical significance test, it was determined that there was no significant difference in the scoring between panels as well. HRD noted that the CEB component did depart from the type of E&E component used in other examinations, but concluded that the new process was fully explained to candidates and all candidates had an equal opportunity to prepare themselves for that new approach. HRD also noted that scoring had been performed "blind", using confidential identifiers for each candidate and that the CEB assessors did not include internal DOC personnel. (*HRD Paiva/Finkle/Fegreus Motion*)

36. On March 2, 2018, both Lt. Paiva and Lt. Finkle filed essentially identical appeals with the Commission. Each appeal alleged the following: "1) Calculation errors in candidate score report; 2) denial of publication, education and career experience points; 3) violation of Civil Service Law, MGL, PAR, MCOFU CBA, contractual agreements and E&E Sheet; 4) EBJ study guide violations; 5)Exam weight, CEB format, and Fact Sheet (abbrev/resume); Request Commission Investigation of the departmental and procedural violations, correct all exam "Fair Test" inequities prior to certification, and make me whole." (*Claims of Appeal; Paiva/Finkle Summary Decision Response II*)

Findings Applicable to Lt. Harte's Appeal

37. On or about January 9, 2018 Lt. Harte emailed a review request of "my answer sheet" and "the Education and Experience (Career Experience Board)." In his request, he noted: "In the past, the exam would have a bubble sheet asking about your time and grade. Then on either the same sheet or on a separate sheet it would ask about your education. I would like to know why it [sic] the exam process was not laid out before signing up for the exam." (*HRD Harte Motion*)

38. HRD treated Lt. Harte's requests as seeking a review of the WWS essay score and his CEB score. After review, by letter dated February 15, 2018, HRD declined to make any adjustments to either score. (*HRD Harte Motion*)

39. On March 1, 2018, Lt. Harte appealed to the Commission, stating: "The 3rd part of the exam is what I am requesting to appeal, called 'Captain Exam Review Response' or called 'Education & Experience (CEB)'. There was no form provide[d] for such education or experience. A sheet was filled out for information purpose[s] only. Not be used for evaluations. The individuals who conducted 'Captain's Responses' who were they". He also questioned a lack of information in advance and, as to the "written part of the exam", claimed he was not told how and by whom the "examination assessment" would be scored and weighted. (*HRD Harte Motion*)

40. On appeal to the Commission, Lt. Harte also contends that DOC did not comply with the conditions stated in the initial July 22, 2017 DOC Bulletin announcing the 2017 Captain's Examination, specifically, that there would be a "cut score" on the TK test and only candidates who achieved that minimum score would be allowed to continue in the testing procedure and failed to execute a written delegation agreement with HRD as required to be permitted to conduct the examination. (*Harte Summary Decision Response II*)

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". *See, e.g.*, *Milliken & Co.,* v. *Duro Textiles LLC*, 451 Mass. 547, 550n.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, §3 directs HRD to "make and amend rules which shall . . . include provisions for . . . (c) Open competitive and other examinations to test the practical fitness of applicants . . ." Pursuant to this authority, Personnel Administration Rule PAR.06 provides, in relevant part:

> **PAR.06. Examinations**
>
> (1) Procedure
>
> (a) The administrator shall establish procedures for competitive and other examinations to test the practical fitness of applicants.
>
> . . .

> (b) The grading of the subject of employment or experience as part of a promotional examination shall be based on a schedule approved by [HRD] which shall include credits for elements of training an experience related to the position for which the examination is held.
>
> . . .
>
> (2) Content of Examinations
>
> (a) All selection procedures shall be practical in character and shall relate directly to those matters which fairly determine the relative ranking of the persons examined based on the knowledge, abilities and skills required to perform the primary duties (critical and frequent tasks) of the position title or occupational group as determined by reliable and representative job information available to [HRD]. Examinations may be assembled or unassembled and may include written, oral, practical or performance tests, training and experience rating . . . other generally accepted selection procedures, or combinations of these, which, in the discretion and judgment of [HRD], are appropriate for the position title or occupational group being tested.
>
> . . .
>
> (3) Examination Results
>
> The passing mark for each examination shall be established by [HRD] in accordance with generally accepted selection procedures.

Also, G.L. c. 31, §22 provides, in relevant part, that HRD "shall determine the passing requirements of examinations" and, in particular, "an applicant shall be given credit for ***employment and experience*** in the position for which the examination is held" and "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." (***emphasis added***)

Section 22 also grants applicants the right to seek HRD review of their written examination marks and E&E credits and, in some cases, to claim that the exam was not a "fair test". Section 24 provides for further appeal of HRD's actions for further limited review by the Commission. G.L. c. 31, §22 through §24. *See generally*., *Clarke* v. *HRD*, 29 MCSR 1 (2016), *on further appeal*, 30 MCSR 410 (2017); *Wilbanks* v. *HRD*, 29 MSCR 22 (2016), *aff'd sub nom Wilbanks* v. *Massachusetts Civil Service Comm'n*, Suffolk C.A. 2016-0356 (Sup. Ct. 2017)

The Commission has construed the applicable Massachusetts civil service laws and rules to vest HRD with broad, although not unfettered, discretion to determine the technical requirements for competitive civil service examinations, including the type and weight given as credit for training and experience, subject to scrutiny solely when HRD's decisions, actions or failure to act are devoid of any rational explanation, are not firmly grounded in common sense, have not been uniformly applied, are arbitrary, capricious or otherwise run afoul of basic merit principles of civil service law. *See, e.g*., *Borjeson* v. *Human Resources Div*., 31 MCSR 267 (2018) (Interim Decision), 31 MCSR 297 (Final Decision) (allowing appeal and requiring rescoring of E&E when HRD had arbitrarily changed its long-standing traditional methodology for reasons that were neither "persuasive nor logical"); *Clarke* v *HRD*, 29 MCSR 1 (2016) (allowing appeal, in part, to grant education credit when documentation submitted indistinguishable from information previously found sufficient to grant such credit); *Merced* v. *Human Resources Div*, 28 MCSR 396 (2015) (affirming HRD's requirement that university teaching credit required faculty status of adjunct professor or higher); *Carroll* v. *Human Resources Div*., 27 MCSR 157 (2014)(deferring to HRD's technical expertise in defining criteria for educational credit); *Cataldo* v. *Human Resources Div*, 23 MCSR 617 (2010) (allowing E&E appeal, in part, for education credit that HRD denied for reasons that could not be reconciled with a reasonable construction of HRD's examination instructions). *See generally*, G.L. c. 31, §1 (basis merit principles means "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills", "assuring fair treatment of all applicants" and protecting employees from "arbitrary and capricious actions"); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303, *rev.den*., 426 Mass. 1102 (1997) (decision "is arbitrary and capricious when it lacks any rational explanation.")

ANALYSIS

After careful review of HRD's Motions and the Appellants' responses, I conclude that HRD has established that there is no material issue on which Appellant Fegreus and Appellant Harte are reasonably likely to prevail and, therefore, HRD's Motions for Summary Decision as to those appeals must be allowed and the appeals must be denied.

Similarly, save for one issue on which a genuine factual dispute exists, HRD has also established that Appellant Paiva and Appellant Finkle are not likely to prevail on most of the issues raised in their appeals. Thus, partial Summary Decision is appropriate on those issues.

I do find, however, that Appellant Paiva and Appellant Finkle have made a timely "fair test" appeal that raises a genuine issue of fact and requires a full evidentiary hearing on the issue of whether the use of a rescaled TK score prejudiced those Appellants' civil service rights by unfairly determining that they had failed to achieve a passing Overall Test Score (and in the case of Lt. Paiva, depriving him of additional points for veteran's credit) which precluded their names from being placed on the current DOC Captain's eligible list.

Fair Test Appeal

G.L. c. 31, §22, ¶4 entitles a civil service test candidate to request that HRD "conduct a review of whether an examination. . .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 [HRD] no later than seven days after the date of such examination." HRD's decision on a fair test review may be appealed to the Commission. G.L. c. 31, §24.

The seven day filing deadline for a fair test appeal has been judicially and administratively construed to be equitably tolled, in appropriate circumstances, especially, when the facts show that

a candidate could not reasonably be expected to know the basis for asserting a fair test claim within the seven day timeframe and where the test administrator provided inaccurate disclosure of the candidate's rights. *See, e.g.*, *O'Neill* v. *Civil Service Comm'n*, MICV09-0391 (2009), *aff'd*, 78 Mass. App. Ct. 1127 (2011) (Rule 1:28) (time to assert a G.L. c. 31, §22, ¶4 "fair test" appeal commences after the examination results are published; *Merced* v. *Boston Police Dep't*, 29 MCSR 84 (2016), *aff'd*, Suffolk C.A. 2016CV00748 (2018). *See Swan* v. *Human Resources Div*., CSC No. B2-15-182 [28 MCSR 631] (2015)

The fair test issue raised by Lt. Paiva and Lt. Finkle concerning the validity of using a "Rescaled TK score" to determine their final TK grade and, therefore, whether they passed or failed the examination, fit the circumstances under which the Commission is warranted to apply the doctrine of equitable tolling in determining whether the Appellants' fair test appeal may be deemed timely. Here, the problem with using a Rescaled TK score could not have been known before the receipt of the CANDIDATE SCORE REPORT on January 3, 2018. All prior communications with the Appellants gave no indication that HRD or DOC contemplated such an adjustment to the TK score that they received. The August 2017 notice simply informed them that they had scored 59 and 56, respectively, on the TK portion of the exam and that this score "will serve as 35% of your overall score." Although the August 2017 TK score notice provided the Appellants with information about how and when (within seven days of that notice) they must file a fair test appeal, that notice has no significance as the Appellants would not know of the basis for any such appeal until January 2018.

When Lt. Paiva and Lt. Finkle received their CANDIDATE SCORE REPORT, they both immediately (the same day) initiated contact with DOC claiming that the TK score was erroneously calculated using a "Rescaled TK score" rather than the "Raw TK score" reported to them in August 2017. They eventually (on January 9 or 10, 2018) were referred to the summary sheet provided with the CANDIDATE SCORE REPORT which specified a 17-day appeal window for the types of review that then could be sought [] and no mention of a "fair test" review or its seven day window, (which, if applicable, would expire on January 10, 2018), directed all further communications to HRD, and told them HRD would not accept any telephone inquiries.

Lt. Paiva's and Lt. Finkle's January 18, 2018 requests for review by HRD were filed within the 17-day window to which the Appellants were referred. In view of the clear steps that Lt. Paiva and Lt. Finkle initiated on the day they received their final scores, combined with the incomplete and confusing appeal instructions provided to them, warrants a finding that they have duly and timely sought review of the Rescaled TK score issue. Lt. Finkle also took immediate steps to question the validity of the CEB and only received feedback on that issue on or about January 10, 2018. To the extent he included a fair test issue about the CEB in his January 18, 2018 submission, I find it is equitable to deem that request timely as well.[7]

Insofar as any other Appellant now claims to make a fair test appeal, I reach a different conclusion. Lt. Fegreus first sought review on January 18, 2018, within the 17-day window for requesting review of the marking of his TK, WWS or CEB scores, but more than seven days after he learned of those scores. Also, at least insofar as the CEB component is concerned, he knew or should have known that the CEB did not use an education and experience form and his CEB score would be based on his oral presentation and not on awarding specific points for specific college experience. Moreover, as noted below, even if Lt. Fegreus were deemed to have made a timely "fair test" appeal on those issues, they all fail on the merits.

Similarly, although Lt. Harte's review requests to HRD appear to have been filed on or about January 9, 2018,[8] he then sought review of his "answer sheet" and the "written part of the exam". He did also question the failure to use a "bubble sheet" to award points for education and experience, which, arguably, might raise a fair test issue. He later raised other issues, including DOC's failure to execute a delegation agreement with HRD, the failure to use a "cut score" as promised, and other errors, but they were not part of what he had asked HRD to review and cannot form the basis for a fair test appeal to the Commission. Also, as noted below, none of these belatedly-asserted potential fair test claims have merit.

The TK Scoring Issue

As HRD correctly points out, HRD's decision on review of the marking of a candidate's answer sheet for a multiple choice exam, such as the TK Test, is final. The Commission lacks jurisdiction to hear an appeal of that decision. *See, e.g.*, *Hickey* v. *Civil Service Comm'n*, 60 Mass. App. Ct. 1104 (2003) (unpublished); *Ryan* v. *Human Resources Div*, 31 MCSR 118 (2018); *Salois* v. *Human Resources Div*., 15 MCSR 428 (2015).

The TK scoring issue raised by Lt. Paiva and Lt. Finkle, however, raises a different issue that falls within the fair test category of appeal, namely, whether it was a fair test of the Appellant's fitness to have substituted a Rescaled TK Score for the Raw TK score when calculating the points to be awarded to the Appellants toward their Overall Test Score.

First, unlike the "standardization" of panel scores in the WWS and CEB components, candidates had no advance notice that they would be graded on a "scale" of any kind. In fact, the notice that candidates received of their TK scores provided them with "raw" TK scores only, i.e. the number of multiple choice questions out of 100 that they answered correctly, and the "result" of the TK examination would "serve as 35% of your overall score". A fair reading of this information certainly could lead a candidate to conclude that the intention was—at least at that time—to credit 35%

7. As noted below, however, to the extent that Lt. Finkle is asserting a fair test appeal regarding the CEB, that appeal fails on the merits.

8. The record is not clear whether Lt. Harte's request to HRD was completed by January 9, 2018 or January 23, 2018. For purposes of this motion, I used the earlier date as the one most favorable to Lt. Harte.

of the number of correct answers to the 100 multiple choice TK questions.

Second, for reasons that are not explained, the test administrator, DOC and/or HRD decided, at some point, to change the original test protocol, which required candidates to achieve a minimum passing grade (or "cut score") on the TK Test in order to continue on in the promotional examination process. Instead, all candidates were allowed to proceed through the WWS and CEB components, regardless of their TK score. Thus, candidates who scored as low as 46 out of 100 correct answers were allowed to compete with others whose scores were considerably higher.[9]

Third, I note that "rescaling" resulted in the lowering of all TK scores. Higher scoring candidates receiving the smallest reduction (no reduction for candidates who scored 100) and lower scoring candidates receiving increasingly larger reductions (with candidates scoring 46 having their score TK reduced by nearly 2 points [46 x .35 = 16.1; rescaled score: 14.19]). Put another way, candidates' "weighted" raw TK scores below 100 became, after "rescaling", an increasingly lower percentage of the raw TK score that was originally provided to them. If this use of "rescaling" is, in fact, an acceptable methodology for scoring the written multiple choice TK component of this three-part promotional examination, it does not appear in this record.

Fourth, Lt. Paiva and Lt. Finkle both may claim to be aggrieved by the Rescaled TK scoring. Had the original "Raw TK scores" been used to compute their "weighted" TK score, they would have been awarded 20.65 TK points (59 x .35) and 19.60 TK points (56 x .35), respectively. These scores, when combined with their WWS and CEB scores, would have given them each an passing Overall Test Score that would have placed them on the 2017 Captain's eligible list (and, in the case of Lt. Paiva, entitled him to receive an additional 2 points as a veteran's credit).[10]

In sum, the change in the TK test scoring procedures, at least, raises legitimate factual issues that should not be decided on motion, but requires a full evidentiary hearing to enable the Commission to understand how HRD justifies this change in procedure. Absent such a satisfactory explanation, Lt. Paiva and Lt. Finkle appear to raise legitimate questions as to whether the TK test component, and/or the Captain's promotional examination as a whole, was a fair test consistent with basic merit principles of civil service law.

WWS and CEB Components and Other Issues

I have carefully reviewed the examination bulletins and candidate preparation materials for the WWS and CEB components, as well as HRD's explanation of the review of the design, administration and scoring of those components. I agree with HRD's conclusion that there is substantial factual basis to believe that those components were properly administered and, as administered, constituted a fair test of a candidate's ability. Writing samples and oral exercises are a well-established part of civil service promotional examinations. The Appellants have not raised any legitimate and genuine disputed issues of fact that present a reasonable basis to conclude that they would prevail at a full evidentiary hearing concerning their complaints about the WWS and CEB components. I note, in particular, that HRD confirmed that the WWS and CEB assessors were well-qualified and suitably trained, that the candidate preparation materials thoroughly explained the process, including extensive advice on how to prepare for those tests, and that, after review, HRD was satisfied that the procedures in place to assure "blind" scoring were not compromised. Given the broad statutory discretion afforded to HRD with respect to the technical aspects of civil service examinations and the deference that the Commission provides in appeals from HRD's review of examinations, on this record, HRD established that it is entitled to summary decision in its favor as to the Appellants' complaints about those two components.

That said, the CEB component does present a legal question that has not been previously considered by the Commission. By allowing the traditional "E&E" point system, based on a paper record, to be replaced by a "oral board" system used, so far as the Commission knows, for the first time in any Massachusetts civil service examination, HRD has created a tension between the statutory provisions for providing objectively determined "E&E" credit with the statutory limitation on the right of review of subjective "oral" exam exercises *See* G.L. c. 31, §22, ¶1(submission of an E&E "sheet"); PAR.06(1)(b) (submission of an E&E "schedule"); *Wilbanks* v. *HRD*, 29 MSCR 22 (2016), *aff'd sub nom Wilbanks* v. *Massachusetts Civil Service Comm'n*, Suffolk C.A. 2016-0356 (Sup. Ct. 2017) (no right of appeal from oral boards)[11]

This statutory tension presents an issue of law that could warrant further scrutiny, and it would behoove HRD to thoroughly study the issue before the same type of CEB is used in the future. For the time being, however, the Commission defers to HRD's conclusion that the use of a delegated "CEB" type component can be reconciled with the statutory provisions of civil service law that seem to assume some form of "paper" submission to, and computation of E&E credits by HRD, which (unlike "oral" components) is then specifically entitled to further objective administrative review and appeal to the Commission. It would not be appropriate for the Commission to begin to undertake that complex analysis here (given the late stage of the process and the limited life of the current DOC Captain's eligible list), but, should the issue arise in the future, and were it presented in a timely manner to enable an appropriate review (i.e. in advance, as soon after learning that

9. For example, a candidate who scored a 48 on the TK Test, ultimately earned an overall passing score of 71.40, which, after veteran's points, placed him in 32nd place on the eligible list, while Lt. Harte, who scored 65 on the TK test and Lt. Paiva and Lt. Finkle (59 & 56, respectively) all received failing Overall Test scores. (*SCExhs.1 & 2*)

10. Although I conclude that Lt. Harte did not make a timely fair test appeal of the rescaling of his TK score, even if his TK score had not been rescaled, the increment in his TK weighted score (65 x.35 = 22.75) would still not have given him a passing Overall Test Score.

11. Thus, appeal rights are not expressly available, as a matter of law, from the OB component results.

a "CEB-type" examination was contemplated as feasible), the Commission may be open to revisit this question.

The Appellants do have a fair complaint that HRD delegated the design, administration and scoring of the Captain's exam to DOC without the parties ever executing a written delegation agreement. Sound administrative practice and procedure should not have allowed this misstep to occur. (Apparently the agreement was drafted but never signed). Delegation, however, is allowed, as a matter of law. G.L. c. 31, §5(*l*). *See generally Malloch* v. *Town of Hanover*, 472 Mass. 783 (2015). Failure to execute a written delegation agreement, while poor form, does not invalidate the substantive act of delegation and does not rise to the level of a violation of the Appellants' civil service rights in this case.

Finally, to the extent I have not addressed any of the other issues raised by the parties, they "have not been overlooked. . . . [N]othing in them . . . requires discussion." *McCormack* v. *Department of State Police*, 92 Mass. App. Ct. 1103, 2017 WL 3469601 (Rule 1:28), *citing Commonwealth* v. *Domanski*, 332 Mass. 66, 78 (1954).

CONCLUSION

Accordingly, the Commission takes the following action in these appeals:

Paiva/Finkle Appeals.(CSC Nos. B2-18-038 & B2-18-039

A. HRD's Motion for Summary Decision, dated April 30, 2018, is allowed, in part, at this time (as to an appeal of the marking of Appellant Paiva's and Appellant Finkle's multiple choice Answer Sheet) and denied, in part, as to the timeliness of those Appellants' Fair Test appeals.

B. HRD's Motion for Summary Decision, dated May 8, 2018, is denied, in part, at this time (as to the "fair test" issue of rescaling the Technical Knowledge Test scores), and, otherwise, is allowed, as to all other issues raised by Appellants Paiva and Finkle.

C. A full evidentiary hearing will be scheduled on the issue of whether or not the 2017 DOC Captain's examination and/or the Technical Knowledge component thereof, constituted a fair test of the fitness to become a DOC Captain consistent with basic merit principles of civil service law, notwithstanding the use of a rescaled Technical Knowledge score in determining that the Lt. Paiva and Lt. Finkle failed to achieve a passing Overall Test Score.

D. Pursuant to 801 CMR 1.00(9)(e), the Department of Correction is granted participant status for purposes of further proceedings in these two appeals.

Fegreus Appeal.(CSC Nos. B2-18-040

E. HRD's Motion for Summary Decision, dated May 8, 2018, is allowed. The appeal of Brian Fegreus, under CSC No. B2-18-40 is hereby ***denied***,

Harte Appeal.(CSC Nos. B2-18-044

F. HRD's Motion for Summary Decision, dated May 11, 2018, is allowed. The appeal of Brendan Harte, under CSC No. B2-18-44 is hereby ***denied.***

* * *

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on September 12, 2019.

Notice to:

Victor Paiva
Scott Finkle
Brian Fegreus
Brendan Harte
[Addresses redacted]
Appear pro se

Michael Downey, Esq.
Melissa A. Thomson, Esq.
Labor Counsel
Human Resources Division
100 Cambridge Street—Suite 600
Boston, MA 02114

Joseph Santoro, Labor Relations Advisor
Norman Chalupka, Jr., Esq.
Department of Correction
PO Box 946—Industries Drive
Norfolk, MA 02056

* * * * * *

FERRUCCIO ROMEO

v.

HUMAN RESOURCES DIVISION

B2-19-082

September 12, 2019
Christopher C. Bowman, Chairman

Examination Appeal-Scoring of Promotional Examination for Police Sergeant-Assessment Center—Chief Christopher C. Bowman dismissed a promotional examination appeal from a Winthrop police officer unhappy with his grade on the sergeant's promotional exam, finding that HRD's review was reasonably thorough and impartial and that its decision to affirm the grade of the consultant assigned to the Appellant's essay was neither arbitrary or devoid of logic.

DECISION

On April 3, 2019, the Appellant, Ferruccio Romeo (Mr. Romeo), pursuant to G.L. c. 31, § 24, filed this appeal with the Civil Service Commission (Commission) regarding a promotional examination for Police Sergeant. I held a pre-hearing conference on June 30, 2019 at the offices of the Commission and I held a full hearing at the same location on August 13, 2019.[1] The hearing was digitally recorded.[2]

FINDINGS OF FACT

Fifteen (15) exhibits (Respondent Exhibits 1-13 and Appellant Exhibits 1-2) were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by Human Resources Division (HRD):

- Brianna Ward, Director of Test Development (HRD);

Called by the Appellant:

- Ferruccio Romeo, 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. On April 3, 2019, Mr. Romeo, a police officer in the Town of Winthrop (Town)'s Police Department, WPD, filed an appeal with the Commission.

2. Mr. Romeo's appeal stated: "On October 25, 2018, I participated in a make-up Sole Assessment Center Examination for Promotion to Sergeant in the Winthrop Police Department. On November 14, 2018, I received notice from Ryan Strategies Group, LLC that I had passed the examination. On November 30, 2018, I filed a timely request for review pursuant to MGL c. 31, s. 22 with HRD via email at civilservice@state.ma.us. On April 1, 2019, Police Chief Terence M. Delehenty issued a department wide email which states 'At the request of HRD I am posting electronically the Sergeant's Promotional List that is attached to this email.' To date, I have not received a response from HRD regarding my Request for Review which was evidently never completed."

3. On April 30, 2019, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Romeo, counsel for HRD, counsel for the Town and the Town's Police Chief.

4. At the pre-hearing conference, HRD stated that an administrative oversight was the reason for the delay in processing Mr. Romeo's appeal. The appeal was reviewed and denied the day prior to the pre-hearing.

5. The parties agreed to the following, unless otherwise noted:

A. Mr. Romeo took the make-up promotional examination for sergeant in Winthrop on October 25, 2018.

B. The examination was an assessment center examination, which was delegated to Winthrop by HRD, with the exception of hearing appeals.

C. Only "in-title" experience was allowed for all candidates (i.e.—permanent, temporary, provisional or "acting" time as sergeant), as opposed to the traditional education and experience that is granted in written examinations administered by HRD.

D. On November 14, 2018, Mr. Romeo received a score of 78, resulting in a rank of third on an eligible list that was updated on 4/1/18.

E. Mr. Romeo filed the following appeals with HRD on 11/30/18: E/E appeal; Essay Question review; Fair Test; Multiple Choice.

F. As referenced above, HRD denied these appeals on 4/29/19.

6. The Commission does not have jurisdiction over appeals related to the scoring of multiple choice questions on a civil service examination. *See* G.L. c. 31, ss.22-24 and *Hickey* v. *Civ. Serv. Comm'n & Human Resources Div.*, 60 Mass. App. Ct. 1104, 799 (2003) (Unpublished Decision), upholding a Superior Court Decision in which the Superior Court affirmed a Commission decision dismissing a multiple choice-related appeal based on a lack of jurisdiction.

7. In regard to the "in-title" appeal, HRD denied the appeal because it referenced "officer in charge" time. At the pre-hearing

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.

conference, the Police Chief indicated that, in Winthrop, "officer in charge" is the same as Acting Sergeant. Based on this information, I asked HRD to determine whether, if given credit for in-title experience for these officer in charge hours, Mr. Romeo's score and/or rank on the eligible list would change.

8. In regard to the essay question appeal, HRD conducted the same review it conducted in *Wilbanks* v. *HRD*, 30 MCSR 316 (2017), in which HRD's review was upheld.

9. For all of the above reasons, I ordered HRD, via a May 2, 2019 Procedural Order, to determine whether, if given credit for in-title experience for these officer in charge hours, Mr. Romeo's score and/or rank on the eligible list would change.

10. On May 6, 2019, HRD informed the Commission, with a copy to Mr. Romeo, that, if given credit for his 387 hours of time as "officer in charge", it would not change his overall score and/or rank on the eligible list.

11. On May 15, 2019, Mr. Romeo notified the Commission that he wished to proceed with his appeal and, per my request, submitted a More Definite Statement.

12. After receiving clarifying information from Mr. Romeo and reviewing Mr. Romeo's initial appeal to HRD, I issued a ruling on June 20, 2019 that the sole remaining issue upon which the Commission had jurisdiction was the marking of Mr. Romeo's written essay.

13. On August 13, 2019, I held a full hearing regarding the marking of Mr. Romeo's written essay. Breanna Ward, HRD's Director of Test Development, testified for HRD.

14. Ms. Ward conducted a review of the marking of Mr. Romeo's essay question.

15. Ms. Ward contacted Ryan Associates, the vendor that conducted the assessment center, to better understand the essay question and how it was graded by Ryan Associates.

16. Ms. Ward learned that four (4) reviewers graded Mr. Romeo's essay question and gave him the following scores: 85, 86, 86 and 86.

17. Ms. Ward inquired about any written guidelines that reviewers used in regard to grading essays. She was told there were no written guidelines.

18. Ms. Ward was provided, verbally, with the qualities that distinguish an essay receiving a grade in the "70s" and an essay receiving a grade in the "90s".

19. Ms. Ward asked for but did not receive a copy of the essays completed by the exam applicants.

20. Ms. Ward was told that, in order for an essay to receive a grade in the "90s", the reviewers would be looking for the applicant to provide a high level goal, timeframes, next steps and a conclusion in their response.

21. Ms. Ward reviewed the essay of Mr. Romeo. She found that Mr. Romeo's essay did not meet all of the above-referenced criteria and that the reviewers' scores in the mid-80s were appropriate.

22. I left the record open for Ryan Associates, via the Town, to submit the essays for all applicants who took the promotional examination in order for me to conduct an in camera review of them. I received the essays on August 23, 2019.

23. Only one (1) applicant scored higher than Mr. Romeo on the essay, receiving an average score of 90. That essay appeared to be slightly better than the essay completed by Mr. Romeo, who received an average score of 85.75. Specifically, the higher-scored essay included a coherent introductory paragraph and quantifiable benchmarks to measure success, both of which were not included in Mr. Romeo's essay.

LEGAL STANDARD

In *Wilbanks*, the Commission stated:

> The standard of review to be applied upon appeal from HRD's review of the markings of an essay question under the current version of Chapter 31, Sections 22 through 24, has not been definitively determined. Case law decided under prior versions of the civil service law holds that "the marking of an examination answer is a finding of fact" as to which the Director of Civil Service (a predecessor to HRD) is given "broad discretionary powers" to exercise "judgment as to . . .proper grading of . . . examinations" and that, on appeal the Commission is "vested with similar" fact-finding powers, which findings of fact should not be disturbed unless "clearly shown to be arbitrary or devoid of logic and reason." *See Ferguson* v. *Civil Service Comm'n*, 344 Mass. 484, 487-88 (1962)(upheld Commission's overturning Civil Service Director's decision to decline to increase the marking of an applicant's answer to an essay question "through mistake", finding that applicant "in his answer . . . stated the crucial fact that a sentence to state prison could not be imposed" and "should receive full credit for his answer"); *Barry* v. *Civil Service Comm'rs*, 323 Mass 431 (1948) (upheld Commission's decision to increase marks on certain answers by one applicant, finding that "the applicant submitted authority to substantiate the correctness of the answers", and declined to increase the marks of another applicant, rejecting his contention that different standards were used in the marking of the examination papers of the two applicants)
>
> Civil service law then provided, as to examination appeals, that "no decision of the director [of civil service] relating to an examination mark shall be reversed and no such mark changed *unless the commission finds that it was through error, fraud, mistake or in bad faith,* and in each case of reversal of such decision or change in marking the specific reasons therefor shall be stated . . . . St. 1945, c. 725, §1 (*emphasis added*). In 1971, the Attorney General noted this prior version of the examination review and appeal requirement in a 1971 opinion, citing *Moore* v. *Civil Service Comm'n*, 333 Mass. 430, 434 (1956):
>
> "One of the subjects with which the special commissions and the Legislature were especially concerned was that relating to examinations. It is apparent . . . that *the making up and grading of examinations were to be primarily administrative functions to be performed by the director and that the appellate jurisdiction of the commission related to examination marks was to be more restricted than it was in other matters*." Op.Atty.Gen., Nov. 19, 1971, citing 333 Mass. at 434 (*emphasis added*).

Shortly thereafter, the legislature completely rewrote the examination review statutes, restricting review by the Director of Civil Service to requests that the "computation of [an applicant's] general average mark be checked for error" and completely eliminating all right of appeal to the Commission. St.1973, c.320,§§1 thorough 5.

Then, in 1974, the legislature enacted a major administrative restructuring of the civil service system. The division of civil service was severed from the Commission, abolished and replaced by the division of personnel administration (DPA), headed by a Personnel Administrator (the "administrator") reporting to and appointed by the secretary of Administration and Finance. All technical, executive and administrative functions of the division of civil service were transferred to DPA and the administrator was substituted for the position of director of civil service in all respects set forth in Chapter 31. The Commission became an independent quasi-judicial agency that retained its investigatory and appellate authority, including rule-making approval, over the actions of the administrator (and otherwise) as provided by Chapter 31, but no longer exercised indirect supervision and control over the functions transferred to DPA. St. 1974, c.835.

A year later, the legislature restored the authority it had removed in 1973, enacting statutory language closer to the present version of Sections 22 through 24 that, among other things, restored authority to the Personnel Administrator (the successor to the Director of Civil Service) to review the marking of essay questions and restored the Commission's authority to hear examination appeals from such "findings of the administrator relative to grading of answers to essay questions". St. 1975, c. 358, §§3, 4.

In *Lincoln* v. *Personnel Administrator*, 432 Mass. 208 (2000), the Supreme Judicial Court addressed the question whether, under the restructured (current) civil service statutes, the plaintiffs (who challenged alleged changes in the way the scores on their 1996 firefighter examination had been determined) could appeal for a "hearing" directly to the Commission from the marking of his/her examination, or whether they were first required to seek a "review" of their scores by the Personnel Administrator of DPA (now HRD). The plaintiffs had argued, and the Superior Court had agreed, that, since the Personnel Administrator designed, administered and scored the examination in the first instance, to provide an "additional review after the examination" was futile, as it "would make him the judge of his own challenged unfairness, something that . . . the Legislature wound not have intended without much more explicit language.'" *Id*., 432 Mass. at 210. The SJC disagreed, and upheld the Commission's dismissal of the petitions for failure to exhaust administrative remedies by first seeking the Personnel Administrator's review, specifically rejecting the argument that such review was a futility.

"Nor is this an instance in which exhaustion is excused as futile. . . . It is true that the statute does require the personnel administrator to review his own action in response to a petition from an applicant. However, as the personnel administrator designs, administers, and scores the examinations, he possesses expertise in regard to the grading and weighing of the examination. As the statute is designated, the initial review by the personnel administrator allows him to apply that expertise, determining whether there has been a mistake, or an issue has been overlooked, that can be easily corrected before an eligibility list is certified. Therefore, the personnel administrator is the most familiar with the examination and is best able to respond to applicants who have raised questions regarding the grading of the examination. . . ." *Id*., 432 Mass. at 212-13.

Finally, the Commission must be mindful of the reality that, in distinct contrast to the role that the Personnel Administrator historically played (noted in *Lincoln*) as the authority who "designs, administers and scores" all civil service examinations, more recently, as in the case of the 2014 BPD Captain's examination, HRD plays a peripheral role in many examinations, delegating the authority to design, administer and score the examinations to a private consultant selected by the municipality or state agency who requests the examination. Moreover, civil service examinations are now generally limited to public safety positions and are no longer given for most civil service titles.

Thus, while HRD remains, in theory, the technical expert in matters of civil service examinations, the institutional scope of that expertise, in fact, is not what it once was. Mr. Wilbanks correctly cites *Boston Police Sup. Officers Fed'n* v. *Civil Service Comm'n*, 35 Mass. App. Ct. 688 (1993) for the proposition that the Commission "hearing" is intended to be a more formal proceeding than the "review" conducted by HRD, and that "the Legislature intended the commission acting in its quasi-judicial capacity, and not the administrator, to be the fact-finder relative to the fairness of the examination." This opinion, however, must be read in light of the issue that was presented to the court, namely, a "fair test" appeal that challenged the fairness of the examination component that purportedly tested supervisory skills and the administrator's impartiality in designing that component. These principles that govern a fair test appeal certainly bear notice, but the scope of an appeal from the marking of specific examination questions, focuses mostly on the answers given, rather than the fairness of the questions posed, so the analogy of the "fair test" line of cases is not precisely apt.

I have carefully considered the relevant legislative history and case law described above, as well as the history of the examination process as it has evolved over time. I conclude that G.L. c. 31, §24 does not mandate that the Commission conduct a "de novo" hearing to supersede HRD's "review" of the grading of an essay question. In particular, I do not agree with Lt. Wilbanks' contention that on appeal from HRD's review of the marks of a single candidate's answers to an examination question, the Commission's "fact-finding" authority should go so far as require the Commission to put on "assessors' hats" and fix and establish ourselves, ab initio, the most "accurate" scores for Lt. Wilbanks' In-Basket Test responses. As a general rule, I do not find that would be appropriate or consistent with the Commission's appellate role. Lt. Wilbanks' has a point that the difference in "expertise" at HRD and at the Commission in the particular circumstances of this case may seem, to some, more theoretical than real, especially in a case such at presented here, when HRD did not design or administer the test in question. However, the statutory distinction in the powers and duties of each body must take primacy over any such perceived shortcomings of the individual incumbent officials from time to time.

Thus, it suffices that, in an appeal from the review of marking of an examination question, the Commission hew to its traditional quasi-judicial appellate oversight of other HRD "actions or inactions", namely, to ensure that HRD's decision is based on the type of "impartial and reasonably through" review that has been required of the Commission when it reviews other HRD "actions or inactions" under G.L. c. 31, Section 2(b), and to ensure that HRD's conclusions are neither "arbitrary" nor "devoid of logic", but, rather, supported by a preponderance of credible evidence.

…

This standard affords sufficient discretion to HRD to perform its duty to conduct the required first-level review, subject to appro-

> priate evidentiary scrutiny by the Commission consistent with the Commission's well-defined core responsibilities, as developed in related case law, to serve as an appellate check on HRD's compliance with all civil service law and rules, generally. *See*, G.L. c. 31, §2(b) & §5(a). *See generally*, *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); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928)."

I have applied the same standard here.

Based on my review, I have concluded that HRD's review was reasonably thorough and impartial and its decision to effectively affirm the grade that Ryan Associates assigned to Mr. Romeo's essay was neither arbitrary or devoid of logic. Rather, according to HRD's review, Mr. Romeo's essay did not contain all of the elements required to justify a higher score in the "90s" as opposed to his given score in the "80s."

While HRD's review would have been more thorough had it obtained the actual essays of the other applicants, my in camera review of those essays only confirms that HRD's conclusion here was logical and supported by a preponderance of the evidence.

In short, only one applicant scored higher than Mr. Romeo on the essay. Based on my review, the higher score was justified, as it contained elements that Mr. Romeo's essay did not: a coherent introductory paragraph and measurable benchmarks.

CONCLUSION

For these reasons, Mr. Romeo's appeal under Docket No. B2-19-082 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 12, 2019.

Notice to:

Ferruccio Romeo
[Address redacted]

Mark Detwiler, Esq.
Human Resources Division
100 Cambridge Street: Ste. 600
Boston, MA 02114

Melinda Willis, Esq.
Human Resources Division
100 Cambridge Street: Ste. 600
Boston, MA 02114

* * * * * *

GREGORY NAYLOR

v.

HUMAN RESOURCES DIVISION

B1-17-163

September 26, 2019
Cynthia A. Ittleman, Commissioner

Examination Appeal-Original Appointment as a Municipal Police Officer-Denial of E&E Credit for Time Served as a Connecticut State Trooper—HRD unfairly denied E&E credit to an applicant for original appointment as a municipal police officer for his two decades of experience as a Connecticut State Trooper. The Commission reversed the denial.

DECISION

The Appellant, Gregory Naylor (Appellant or Mr. Naylor), filed a timely appeal with the Civil Service Commission (Commission) on August 14, 2017 under G.L. c. 31, s. 22, appealing the decision of the state's Human Resources Division (Respondent or HRD) to deny him employment/experience (E/E) credit for time served as a Connecticut State Trooper (approximately 20 years) as part of the entry-level civil service examination for police officer administered by HRD on March 25, 2017. A prehearing conference was held on September 26, 2017 at the Commission's office in Boston. A Commission Procedural order dated September 27, 2017 permitted HRD to file a motion for summary decision (Motion) and for the Appellant to file an opposition (Opposition) thereto. HRD filed the Motion and the Appellant filed an Opposition. After careful consideration, the Motion was denied at that time. A full hearing was held on May 7, 2018 in the Commission's office in Boston.[1] The hearing was digitally recorded and copies of the recording were sent to the parties.[2] The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is allowed.

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. 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

A total of thirty-two (32) exhibits[3] regarding the 2017 appeal were entered into the record at the full hearing. Based on these exhibits and the testimony of the following witnesses:

Called by the Respondent:

- Regina Caggiano, Deputy Director of Civil Service for HRD

Called by the Appellant:

- Gregory Naylor, Appellant

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

1. HRD administers and scores civil service examinations for the official service position of Police Officer. (G.L. c. 31, s. 5(e); PAR.06)

2. HRD administered an entry-level Police Officer examination on March 25, 2017. (R. Exs. 1, 8, 9)

3. The entry-level Police Officer examination administered by HRD is for the titles of Municipal Police Officer and Transit (MBTA) Police Officer, which are both civil service titles and therefore under the purview of HRD. (Testimony of Caggiano)

4. At the request of the State Police, the 2017 Police Officer examination was also open to candidates seeking to be Troopers. (Testimony of Caggiano)

5. State Trooper is not a civil service title. (Testimony of Caggiano)

6. HRD scored the examination and compiled the eligible list for candidates seeking to be State Troopers and had no further involvement in the hiring of candidates. (Testimony of Caggiano)

7. Candidates taking an entry-level civil service examination (an open, competitive exam) receive credit for "employment or experience in the position for which the examination is held". G.L. c. 31, s. 22. "Employment or experience" is referred to as "E/E" (Testimony of Caggiano)

8. HRD also refers to E/E credit as "in-title" credit. (Testimony of Caggiano)

9. Candidates were notified of the upcoming 2017 Police Officer examination by the exam poster. (R.Ex. 1)

10. The exam poster for the Police Officer examination begins "Job Bulletin [;] Commonwealth of Massachusetts invites applications for: 2017 Police Officer and Trooper". (R.Ex. 1) Below this caption are the opening and closing dates to apply to take the exam and "Description: Municipal Police Officer, MBTA Transit Police Officer, and State Trooper". (*Id*.) The poster provides the following information regarding E/E credit:

> **MUNICIPAL AND TRANSIT POLICE; CREDIT FOR EMPLOYMENT/EXPERIENCE:** Pursuant to the provisions of MGL Ch. 31, § 22, individuals may apply to receive credit for employment or experience in the position of the title of municipal Police Officer. If you believe you are eligible for this credit, you must claim this credit by completing the application section of the application. All claims must be verified by supporting documentation, which must provide specific details of any employment or experience you have in the examination title as the result of service as a municipal police officer, including dates of service and number of hours worked per week. The supporting documentation must be on original letterhead with an original signature from the appointing authority where the employment or experience occurred. Please note, credit for employment or experience is applicable only to individuals who achieve a passing score on the written examination, and cannot be added to a failing written examination score. Claims must be submitted during the application period; supporting documentation must be scanned and attached to your application or sent to civilservice@state.ma.us. Documentation must be submitted within 7 calendar days of the written examination. (R.Ex. 1)

11. Candidates indicate their interest in taking the Police Officer examination by submitting an exam application. (Testimony of Caggiano, R.Ex. 2)

12. On the 2017 Police Officer examination application, Supplemental Question 3 stated:

> Q: Police Officer Claim for In-Title Experience Credit: Credit will be given only for experience in the position title for which the examination is conducted. In other words, since you are taking the examination for municipal Police Officer, you can claim any experience you have had performing work ONLY as a Full Time, Reserve, or Intermittent Police Officer in a municipal police department before the date of the exam. While HRD may hold military make-up exam session(s) after March 25, 2017, HRD will not grant credit for experience accumulated after March 25, 2017. Calculating In-Title Experience Credit: You will receive 0.2 points for each month of creditable In Title experience as a Police Officer. One month equals 172 work hours or 16 or more work days. Part-time work In Title Experience will be prorated on the basis of a 40-hour workweek. Your In Title Experience Credit is weighted at 10%. If you do not qualify for In Title Experience Credit, your overall score will be based on your examination score alone. Verifying In-Title Experience Claims: Supporting documentation must be provided in the form of a dated letter, signed by the appointing authority or your employer (past or present), identifying the position title, type of job responsibilities, dates of experience, whether the experience was full or part-time and other pertinent information concerning your experience. If the experience was less than full-time, the verification must include the actual time worked, e.g. number of hours per week. Letters of verification must be on original, official letterhead or stationary, with an original signature. Supporting doc-

3. At the hearing, both parties relied on the exhibits attached to the Motion and Opposition. The Respondent submitted twenty-five (25) exhibits with its Motion and the Appellant submitted seven (7) exhibits with his Opposition to the Motion. The Appellant's exhibits are marked "A.Ex. #" and the Respondent's exhibits are marked "R.Ex. #".

> umentation must be submitted by mail or email (civilservice@state.ma.us) which must be postmarked within 7 calendar days of the written examination. (R.Ex. 2)

13. Candidates with in-title experience have the opportunity to add to their written examination in accordance with the scoring method outline in the exam application. (R.Ex. 2; Testimony of Caggiano)

14. The 2017 Police Officer exam application asked candidates to select the eligible lists for which their names would be placed, if they received a passing score. The options were: 1) Municipal and Transit Police (MBTA) only; 2) State Trooper; or 3) Municipal, Transit Police, and State Trooper. (R.Ex. 2)

15. The Appellant submitted the application for the 2017 Police Officer Examination on or about January 13, 2017. (R.Ex. 2)

16. On his exam application, in response to Supplemental Question 3, the Appellant selected "Yes, I am eligible for In Title Experience credit, and will provide supporting documentation as instructed above." (R.Ex. 2)

17. Also on his exam application, the Appellant elected to be placed on the eligible list for "Municipal Police and Transit Police (MBTA) Only" . (R.Ex. 2)

18. On February 21, 2017, the Appellant submitted to the HRD Civil Service Unit email address documentation supporting his request for "In Title Experience credit" including, in part, a letter from the Connecticut State Police, signed by Officer Lt. Baldwin, "Trooper 'B' North Canaan", which states, in part,

> Per the requirements of the State of Massachusetts, Civil Service Examination guidelines in regards to verification of police experience; this letter is to advise you that Gregory S. Naylor (date of birth and employee number redacted) is currently a sworn member of the Department of Emergency Services and Public Protection, Division of State Police and has been so since February 14, 1997. Mr. Naylor presently holds the rank of Trooper First Class and is assigned as the **North Canaan Resident Trooper**, under my command, out of Troop B in North Canaan. Amongst other things, TFC Naylor has held the rank of Detective, within the Bureau of Criminal Investigation, and has extensive training and experience within the Bureau of Field Operations.
>
> TFC has been a full-time employee since February 14, 1997 and works an average of 200 hours monthly and over 16 days per month. TFC Naylor's training records are maintained and available upon official request …with appropriate references also being available upon request.
>
> TFC Naylor is eligible to retire from the service of the Connecticut State Police as of February 14, 2017 …. (R.Ex. 5)(emphasis added)

In addition to the letter from Lt. Baldwin, the Appellant included with his February 21, 2017 email to HRD a "Job Specifications Detail ASP page", printed from the Connecticut Department of Administrative Services website on February 15, 2017. This Job specification states that the duties of a Connecticut State Trooper include, in part,

> **EXAMPLES OF DUTIES**:
>
> ASSIGNED TROOP AREA: Patrols highways and/or local streets; detects and determines degree of violation and issues summons (sic), written or verbal warnings; engage in high speed pursuit or responds to initial aid calls including emergencies; aids disabled motorists; supervises activities at accident scenes, directs activities such as protection of scene, aiding victims …
>
> RESIDENT TROOPER: In addition to the above duties may perform the following: establish and administer town police budget; schedule, supervise and review work of constables sand other staff; work closely with town officials on police related matters; develop and administer various police and community relations programs; provide for private requests for security; conduct in-service (sic) training sessions; maintain town police records.
>
> TROOPER ASSIGNED TO A SPECIALIZED UNIT: In addition to any of the above duties may perform others relating to special program being administered.
>
> **MINIMUM QUALIFICATIONS REQUIRED**
>
> **KNOWLEDGE, SKILL AND ABILITY**:
>
> Knowledge of relevant agency policies and procedures; knowledge of relevant state and federal laws, statues (sic), regulations and court decisions; knowledge of police practices and investigate procedures; some knowledge of area resources; interpersonal skills; oral and written communication skills; ability to independently analyze emergency situations and develop effective courses of action; ability to follow instructions.
>
> **EXPERIENCE AND TRAINING**:
>
> STATE POLICE TROOPER: Successful completion of a prescribed one (1) year training program as a State Police Trooper Trainee. …

(R.Ex. 5)(**EMPHASIS IN ORIGINAL**; EMPHASIS IN ORIGINAL; emphasis added)

19. On February 22, 2017, the Appellant submitted to the HRD email address a letter dated February 21, 2017 from Deputy Chief Buckley of the New Milford, Connecticut Police Department. This letter states, in part,

> Greg was a certified New Milford, CT Police Officer during 1995-1997. Greg left the New Milford Police Department in good standing and went on to have a successful career with the CT State Police. During Greg's time in New Milford; he worked full-time (5 days on/2 off; 40+ hours/week during said timeframe). Please see attached department mission statement and job description, both of which were the standards Greg was held to …

(R.Ex. 6)(emphasis added)

20. The Appellant took the Massachusetts Police Officer examination on March 25, 2017 and received a passing score on the written examination. (R.Ex. 9)

21. The August 9, 2017 score notice listed the Appellant's Employment/Experience Score as "Not Scored." (R.Ex. 9)

22. The notice further stated:

> Your claim for Employment/Experience, has been denied credit for the following reason:
>
> IVH - Your Employment/Experience Claim in the examination title may be creditable but your documentation is incomplete because: you did not verify the specific length of employment (using months, days, and years - use date of exam, if still employed); you did not verify whether the employment was full or part-time (using hours); for part-time employees: you did not document the total number of hours worked. (R.Ex. 9)

23. On August 9, 2017, the Appellant emailed HRD asking why he did not receive credit "for [his] twenty year plus experience in full-time law enforcement." (R.Ex. 10)

24. On August 9, 2017, HRD responded to the Appellant, stating:

> Credit is only given for Municipal police experience (In Title). State Police is not a civil service title and therefore is not creditable for additional points for this exam. (R.Ex. 10)

25. On August 9, 2017, the Appellant submitted to HRD an appeal of his E/E score. (R.Ex. 11)

26. On August 10, 2017, the Appellant resubmitted the correspondence from the New Milford Police Department that was previously submitted on February 21, 2017. (R.Ex. 12)

27. On August 16, 2017, the Appellant resubmitted the February 21, 2017 letter from Deputy Chief Buckley of the New Milford Police Department noted above. (R.Ex. 14)

28. On August 18, 2017, the Appellant submitted regulations pertaining to Connecticut State Troopers, including job duties. (R.Ex. 15) These regulations state, in part,

> **Section 15.3.2. Resident State Trooper Program**
>
> a. **Review, assignment, and responsibility** … Before entering into an agreement with a town to provide resident state trooper services, the Department of Emergency Services and Public Protection (department) shall:
>
> (1) **Review and respond to the Town's request for resident state trooper services**, ….
>
> (2) **Assign resident state troopers …**
>
> (3) **Jurisdictional issues** - Primary responsibility for delivery of police services in a resident state trooper town shall reside with the department's Division of State Police.
>
> b. **Chain of command** - …
>
> (1) Resident state troopers shall utilize the following command structure:
>
> (a) District Commander;
>
> (b) Trooper Commander;
>
> (c) Resident state trooper supervisor;
>
> (d) Resident state trooper; and
>
> (e) Town police officer.
>
> (2) Resident state troopers shall supervise all town police officers. …
>
> c. **Communications** …
>
> (1) … The trooper commander and the town CEO shall meet quarterly within each fiscal year to discuss problems and to ensure the effective operation of the resident state trooper program. …
>
> As part of the evaluation of resident state troopers, the troop commander shall meet with the Town CEO for input …
>
> There shall be regular and on-going communication between the resident state trooper/sergeant and the town CEO … Communication may include, but is not limited to, statistical and summary report of law enforcement activities in the town for the previous monthly …
>
> **Hiring town police officers**
>
> Resident state troopers/sergeants involved in the hiring of town police officers … shall be guided by POST Regulation sections …. Applicable state statutes, and applicable public acts.…

(R.Ex. 15) (**emphasis** in original)

29. On August 30, 2017, the Appellant submitted new correspondence from the Connecticut State Police dated August 23, 2017 (R.Ex. 16). The August 23 letter is from Lieut. Baldwin, the Appellant's "Commanding Officer, Troop 'B' North Canaan, Connecticut State Police"; as well as correspondence from the First Selectman of North Canaan, CT (R.Ex. 17). This two (2)-page letter states, in part, that the Appellant retired from the Connecticut State Police August 1, 2017, that he had been a full-time employee with a minimum of a 45 or 46.25 hour work week beginning on February 14, 1997, that his assignments included, in part, from February 2, 2007 to July 1, 2015 Norfolk Resident Trooper, that most of the Appellant's career "was spent at Troop B in North Canaan which patrols and covers thirteen towns in northwest Connecticut", and that "eleven out of the thirteen towns or municipalities have no organized police department and depend entirely upon Trooper B for police services." (*Id.*) Lieut. Baldwin also provided a detailed description of the lengthy history of the resident trooper division of the Connecticut State Police and the manner in which it functions, reported that the Appellant resided in the town where he was a resident Trooper, attached copies of the pertinent operations manual, and stated that the Connecticut State Police "is not simply a highway patrol". (*Id.*)

30. On August 30, 2017, the Appellant submitted to HRD an August 30, 2017 letter from the Town of North Canaan's First Selectman, Mr. Humes. Mr. Humes wrote, in part, that the Appellant was a Resident Trooper in North Canaan from 11/1/15 to 8/1/17, adding that, "[l]ike many other towns in northwest Connecticut, North Canaan does not have an organized police department" and that it entered into a contract with the State Police" and it "hires, selects and finances the vast majority of costs associated with the trooper …. By state statute and policy, Mr. Naylor answered directly to me and the commanding officer of Troop B North Canaan …", the Appellant also "honorably served" the town of Norfolk from 2/1/07 to 7/1/15, and Mr. Humes gave the Appellant the key to the town for his dedication and service. (R.Ex. 17)

31. On August 30, 2017, the Appellant also resubmitted the regulations pertaining to Connecticut Resident Troopers that he previously provided on August 18th. (R.Ex. 18)

32. On August 31, 2017, HRD emailed the Appellant a final score notice, following the E/E appeal, which indicated that the Appellant's appeal for E/E credit "was partially accepted." (R.Ex. 19)

33. Following appeal, the Appellant was granted E/E credit for his time employed as a Municipal Police Officer in New Milford, Connecticut. The Appellant's post-appeal E/E score was .4. (R.Ex. 19 - score notice dated August 31, 2017) The E/E score notice states that the .4 E/E score did not change the Appellant's "final rounded score" for the 2017 Police Officer Examination. (*Id*.)

34. HRD's August 31, 2017 score notice to the Appellant also states, "Your original Employment/Experience claim was amended and/or denied in the following ways(s): Municipal Time Credited: additional Request (State Police CT) Denied". (R.Ex. 19) The score notice did not acknowledge the Appellant's experience as a Resident Trooper.

35. The Appellant appealed to the Commission on August 14, 2017, after receipt of the first score notice but prior to the completion of the appeal process at HRD. (R.Ex. 20)

36. The Appellant's appeal to the Commission states:

> I prepared and submitted proof of twenty two years of full time police experience, including municipal and State Police service, which was not accepted and/or denied for credit. Municipal police service and resident State Trooper assignments satisfy the definition of municipal police with documents. (R.Ex. 21)

37. The Appellant does not contest the credit that HRD provided for his employment in New Milford, Connecticut as a municipal Police Officer. (Administrative Notice)

38. Of the approximately 12,000 candidates who took the exam, approximately 1,500 claimed E/E experience. (Testimony of Caggiano)

39. In promotional exams, HRD includes Employment and Experience (E&E) as an exam component, calculated as percentage of a candidate's overall score. (Testimony of Caggiano)

40. In a promotional exam, as opposed to the exam here, which is for original appointment, candidates receive 70 points for completing an E&E claim form (or application), and can add to that base score by answering questions about relevant education and experience and providing supporting documentation. (Testimony of Caggiano).

41. A typical category of experience for promotional examinations allows for "outside" experience, in a place other than the Department within which the candidate is employed. For example, on the 2017 Police Departmental Promotional E&E exam component, experience as a State Trooper is responsive to category 7A (within 5 years) and 7B (5 to 12 years prior) experience. Category 7A experience states:

> Police Departmental Promotional Exam Experience Category 7A: Supervisory and Police Officer Experience OUTSIDE Department - Recent Timeframe. Experience outside the specified department and within 5 years of the examination date in a recognized federal, state, or municipal police department in a police officer or supervisory capacity (e.g., as a Police Chief, Deputy Police chief, Captain, Lieutenant, Sergeant, Police Officer, Sheriff, Court Officer, Federal Marshall, Campus Police Officer, Military Police Officer, or as a special agent employed by a branch of the United States government such as the Federal Bureau of Investigation, U.S. Customs Service, U.S. Secret Service, Internal Revenue Service, Drug Enforcement Agency, or the Bureau of Alcohol, Tobacco, and Firearms). Do not include experience for which you have given yourself credit in a previous category.

(R.Ex. 4)

Category 7B experience is for the same experience as detailed in 7A above, but for the older timeframe of 5 to 12 years prior to the exam date. (*Id.*)

APPLICABLE LAW

Pursuant to G.L. c. 31, s. 2(b), the Commission has the authority to "hear and decide appeals by a person 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. . . ." Furthermore, G.L. c. 31, s. 2(b) states, in pertinent part: "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*.

It is 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." *Mass. Assn. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 259 (2001), *citing City of 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, s. 1. "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." *Cambridge*, 43 Mass.App. at 303 (internal citations omitted).

HRD is vested with broad authority to determine the requirements for competitive civil service exams. Under G.L. c. 31, s. 22, "[t]he administrator shall determine the passing requirements of examinations." The statute also states that "[i]n any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held." *Id*. The Personnel Administration Rules ("PAR") promulgated by HRD provide the following, in pertinent part: "[t]he 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." PAR .06(c)(emphasis added).

ANALYSIS

HRD has failed to establish by a preponderance of the evidence that its decision to deny the Appellant E/E credit for his approximately twenty (20) years of employment experience in the Connecticut State Police in connection with the 2017 entry-level exam for police officers was appropriate. Rather, I find that HRD's decision violated basic merit principles and the Appellant was aggrieved by HRD's decision since he was denied credit for his many years of related experience.

Although the Commission typically defers to HRD's significant authority regarding the examination process and assessment of credit toward E/E, a different result must issue in this case. Here, HRD chose to ignore the fact that the Appellant had approximately twenty (20) years of experience in law enforcement, arguing that the exam that the Appellant took was for an entry level police officer position and that, therefore, his experience as a Connecticut State Trooper was not in the position for which the exam was held. As noted above, G.L. c. 31, s. 22 states, in part, that "[i]n any competitive examination, an applicant shall be given credit for employment or experience in the position for which the examination is held." *Id*. In addition, as noted above, HRD's regulation, PAR.06(c) states, in part, that: "[t]he 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." PAR .06(c)(emphasis added). The Legislature could not have anticipated that HRD would create an exam job title for police officer that would function to preclude E/E credit for someone who has so many years of experience as a law enforcement officer and it would be illogical to do so. In fact, HRD previously titled the exam a "Police Officer" exam under which candidates with experience as campus police officers were allowed E/E credit. *See, e.g*., *Verderico* v. *HRD*, 28 MCSR 229 (2015). HRD has since changed the exam title and denied requests for E/E credit for campus police, for example, questioning whether campus police on each college campus are legally authorized to perform the same functions as municipal police officers, whether each of the campus police officers on a campus actually perform the functions of a municipal police officer, and stating that making such determinations were beyond the resources of HRD. In the instant case, there are no such concerns. The Appellant submitted multiple documents making it clear that, in addition to his two (2) years of experience as a police officer at the New Milford, Connecticut Police Department, the Appellant had been a Connecticut State Trooper for twenty (20) years and that such experience even included serving municipalities as a Resident Trooper. Appropriate authorities with first-hand knowledge provided additional information about the Appellant's career. When a candidate has twenty plus years of law enforcement experience, denying such candidate credit for such experience on the entry-level exam goes against the provisions of G.L. c. 31, s. 22 requiring that candidates be given credit for such experience. Further, there is no doubt that lengthy experience is desirable in a candidate and that HRD had abundant, clear evidence of the Appellant's experience. Under the circumstances, it defies common sense to deny the Appellant credit for such experience in connection with a police officer exam for original appointment, especially when HRD provides such credit in connection with promotional exams.

There is no dispute that, in addition to working as a municipal police officer in the New Milford, Connecticut Police Department, for which HRD gave the Appellant credit, the Appellant served in the Connecticut State Police for two (2) decades and retired therefrom. The Appellant provided ample evidence to HRD indicating the nature of his assignments, the time periods for his assignments, and the applicable rules and requirements for his assignments. Specifically, in connection with his exam application in February 2017, the Appellant submitted a letter from the Connecticut State Police Command which states, for example, that the Appellant had been a full time Connecticut State Trooper since February 4, 1997, working an average of 200 hours monthly and over 16 days per month, that the Appellant was assigned as the North Canaan Resident Trooper, and that he has held the rank of Detective in the Bureau of Criminal Investigation. The letter added that training records and references were available upon request and that the Appellant was eligible to retire from the Connecticut State Police as of February 14, 2017. With this letter, the Appellant included a Job Specific Detail printout from the pertinent Connecticut state webpage. The printout describes in detail the duties of State Troopers in Connecticut, that Connecticut State Troopers are required to complete one (1) year of training as trainees, and that State Troopers may be assigned as "Resident Troopers", who, in addition to their other duties may "establish and administer town police budgets; schedule, supervise and review work of constables and other staff; work closely with town officials on police related matters; develop and administer various police and community relations programs; provide for private requests for security; conduct inservice (sic) training session; maintain town police records." R.Ex. 5. In addition, in February 2017 the Appellant submitted to HRD a letter from Deputy Chief Buckley of the New Milford, Connecticut Police Department stating, in part, that the Appellant had worked there successfully from 1995 to 1997, working full time (5 days on/2 off; 40+ hours/week), and attaching the Appellant's job description and the Police Department's mission statement.

After HRD sent the Appellant his score notice on August 9, 2017 indicating that his request for E/E credit was denied because credit is only available for municipal police experience and not for State Police experience, the Appellant asked HRD to review his E/E credit denial and he submitted still further information. In addition to resubmitting the letter from the New Milford Police Department, the Appellant submitted to HRD regulations pertaining to the Connecticut State Police, including Resident State Trooper Program, which states, in part, that Resident Troopers like the Appellant supervise all town police officers, town officials

evaluate Resident Troopers, there is regular and on-going communication between the Resident Trooper and the town CEO, and Resident Troopers are involved in the hiring of town police officers. Shortly thereafter, the Appellant submitted a new two (2)-page letter from the Connecticut State Police indicating, in part, that the Appellant had retired August 1, 2017, that he had been a fulltime employee with a minimum of a 45 or 46.25 hour work week since he was hired in 1997, that his assignments included, in part, being the Norfolk Resident Trooper from 2/2/07 to 7/1/15, that most of his career was in North Canaan, which patrols and covers thirteen (13) towns in Connecticut, most of which have no organized police department and depend entirely on Resident Troopers for police services, and the letter included copies of pertinent parts of the pertinent operations manual. In addition, the Appellant submitted a letter from the town of North Canaan's First Selectman who wrote, in part, that many towns in Connecticut do not have organized police departments and that they contract with the State Police for police services, that the First Selectman worked directly with the Appellant when the Appellant was a Resident Trooper in the town from 11/1/15 to 8/1/17, and that the town highly valued the Appellant's service. At about this time, the Appellant further resubmitted to HRD the Connecticut Resident Troopers regulations. Notwithstanding the abundant evidence of the Appellant's decades of police experience, including his work with a municipality as a Resident Trooper, HRD informed the Appellant that he was credited .4 for his two (2) years of experience at the New Milford, Connecticut Police Department, that the .4 credit did not change his score (scores are rounded down following the determination of E/E credit by HRD), and he received no credit for his twenty (20)-year career as a State Trooper.

By denying the Appellant credit for his two (2) decades of law enforcement experience, the Appellant was treated unfairly, in violation of basic merit principles. As noted above, a decision is arbitrary and capricious "when it lacks any rational explanation that reasonable persons might support." *Cambridge*, 43 Mass. App. Ct. at 303. In the face of the abundant and clear evidence of the Appellant's lengthy law enforcement experience, in addition to the common knowledge that a candidate for employment with considerable experience is desirable, HRD's decision to deny the Appellant credit for his lengthy law enforcement experience was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Appellant's appeal under Docket Number B1-17-163 is hereby ***allowed*** and HRD is hereby ordered to award the Appellant E/E credit for his twenty (20) years of experience as a Connecticut State Trooper in connection with any entry-level police officer exam that the Appellant takes and passes.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 26, 2019.

Notice to:

Gregory Naylor
[Address redacted]

Melissa A. Thomson, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Michele Heffernan, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

G.L. c. 31, § 72 Inquiry Re: BOSTON FIRE DEPARTMENT

I-19-181

October 10, 2019
Christopher C. Bowman, Chairman

Section 72 Investigation by Commission-Further Investigation of Racist Social Media Post by Boston Firefighters-Disparate Treatment—The Commission issued an additional order clarifying the further investigation of racist social media postings by a Boston firefighter that it was requiring of the Boston Fire Department. The matter came to the attention of the Commission in the context of a discharge appeal from another Boston firefighter who alleged that he had been more harshly disciplined than the firefighter at issue here. In this order, the Commission notes that the BFD appears to have failed to take the appropriate investigatory action in the case of another firefighter prone to making nasty social media posts involving the "N" word.

ORDER (CORRECTED)

On August 29, 2019, the Civil Service Commission (Commission) issued a decision affirming the Boston Fire Department (BFD)'s decision to terminate Firefighter Octavius Rowe. (*See Rowe* v. *Boston Fire Department*, CSC Case No. D1-18-074 [32 MCSR 314] (2019)).

A summary of the Commission's decision in *Rowe* stated in part that:

> "Firefighter Rowe maintained a presence on social media and participated in various podcasts in which he regularly identified himself as a Boston firefighter. As part of those same public forums, he repeatedly spoke, wrote and/or posted bigoted comments that violate the norms of decency and various rules and regulations of the Boston Fire Department, including conduct unbecoming a firefighter, justifying his termination."

As part of its decision in *Rowe*, the Commission also addressed allegations of disparate treatment, including allegations by the Appellant that another incumbent Boston firefighter may have engaged in similar behavior by allegedly posting racial comments on social media.

Specifically, the Commission's decision stated:

> "That leaves the allegations against, and the BFD's response to, Firefighter MG. As referenced in the findings, Rowe's counsel presented the BFD with two (2) pages that appear to be postings from a Facebook account. Each page has the name of MG as the person who posted the comments.

The posting on the first page stated:

> "not sure who to post this to but here it is…today supposedly boston e-37/I26 claimed to have rescued a person from a fire or annunciation red . well guess what? they didn't LADDER COMPANY 4 MADE THE SAVE….ACTUALLY F.F. JAMES CASHINS E-14 DETAILED TO L-4 MADE THE SAVE . this job has denigrated to a bunch of self serving douche bags who would falsify a report so that their useless company can recieve (sic) accolades they didn't earn…these phony fucks are polishing their badges for an award THEY DIDN'T EARN. pass the word LADDER 4 AND F.F. CASHINS FROM E-14 DESERVE THE AWARD NOT THE PHONIES."

The posting on the second page stated:

> "all lives matter means shut up nigger????? Hahahahahaha funny i don't see a mark on this man, his t-shirt isn't ripped or slightly askew what channel can I follow this on?? cnn… nope msnbc… nope, bet…nope, fox news nope, local channels nope"

In response, the BFD asked Ed Dominguez [private investigator] to review MG's social media activity. Dominguez was unable to find these posts on MG's Facebook account. Rather, he only found limited postings, photographs, and other information. There were some indications in Mr. [G]'s profile of his employment with the Boston Fire Department, including photographs of him in his Boston Fire Department uniform [].

Disturbingly, Dominguez found that MG's profile photograph depicted what appeared to be a photograph taken from inside of a vehicle of an older black male standing outside holding his hand up. According to Dominguez:

> 'The hand appears to contain an unknown item. It is unclear what the photograph is depicting and the connection to Mr. [G]. Mr. [G] has used the photograph of this older black male as part of his Facebook profile cover photograph dating back to 2012. Ed Dominguez believes he recognizes this older black male as a homeless person that has panhandled on Morton Street since the early 1990s.'

The BFD brought Firefighter MG in for a 'disciplinary interview at which time Firefighter MG admitted that he wrote and posted the 'phony fucks … douchebags' posting, but denied that he wrote and/or posted the posting containing the words 'shut up nigger'. According to the BFD, they were unable to determine whether MG wrote the second posting or not and only gave Firefighter MG a written warning for the first post.

Based on a review of the record currently before the Commission, I am not satisfied that the BFD pursued the same due diligence regarding the allegations against Firefighter MG that it did against Rowe for the following reasons. First, standing alone, the fact that Firefighter MG had, for years, purportedly used the picture of a black homeless man as his Facebook profile photo, should have been a bright red flag to the BFD. I only learned of that information after ordering the BFD to produce all records related to Dominguez's investigations of firefighters other than Rowe. There is nothing in the record to show that Firefighter MG was questioned about this inexplicable observation by Dominguez.

Second, the BFD witnesses stated at the hearing before me that they were unable to research this issue further, in part, because Rowe's counsel refused to produce any further information regarding the source of the postings. At my request, Rowe's counsel produced what was entered, post-hearing, as Appellant Exhibit 35. That document provides the names of two (2) Boston firefighters who, at a minimum, could provide the BFD with additional information as part of a meaningful investigation into whether Firefighter MG posted the second posting. There is no indication that the BFD followed up on that important information.

Third, the BFD's quick acceptance of Firefighter MG's denial regarding the second post is problematic, particularly given that the second post appears to be similar to the first post (which MG admitted to posting) in regard to tone and writing style.

In summary, when the BFD is presented with evidence that a Boston firefighter has allegedly used the n-word in a public posting, they should take every step possible to investigate the allegation and, if proven, take appropriate disciplinary action, up to and including termination. That has not happened here.

G.L. c. 31, § 72 states that:

> 'The commission or administrator [HRD], 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.' (emphasis added)

Based on the facts presented here, a Section 72 inquiry by the Commission is warranted.

By separate order this day, the Commission is opening such an inquiry to ascertain what further action should be recommended by the Commission or taken by the BFD to further investigate the allegation that a BFD firefighter has allegedly used the n-word in a social media posting that has come to the Commission's attention in the course of the present appeal."

Consistent with the above findings and conclusions, the Commission, on August 29, 2019, opened a formal Section 72 inquiry under CSC Tracking No. I-19-181, stating in part that:

> "The BFD has thirty (30) days to file a written response to this inquiry which should include recommended steps for conducting a further investigation of the above-referenced allegation."

On September 30, 2019, the BFD provided the Commission with a one-page reply stating in part that:

> " … the BFD has undertaken a further investigation of MG's alleged use of the 'n-word'. BFD has asked investigator Ed Dominguez to further investigate MG's social media activity, along with that of [the two firefighters who provided the alleged post to Appellant Rowe via text message]. Upon receipt of Dominguez's investigative report, BFD will interview all three members, after which it will make its factual conclusions, if any, and determine the appropriate action, if any, with regard to each."

Based on the BFD's reply, it appears that clarification is warranted regarding the Commission's August 29th order.

Based on the plain language of Section 72, the Legislature clearly intended that the Commission, after conducting an inquiry regarding the alleged misconduct of a civil service employee, may recommend that appropriate disciplinary action be taken against that employee by the Appointing Authority, if warranted.

Here, prior to making said recommendation, the Commission ordered the BFD to provide the Commission with recommended steps for conducting a further investigation of the above-referenced allegations. While the BFD's response to the Commission appropriately provides information regarding the steps the BFD will take to undertake this investigation, the BFD erroneously assumes that the Commission has now divested itself of jurisdiction of this matter. That is not the case. Rather, the Commission, after receiving all information related to the BFD's further investigation, will make appropriate recommendations to the BFD, including recommendations regarding possible disciplinary action.

Further, to the extent that clarification is required, the Commission's August 29th order did not state, imply or suggest that the BFD investigate the two firefighters who forwarded the above-referenced posting to Firefighter Rowe and any action by the BFD to do so would be inconsistent with the Commission's August 29th order.

For all of the above reasons, the Commission hereby issues the following additional orders:

> I. The BFD shall complete its further investigation of the alleged misconduct referenced in the Commission's August 29th order within sixty (60) days.
>
> II. Within ten (10) days of completing its further investigation, the BFD shall provide the Commission with all information regarding that further investigation, including, but not limited to, any findings and recommendations.
>
> III. Upon receipt and review of the BFD submission, the Commission will determine whether any additional information or review is warranted prior to making any appropriate recommendation to the BFD.

SO ORDERED.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 10, 2019.

Notice to:

Kay H. Hodge, Esq.
John M. Simon, Esq.
Stoneman, Chandler & Miller, LLP
99 High Street
Boston, MA 02110

Barbara Parker, Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

* * * * * *

MARK A. McLAUGHLIN

v.

BOSTON FIRE DEPARTMENT

D-17-103

October 10, 2019
Cynthia A. Ittleman, Commissioner

Douglas Louison, Esq. (For Appellant)
Connie S. Wong, Esq.[1] (For Respondent)
Robert J. Boyle, Jr., Esq. (For Respondent)

Disciplinary Action-One Day Suspension of Boston Firefighter-Sick Leave Abuse-Failure to Document-Progressive Discipline—The Boston Fire Department had just cause to discipline this firefighter with a one-day suspension for violating sick leave policy where he used 16 sick days over a one-year period, but only provided proper documentation in the form of acceptable medical notes for five of the 16 absences. The Commission also found that, given this Appellant's disciplinary history, progressive disciplinary principles had been properly followed and that there had been no disparate treatment.

DECISION

On May 22, 2017, Mark McLaughlin (Mr. McLaughlin or Appellant), pursuant to G.L. c. 31, s. 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (Department or Respondent) to suspend him for one (1) tour/day. A pre-hearing conference was held on May 30, 2017 at the offices of the Civil Service Commission (Commission) in Boston. A hearing was held on July 19, 2017 at the Commission offices in Boston as well.[2] The Respondent's witnesses were sequestered. The hearing was digitally recorded and both parties were provided with a CD of the hearing.[3] The Respondent filed a post-hearing brief but the Appellant declined to do so. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Seventeen (17) exhibits were entered into evidence.[4] Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Scott Malone, Deputy Chief, Boston Fire Department
- Michael Celona, District Chief, Boston Fire Department

Called by the Appellant:

- Mark A. McLaughlin, Firefighter, Boston Fire Department, Appellant

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

1. The Appellant has been employed in the Department since approximately 1998 as a Firefighter. His father was a firefighter who is on disability retirement. The Appellant does not live with his father. (Testimony of Appellant)

2. The Department's attendance policy was established through collective bargaining with the Boston Firefighters' Association, IAFF Local 718. The collective bargaining agreement (CBA), effective 11/2/2001, Article XVII, section 3, did not contain a maximum number of tours that an employee could take as undocumented sick days within a twelve (12) -month period. (Testimony of Malone; Ex. 1A) Instead, employees were only required to produce a doctor's note for sick leave when the employee was out sick for two (2) consecutive actual tours of duty. (*Id.*)

3. In 2010, the Respondent and Local 718 amended Article XVII, section 3, by deleting the prior section 3 and replacing it providing, in part, that the Fire Commission can require an employee to communicate with the Department Medical Examiner and/or obtain a medical letter from his/her medical provider if the employee has "accumulated ten (10) tours or more of undocumented absences within a rolling twelve (12) month period. …" (Ex. 1) Deputy Chief John Walsh was the head of the Department's Personnel Office at that time, which mailed medical documentation guidelines to all employees and posted the same information on bulletin boards in all units and fire stations. (Testimony of Malone) In addition, the Department had an online database that enabled employees to see how many undocumented absences that they had at any particular time. (*Id.*)

4. The Department's 2012 medical documentation guidelines, effective 12/1/12, states,

> "All medical documentation required to excuse the specific absence under this policy must be submitted to the Medical Officer within thirty (30) calendar days of returning to work.
>
> The following information must be contained in medical documentation required under this policy:
>
> 1. The name of the employee, assignment, and employee i.d.
>
> 2. The name and contact information of the medical provider.

1. Previously Thomas Costello, Esq., also appeared, on behalf of the City of Boston Office of Labor Relations. However, Mr. Costello no longer works for the City of Boston.

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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

4. The Respondent submitted Exhibits (Exs.) 1 and 1A through 14; the Appellant submitted Exs. 15 and 16.

> 3. When the absence was for the employee's own illness; injury; incapacity, the date(s) the medical provider examined the employee in connection with the employee's absence(s).
>
> 4. The specific date(s) for which the medical provider believes that the employee needed to be absent from work.
>
> 5. When the absence was for the illness of the employee's immediate family member; the name of the ill family member, the relationship of such individual to the employee, and the date(s) the medical provider determined the employee was needed to care for such individual.
>
> 6. Faxes will not be accepted unless it is faxed from your Doctor's Office.
>
> 7. Appointment cards and reminder letters will not be accepted as valid sick leave documentation.
>
> 8. Treatment by telephone conversation / consultation will not be accepted.
>
> 9. A prescription printout form is not a valid sick leave documentation and will not be accepted.
>
> 10. All documentation will be reviewed on a case by case basis.
>
> All original documentation and a copy shall be sent by mail in a sealed envelope (U.S. Mail and/or Department Mail). Hand delivered documentation shall be in a sealed envelope only to the Personnel Division. Unsealed documentation will not be accepted by the Personnel Division. A copy of the documentation will be returned to the member Approved or Disapproved by the Medical Office. Any questions please call the Personnel Division . . .
>
> It is the employee's responsibility to obtain adequate medical documentation within the stated thirty (30) calendar day period."

(Ex. 2) (emphasis added)

5. The Department reissued the Guidelines on 11/3/14 with some changes, as noted below:

> " … 3. The date(s) the medical provider examined the employee in connection with the employee's absence(s) when the absence was for the employee's own illness, injury or incapacity.
>
> 5. added:
>
> • The Department will accept copies of documentation for family members.
>
> • Doctor must be seen within 72 hrs of sick leave." (Ex. 3)

The 2014 version of the Guidelines added that doctors' notes on prescription pads and prescription printouts from pharmacies or medical provider's offices would not be accepted as medical documentation. In addition, the 2014 version added:

> • "'all documentation will be reviewed on a case by case basis'";
>
> • all "ORIGINAL DOCUMENTATION and a COPY shall be sent by mail in a sealed envelope (U.S. mail, Department mail or hand delivered) to the Personnel Division. Unsealed documentation will not be accepted by the Personnel Division." (Ex. 3)(emphasis in original)
>
> • 'a copy of documentation will be returned to the member either approved or disapproved by the Medical Office only if the member submits a copy. If no copy is received then nothing is sent back to the member.'
>
> • [the federal Family Medical Leave Act (FMLA)] … paperwork is handled by the Human Resources office."

(Ex. 3)

6. The Appellant was informed about the availability of FMLA in appropriate circumstances but he did not apply for it. (Testimony of Appellant and Malone) He did not want to disclose the names of the pertinent family member/s in connection with sick leave. (Testimony of Appellant)

7. On 3/14/15, Fire Commissioner and Chief Finn issued General Order No. 11, regarding sick leave. This Order reiterates the 2014 guidelines but adds, in part,

> "This is to remind all personnel that sick leave is to be used only 'where an employee is suffering from illness or injury (non-work related) to such an extent as to be unable to perform the duties of his/her position, or where members of the family within the household of the employee are ill and require the care of such employee.'
>
> **All hand delivered documentation shall be in a sealed envelope, with the original and a copy addressed to the attention of the Medical Office**. … Unsealed documentation will not be accepted by the Personnel Division. …
>
> Misuse and/or abuse of sick leave will not be tolerated. The department has been monitoring and shall continue to monitor the sick leave usage of all personnel. The department is currently investigating those members who have excessive and/or suspicious patterns of absenteeism. Any member found to have excessive undocumented sick leave shall be subject to progressive disciplinary action."

(Ex. 4)(**emphasis** added)(emphasis added)

8. Between 2015 and 2017, the Respondent disciplined approximately two hundred (200) employees for excessive undocumented sick leave. (Testimony of Malone) In that regard, the Respondent had held hearings for employees who were facing more than a four (4)-tour suspension for excessive undocumented sick leave absences. (*Id*.)

9. On or about October 31, 2013, the Appellant's division commander, Deputy Chief Michael Doherty, issued the Appellant an oral warning regarding his excessive undocumented sick leave usage (twelve (12) days/tours, two (2) more days than the ten (10)-day limit) between August 1, 2012 and August 1, 2013. (Ex. 5) Specifically, the Deputy Fire Chief's written warning indicated that the Appellant had not provided "any reasonable and/or credible documentation for the high rate of sick leave tours" and that "[a]ny future incidents of misuse and/or abuse of sick leave can result in disciplinary action up to and including discharge. …" (*Id.*)

10. By notice dated January 15, 2015, Deputy Chief of Personnel Walsh notified Deputy Chief Doherty that the Appellant had taken eleven (11) undocumented sick tours between December 15, 2013

and December 15, 2014, that the Appellant had already been given a warning on December 21, 2013 about excessive undocumented sick leave for the prior twelve (12)-month period, and that, therefore, the Appellant should be issued a one (1)-day suspension. (Ex. 6)

11. The Appellant requested an appeal within the Department, seeking to reverse the one (1)-day suspension for undocumented sick tours between December 15, 2013 and December 15, 2014. A Department hearing was held and the Appellant presented documentation from a physician stating that the Appellant had "previous notes written for sick day excuses on two (2) of the eleven sick leave dates". (Ex. 8) This brought the Appellant's undocumented sick leave days below ten (10) leave days for the cited twelve (12)-month period from 2013 to 2014. As a result, Deputy Chief Walsh, of the Personnel Division, asked Deputy Chief Doherty, Division 2, to rescind the one (1)-day tour suspension. (*Id.*) However, Chief Walsh also admonished the Appellant that the Department was monitoring sick leave and that the Appellant could be disciplined for any future violations of the sick leave policy and guidelines. (Testimony of Malone and Appellant)

12. Between October 18, 2015 and October 18, 2016, the Appellant used sixteen (16) sick tours but only provided acceptable medical documentation for five (5) of the absences. (Testimony of Malone) By letter dated October 20, 2016, the Appellant was given written notice of the lack of documentation for absences. (Ex. 9) The Appellant requested and received a Department hearing for this suspension. (Ex. 11)

13. At this Department hearing, the Appellant offered four (4) documents in support of his sick absences. (Exs. 12A - 12D) Three (3) of the four (4) documents were handwritten notes on a physician's prescription pad in contravention of the Department policy and guidelines. (*Id.*) The Department had already accepted documentation from the Appellant for two (2) of the absences but rejected the notes the Appellant provided at the Department hearing regarding the Appellant's undocumented absence on March 8, 13 and 16, 2016. (Testimony of Malone and Appellant; Exs. 12C and 12D)

14. The document the Appellant offered at the Department hearing (and at the Commission hearing) regarding the Appellant's March 8, 2016 absence was submitted to the Department beyond the required thirty (30) day period and did not identify the family member whose illness led to the Appellant's absence in violation of the Department policy and guidelines. (Ex. 12C) Specifically, the note regarding the March 8, 2016 absence was date-stamped "received" at the Department on April 11, 2016 and said only "Family illness. Out of work 3/8/16". (*Id.*)[5]

15. The medical notes that the Appellant offered for his absences on March 13 and 16, 2016 were also submitted beyond the required thirty (30)-day period in violation of the Department policy and guidelines. (Testimony of Malone; Ex. 12D) Specifically, the physician's note for the March 13 and 16, 2016 absences is dated April 12, 2016 but the Department Medical Office received it on May 2, 2016. (*Id.*) When the Department receives an inadequate initial medical note from an employee and informs the employee that the initial note is inadequate, the employee must submit the correct medical note within the same thirty (30)-day period. (Testimony of Malone)

16. By memorandum dated April 25, 2017, Deputy Chief Doherty issued a one (1)-tour suspension to the Appellant for his undocumented sick absences between October 18, 2015 and October 18, 2016. (Ex. 10) By memo dated May 10, 2017, Deputy Chief Malone wrote to Fire Commissioner and Chief Finn that the Appellant failed to produce the required medical documentation for sick leave and that he recommended that "any further infractions of the Departments (sic) Sick Leave Policy may result in more severe progressive discipline being imposed. …" (Ex. 13) (emphasis added)

17. As of the date of the Commission hearing, the Appellant's union had not filed a grievance pertaining to the Appellant's one (1)-tour suspension for failing to submit appropriate medical notes for the cited dates on which the Appellant had used sick leave time. (Testimony of Appellant and Malone)

18. The Appellant's other discipline at the Department was a forty-five (45)-day suspension in 2011 when he acknowledged that he "misrepresented [his] EMT Certification status and received additional compensation from the Boston Fire Department under false pretences (sic)." (Ex. 14)[6]

APPLICABLE LAW

Pursuant to G.L. c. 31, § 43, a "person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . . ." The statute provides, in pertinent part:

> 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 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 his position, said action shall not be sustained and the person shall be returned to his position without loss of

5. At the Commission hearing, the Appellant asserted that his father's physician told him that he (the physician) could not provide name of the Appellant's father in the medical note because of the privacy provisions of the HIPAA (the federal Health Insurance Portability and Accountability Act of 1996). The Appellant further asserted that everyone at the Department knows who his father is. However, the Appellant also asserted that on a couple of occasions he took sick leave when he cared for one (1) or (2) other members of the family, with whom he may or may not have resided.

6. The Appellant was one (1) of a number of Firefighters state-wide who were found to have similarly misrepresented their EMT training. (Administrative Notice)

> compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

G.L. c. 31, § 43.

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." *Cambridge* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *Comm'rs of Civil Serv.* v. *Mun. Ct. of Bos.*, 359 Mass. 211, 214 (1971); *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. of Brockton* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (*citing 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).

While the Commission makes *de novo* findings of fact, "the Commission's task, however, is not to be accomplished on a wholly blank slate." *Town of Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006). "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.* at 823-24 (*citing Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983)).

Under certain circumstances, the Commission may modify the discipline issued to a tenured civil service employee. "The … power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority." *Falmouth* v. *Civ. Serv. Comm'n*, 61 Mass. App. Ct. 796, 800 (2004) quoting *Police Comm'r* v. *Civ. Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). 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 commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." *Falmouth* v. *Civil Service Commn*, 447 Mass. 814, 823 (2006). The Commission is also guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" as well as the "underlying purpose of the civil service system … to guard against political considerations, favoritism and bias in governmental employment decisions. " *Id*. (and cases cited).

ANALYSIS

The Department has established by a preponderance of the evidence that it had just cause to discipline the Appellant for violating the Department's sick leave policy and guidelines. Between 2001 and 2010, the Department's sick leave policy only required employees to produce a doctor's note when the employee was out sick for two (2) consecutive actual tours of duty. As of 2010, in an effort to address excessive sick leave absences, the Department and Local 718 amended the sick leave policy to require that employees who had used at least ten (10) sick leave days within a rolling twelve (12)-month period submit medical documentation to the Department. Notice of this sick leave policy change was mailed to employees and posted on bulletin boards throughout the Department. The Department also has a database that allows employees to check how much sick leave they had used. As of December 1, 2012, the sick leave policy and guidelines required that all medical documentation be submitted within thirty (30) days of returning to work, that medical notes identify the employee, provide the name and contact information of the medical provider, the date the medical provider examined the employee, and the dates the medical provider believes the employee needed to be out of work. Also, under the 2012 policy and guidelines, if the employee took sick leave to care for a family member, the employee was required to indicate it involved the employee's "immediate family member", the name of the family member, the relationship of the family member to the employee, and the date the medical provider indicated that the employee was needed to care for the family member. Further, the 2012 policy and guidelines specified, in part, that all original documentation and a copy shall be mailed to the Department in a sealed envelope (U.S. mail or Department mail), delivered documents shall be in a sealed envelope, unsealed documents will not be accepted, and a copy of the documentation will be returned to the employee marked approved or disapproved.

In a continuing effort to address excessive sick leave, effective November 3, 2014 the Department added to its policy and guidelines, in part, that doctors' notes on prescription pads would not be accepted as medical documentation. On March 14, 2015, Fire Commissioner and Chief Finn issued General Order No. 11, reiterating the 2014 sick leave policy and guidelines but further reminded employees that sick leave is only when an employee is "unable to perform the duties of his/her position, or where members of the family within the household of the employee are ill and require the care of such employee". General Order No. 11 also states,

> … [m]isuse and/or abuse of sick leave will not be tolerated. The department has been monitoring and shall continue to monitor the sick leave usage of all personnel. The department is currently investigating those members who have excessive and/or suspicious patterns of absenteeism. Any member found to have excessive undocumented sick leave shall be subject to progressive disciplinary action.

(Ex. 4)

In fact, between 2015 and 2017, the Department disciplined approximately two hundred (200) employees for excessive undocumented sick leave.

By letter dated October 20, 2016, the Department informed the Appellant that he had violated the Department sick leave policy and guidelines because he had used sixteen (16) sick tours/days but provided acceptable medical notes for only five (5) of the sixteen (16) absences during the period October 18, 2015 to October 18, 2016. The Appellant requested a Department hearing. The Department accepted two (2) medical notes that the Appellant offered. At the Department hearing, the Appellant belatedly offered four (4) medical notes, three (3) of which were handwritten notes on a physician's prescription pad and beyond the thirty (30) day deadline, in violation of the Department's policy and guidelines. In addition, the Appellant did not identify the family member for whom the Appellant took a sick leave day/tour. By memorandum dated April 25, 2017, Deputy Chief Doherty issued the Appellant the one (1)-tour/day suspension at issue here. On May 10, 2017, Deputy Chief Malone wrote to Fire Commissioner and Chief Finn regarding the Appellant's failure to provide the required medical notes and recommended that any further violations "may result in more severe progressive discipline being imposed . …" Ex. 13 (emphasis added).

This is not the Appellant's first violation of the Department's sick leave policy and guidelines. The Appellant first violated the Department's sick leave policy and guidelines in 2013. Specifically, in October, 2013, Deputy Chief Doherty issued the Appellant a warning for using twelve (12) days/tours of undocumented sick leave, two (2) more days than the ten (10)-tour/day limit, between August 1, 2012 and August 1, 2013.

On January 15, 2015, Deputy Chief Walsh informed Deputy Chief Doherty that the Appellant again violated the Department's policy and guidelines by taking eleven (11) undocumented sick leave tours/days between December 15, 2013 and December 15, 2014, recommending that the Appellant be suspended for one (1) day/tour, since the Appellant had already been given a warning regarding a prior violation of the Department's sick leave policy and guidelines. The Appellant appealed the suspension internally and belatedly produced medical documentation pertaining to two (2) sick leave absences, reducing the total number of undocumented absences to less than ten (10). The Department rescinded the one (1)-day suspension but Chief Walsh reminded the Appellant that he could be disciplined for any future undocumented absences.

The other discipline in the Appellant's record is a forty-five (45)-day suspension in or about 2011, involving his misrepresentation of his EMT Certification status, for which he received additional compensation from the Department under false pretenses. Although the EMT Certification matter did not involve excessive use of undocumented sick leave, it was recent enough to raise doubts about the Appellant's credibility.

In the firefighting profession, where sufficient staffing to respond to emergencies is essential, there can be little doubt that excessive sick leave can impair the ability of Fire Departments to timely respond. In response to excessive sick leave use in the Department and to ensure that there is adequate personnel available at all times, the Department established detailed and specific sick leave rules, providing notice to all employees and provided employees with the means to monitor their sick leave use. When, as here, the Fire Department has developed and implemented such a policy and guidelines in response to excessive sick leave use, the failure to adhere to such policy and guidelines constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service warranting discipline. The Appellant used sixteen (16) sick tours/days (six (6) days over the limit) during the period October 18, 2015 to October 18, 2016 but provided acceptable medical notes for only five (5) of the sixteen (16) absences in violation of the Department's well established policy and guidelines. The Department suspended the Appellant for one (1) tour/day as a result of his failure to adhere to the Department policy and guidelines.

When the Department issued the Appellant a one (1)-tour/day suspension for violating the Department sick leave policy and guidelines in the period between October 18, 2015 and October 18, 2016, it followed the principles of progressive discipline since the Appellant's most recent discipline that was sustained following a Department hearing was a warning. There is no indication in the record that the Appellant was the subject of disparate treatment, nor is there any indication in the record that the disciplinary action taken against the Appellant was the result of bias or other improper motive. In addition, the findings here are substantially the same as those found by the Department. For these reasons, modification of the one (1)-tour/day suspension is not warranted. Further, I find that the Department was faced with excessive undocumented sick leave at the time, a crucial issue for a firefighting force, which it sought to address with a policy and detailed guidelines, it informed the employees were informed of the policy and guidelines, and the policy and guidelines were evenly applied to the Appellant. As a result, there is no reason to disturb the one (1)-day/tour suspension issued by the Department to the Appellant.

CONCLUSION

Accordingly, for the above stated reasons, the discipline appeal of Mr. McLaughlin, under Docket No. D-17-103, is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 10, 2019.

Notice to:

Douglas Louison, Esq.
Louison, Costello, Condon and Pfaff, LLP
101 Summer Street
Boston, MA 02110

Connie S. Wong, Esq.
Deputy Commissioner
Boston Fire Department
115 Southampton Street
Boston, MA 02118

Robert J. Boyle, Jr., Esq.
Boston City Hall
Boston, MA 02132

* * * * * *

MARIA SANCHEZ

v.

SPRINGFIELD POLICE DEPARTMENT

D1-19-032

October 10, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Termination of Probationary Employee-Springfield Police Department-Probationary Period Extended by Injury Leave—The Commission affirmed the discharge of a probationary police officer by the Springfield Police Department where she had yet to actually serve a full year plus two months. The Appellant's probationary period had been extended for two months by the Department for performance issues and then further extended by six weeks for time spent on injury leave. As such, the Appellant never became a tenured employee with Civil Service appeal rights.

DECISION ON MOTION TO DISMISS

On February 8, 2019, the Appellant, Maria Sanchez (Ms. Sanchez), filed an appeal with the Civil Service Commission (Commission), contesting her "forced resignation" from her position as police officer from the Springfield Police Department (SPD).

2. On March 27, 2019, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Ms. Sanchez and counsel for the SPD.

3. At the pre-hearing, the SPD submitted a pre-hearing memorandum stating that, as of the date of her resignation, Ms. Sanchez was still a probationary employee. Thus, according to the SPD, the Commission had no jurisdiction to hear this appeal.

4. The parties agreed to the following at the pre-hearing:

A. On November 30, 2017, Ms. Sanchez graduated from the Police Academy.

B. On December 1, 2017, Ms. Sanchez was sworn in as a police officer and issued a firearm.

C. On December 3, 2017, Ms. Sanchez was assigned to her first shift as a police officer.

D. On November 28, 2018, the SPD, citing performance issues, extended Ms. Sanchez's probationary period by two months.

E. On February 1, 2019, Ms. Sanchez submitted her letter of resignation. Ms. Sanchez alleges it was a "forced resignation".

5. On April 26, 2019, the SFD submitted a Motion to Dismiss the Appellant's appeal, arguing that the Appellant's probationary period began on December 3, 2017, the day she was assigned to her first shift. Thus, according to the SPD, the Appellant's probationary period would not end until February 3, 2019 fourteen months (twelve months plus two extended months) after her first shift on December 3, 2019.

6. On May 27, 2019, Ms. Sanchez submitted a reply that did not address the substantive issue of when her probationary period began (i.e. - December 1, 2017 or December 3, 2017). She did, however, reference that she had been on injured leave from "for an approximate total time of 4 months" [the injured leave time actually included approximately six (6) weeks from 4/10/18 to 4/29/18 and again from 7/3/18 to 8/10/18].

7. On June 24, 2019, I notified the parties via email that I was taking administrative notice of the following March 21, 2003 memorandum from the state's Human Resources Division (HRD) regarding the start of a police officer's probationary period: memorandum from the state's Human Resources Division (HRD) dated March 21, 2003. That memo states in part: " … the Human Resources Division has defined that a police officer's twelve-month probationary period begins upon successful completion of the police academy and allowed to perform the duties of a police officer." [sic]

8. Applying the HRD memorandum to the instant appeal, Ms. Sanchez's probationary period began on December 1, 2017, not December 3, 2017, as argued by the SPD.

9. On July 1, 2019, the SPD submitted a reply effectively arguing that HRD's memorandum was inconsistent with caselaw.

10. On July 8, 2019, Ms. Sanchez submitted a response which did not address the issue raised in the HRD memorandum.

11. On June 24, 2019, I notified the parties that I would be holding a motion hearing to address various issues, including but not limited to: the HRD memorandum referenced above; the period of injured leave referenced in the Appellant's May 27, 2019 submission; as well as whether the Appellant's resignation could or could not be construed as a constructive discharge.

12. On July 18, 2019, the Commission issued the following two (2) decisions related to, among other things, when the probationary period of a police officer begins:

- *Qirici, Enxhi* v. *Boston Police Department,* 7/18/19 [32 MCSR 279]
- *Brandao, Emanuel* v. *Boston Police Department,* 7/18/19 [32 MCSR 255]

13. In both of these decisions, the Commission, consistent with prior Commission decisions and HRD's 2003 memorandum, concluded that the police officers' probationary period began upon completing the police academy and being sworn in as a police officer.

14. On July 24, 2019, I held a motion hearing at the Springfield State Building which was attended by Ms. Sanchez and counsel for the SPD.

15. On August 13, 2019, the SPD submitted an amended Motion to Dismiss addressing the issue of Ms. Sanchez's injured leave and how, according to the SPD, it provided another reason why Ms. Sanchez had not completed her probationary period at the time of her separation from employment.

16. On August 25, 2019, Ms. Sanchez submitted a reply that argued, in part, that the SPD never notified her that her probationary period was being extended due to her injured leave. In the alternative, Ms. Sanchez argued that another non-minority police officer was out on injured leave for a period greater than her, and, to her knowledge, that police officer's injured duty leave did not impact the date upon which he became a tenured police officer.

17. In their respective submissions, neither party indicated whether the SPD had notified the state's Human Resources Division (HRD) of Ms. Sanchez's termination. On September 3, 2019, I sent an email to counsel for the SPD to inquire as to whether such notification to HRD was made by the SPD. In response, I received a reply stating that HRD was notified, which was accompanied by an "Absence and Termination Notice (Form 56) which stated that the Ms. Sanchez's last date of employment was "2-1-19". The SPD checked "Resigned" as opposed to "Terminated - Probationary Period, Section 34".

APPLICABLE LAW

G.L. c. 31, § 34 states in relevant part:

> "During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.
>
> …
>
> If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period.
>
> If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.
>
> If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as a tenured employee until he has served a full probationary period or the remainder thereof, as the case may be, following the termination of said educational leave and his commencing of or return to employment.
>
> The probationary period of an employee shall not be deemed to be interrupted by his temporary appointment pursuant to section six to a position in a higher title in the same departmental unit, by his temporary promotional appointment pursuant to section seven, or by his provisional promotion pursuant to section fifteen."

G.L. c. 31, § 41 states in relevant part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two."

G.L. c. 31, § 61 states:

> "Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a 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 shall be considered a full-time tenured employee in such position,

> except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters."

The Personnel Administration Rules state in relevant part:

> PAR.12 PROBATIONARY PERIOD
>
> (2) The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period.
>
> PAR.13 LEAVES OF ABSENCE
>
> (1) A civil service employee seeking a leave of absence or renewal of same for a period longer than three months shall submit a written request for the leave or renewal to the appointing authority at least twenty-one days before the leave unless submission within such time period is impracticable.
>
> (2) When an appointing authority requests prior approval of the administrator for an employee leave of absence or renewal of a leave of absence under MGL c. 31, §37, for a period to exceed three months, such approval shall be requested at least fourteen days before the leave or renewal of leave of the employee is to commence unless request within such time period is impracticable. Said request shall be in writing. A copy of the request shall be delivered to the affected employee. If approval is granted, the written notice of said approval by the administrator shall be delivered to the applicant.

ANALYSIS

Consistent with prior Commission decisions and guidance offered by HRD dating back to 2003, Ms. Sanchez's probationary period start date is December 1, 2017, the date that Ms. Sanchez was *sworn in as a Springfield Police Officer* after completing the Police Academy.

Based on performance reasons, the SPD extended Ms. Sanchez's probationary by two (2) months, increasing the amount of time that Ms. Sanchez must actually perform the duties and responsibilities of a police officer from twelve (12) to fourteen (14) months.

As of February 1, 2019, the date of separation, Ms. Sanchez had not performed the duties and responsibilities of a Springfield Police Officer for fourteen (14) months as she had been on injured leave for approximately six (6) weeks. In order to complete her probationary period, Ms. Sanchez would have had to have actually performed the duties and responsibilities of a police officer for an additional six (6) weeks.

The SJC's decision in *Police Commissioner of Boston* v. *Cecil*, 431 Mass. 410 (2000), unequivocally reinforced the need to actually perform the duties of a police officer for twelve months [or, as in this case, fourteen (14) months when the probationary period has been extended] before becoming a permanent, tenured police officer. ("The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree." Id. Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer.")

Further, Section 34 explicitly states that:

> "If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that **such employee shall, upon resuming employment, be required to perform service equal to a full probationary period**." (emphasis added)

Solely for the purposes of reaching a decision on this motion to dismiss, I accept as true the Appellant's statement that the SPD never notified her that her probationary period was being extended due to her injured leave. In *Patterson* v. *Town of Plymouth*, 21 MCSR 650 (2008), a similar issue was raised. The findings in *Patterson* state that Patterson took a short-term medical leave and that he was not notified that his probationary period was being extended. Based on a full reading of the decision, it appears that Patterson could only be considered tenured if those weeks on leave were credited toward the probationary period. The Commission's analysis in *Patterson* does not explicitly draw that conclusion, however, and more importantly, the primary issue in *Patterson* appeared to be when the probationary period *began*—at the time of being sworn in as a police officer or days later when Patterson worked his first shift.

The Commission has more squarely addressed the issue of an alleged lack of notice in cases unrelated to performance-related extensions in *Andrade* v. *City of Cambridge*, 31 MCSR 90 (2018) (currently pending appeal in Superior Court). In *Andrade*, the City, approximately six weeks prior to the expiration of Mr. Andrade's probationary period, placed him on paid administrative leave after he was arrested for a domestic assault and battery. Mr. Andrade never returned to performing his duties as a firefighter and the City terminated him several months later. The City never notified Mr. Andrade that this paid administrative leave would interrupt his probationary period.

In *Andrade*, the Commission concluded:

> "That leaves the more substantive issue of whether the City's failure to extend Mr. Andrade's probationary period under Section 34 resulted in Mr. Andrade becoming a tenured employee, notwithstanding the requirement in Section 61 that firefighters must perform the duties of the position for twelve months before obtaining tenure.
>
> While it is true that, in *Cecil*, the Boston Police Department extended Cecil's probationary period under Section 34, pending an internal investigation, the SJC's decision, when read in its entirety, emphasizes the Legislature's clear intent on ensuring that firefighters and police officers *actually perform the duties of the position for twelve months* prior to obtaining tenure stating:
>
> '*Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer. The commission*

exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.'

CONCLUSION

Ms. Sanchez was approximately six (6) weeks shy of completing her probationary period at the time she was separated from employment due to her prior injured leave. As such, she was not a tenured employee entitled to the due process rights afforded to tenured civil service employees, regardless of whether the separation was a voluntary resignation or, as argued by the Appellant, a constructive discharge. For this reason, Ms. Sanchez's appeal under Docket No. D1-19-032 is hereby ***dismissed***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 10, 2019.

Notice to:

Maria Sanchez
[Address redacted]

Maurice M. Cahillane, Esq.
Egan, Flanagan & Cohen
67 Market Street
P.O. Box 9035
Springfield, MA 01103

* * * * * *

TIMOTHY GILLESPIE

v.

DEPARTMENT OF STATE POLICE

D-17-078

October 24, 2019
Paul M. Stein, Commissioner

Disciplinary Action-State Police Officer-Insubordination-Refusal to Move Personal Vehicle From Visitors' Parking Space-Forfeiture of 10 Days Accrued Vacation Time-Retaliation-Disparate Treatment—In a decision by Commissioner Paul M. Stein, the appeal from a state trooper challenging a forfeiture of 10 days of accrued vacation time for insubordination was dismissed. The Commission found that the trooper, a 37-year veteran of the force and the union SPAM representative, had indeed refused a direct order from a superior to move his high-end Jaguar out of the visitors' parking lot to an employee gated lot. The Commission also rejected the trooper's claims of retaliation and disparate treatment.

DECISION

The Appellant, Timothy Gillespie, acting pursuant to G.L. c. 31, §43 and G.L. c. 22C, §13, as amended by St.2002,c.43, appealed to the Civil Service Commission (Commission) challenging the decision of the Respondent, the Massachusetts Department of State Police (MSP), requiring him to forfeit ten (10) days of accrued vacation time earned in his position of Massachusetts State Trooper.[1] The Commission held a pre-hearing conference in Boston on May 9, 2017 and held a digitally recorded full hearing at that location on June 14 & 26, 2017.[2] The full hearing was declared private, with witnesses sequestered. Twenty-eight (28) exhibits were received in evidence at the hearing (JExhs.1-22, 27, 28 & 30-33) and one post-hearing exhibit was submitted by the MSP at the Commission's request and marked PHExh.35.[3] The Commission received Proposed Decisions on September 29, 2017.

On September 5, 2018, the MSP submitted a request, to which the Appellant objected, to supplement the record to take administrative notice of two decisions of the Massachusetts Department of Labor Relations (DLR) on charges of unfair labor practices which the MSP contends relate, in part, to issues presented in this appeal to the Commission. After review of the request and consideration of the Appellant's objection, I agree that taking administrative notice of the DLR decisions, for what they may be worth, is appropriate and they have been marked as PHExh.36.[4]

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.

3. Exhs.23-26, 29 & 34 were marked for Identification (ID).

4. The MSP had previously moved to stay this appeal pending the DLR decisions, to which the Appellant objected and the motion was denied. (Respondent's Motion to Hold Appeal in Abeyance ("MSP Motion to Stay Appeal"); Appellant's Opposition to Motion to Hold Appeal in Abeyance ("Appellant's Opposition to Motion to Stay Appeal") *See generally*, *Town of Dedham* v. *Labor Relations Comm'n*, 365 Mass. 392 (1974), *cited in Fernandes* v. *Attleborough Housing Auth.*, 470 Mass. 117 (2014)

For the reasons stated below, Trooper Gillespie's appeal is denied.

FINDINGS OF FACT

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

Called by the MSP:

- MSP Lieutenant Dennis Brooks
- MSP Lieutenant Kevin Emmett
- MSP Detective Lieutenant James O'Leary
- MSP Captain (now Major) Francis McGinn
- MSP Major (now retired) William Christianson

Called by the Appellant:

- MSP Trooper Timothy Gillespie, 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, Timothy Gillespie is a sworn member of the MSP who has served in the position of State Trooper since July 19, 1982. (*Exhs. 4 & 30; Testimony of Appellant*).

2. Since 2001, Tpr. Gillespie was assigned to day-shift (7:00 a.m. to 3:00 p.m.) patrol duties with Troop F, a division of the MSP stationed at the Logan Airport Barracks (SP-Logan) located at Building 11, 2 Service Road, Logan Int'l Airport, East Boston, which is sometimes referred to as the "TSA Building". (The MSP occupies the first two floors of the building and the federal Transportation Security Administration (TSA) occupies the third floor). Troop F has the responsibility to provide policing and security services throughout Logan Airport as well as the Seaport District and other MassPort properties. (*Exhs. 15, 27, 28, 30 & 32; Testimony of Appellant, Lt. Emmett, Lt. Brooks, Maj. McGinn & Maj. Christiansen*)

3. At all times relevant to this appeal, Tpr. Gillespie was the duly elected Troop F representative for his union, the State Police Association of Massachusetts (SPAM). As union representative, Tpr. Gillespie had responsibility, among other things, to mediate concerns of SPAM members with MSP management. He also serves as a member of the SPAM Executive Board. (*Exhs. 22, 28 & 30; Testimony of Appellant, Maj. McGinn & Maj. Christiansen*)

4. Immediately prior to the incident that led to the discipline involved in the present appeal, Tpr. Gillespie received an overall "Outstanding" performance evaluation rating from his supervisor, Lt. Kevin Emmett, which covered the period from January through December 2015, including, in particular, a rating of "Outstanding" in the specific performance factor of "Follows Oral and Written Direction of Supervisors". His prior formal disciplinary history included a forfeiture of four (4) vacation days in 2011 and a written reprimand in 2013. (*Exhs. 4, 30 & 31*)

5. Most MSP uniformed staff assigned are provided an assigned or "take home" cruiser which may be used to commute to and from duty. At Troop F, however, only the command staff (superior officers) and members assigned to certain specialized units (K-9, Explosives Ordinance Disposal [EOD], Detectives, etc.) have assigned or "take home" cruisers. All other troopers assigned to Troop F (approximately 80% of the uniformed staff) commute to and from work in a personal vehicle for which they receive a stipend of $40 per day to offset the cost of commuting, and are assigned a cruiser for use on-site during their shift. (*Exh. 15, 27 28; Testimony of Lt. Brooks, Lt. Emmett & Maj. McGinn*)

6. Parking areas are provided on all three sides of the TSA Building:

- Gated Lot: An enclosed, gated parking lot, with approximately 136 spaces, is accessible only by use of an authorized employee ID badge and is primarily dedicated to MSP personnel, although at times, the lot will be opened to accommodate attendees at state, local or federal trainings and classes. MSP supervisors are provided assigned spaces for their cruisers in this gated lot. Troop F personnel are expected to park their personal vehicles in the remaining unassigned spaces in this lot.[5]
- Cruiser Lot: In addition to the gated lot, supervisors and other officers assigned a take-home cruiser are permitted to park in the area behind the rear of the TSA building where the cruisers used by troopers during a shift are also parked. Personal vehicles are not permitted in this area.
- Short Term Parking: Immediately adjacent to the front entrance of the TSA Building are several spots where MSP personnel are authorized to use for short-term parking, such as coming to drop off a report or meet briefly with a supervisor. These spot are not meant to be used by MSP personnel as an alternative to the gated lot.
- TSA Parking: TSA personnel park in a separate designated area outside the gated lot.
- Visitor Parking: Approximately ten (10) spaces in front of the building (and several spaces for disabled) are designed for visitors coming to TSA or MSP and have clearly marked signage to that effect.

(*Exhs. 15, 20, 27, 28 & 32; Testimony of Major McGinn, Lt. Brooks & Lt. Emmett*)

7. For some time prior to October 2015, a number of Troop F and TSA personnel had become accustomed to using available visitor spaces as an alternative to their designated parking areas (i.e. the gated lot for Troop F and the parking areas reserved for TSA personnel). In particular, there were approximately four MSP members who preferred to park their expensive high-end personal vehicles in an open visitors space. Tpr. Gillespie, who owned a late-model Jaguar, was one of the Troopers who frequently parked

5. The gated lot once contained more spaces than presently and all MPS personnel were provided a personally assigned space, but the area was reduced in size several years ago to accommodate the construction of another structure, at which time the only assigned spaces were reserved for supervisory personnel. (*Testimony of Maj. McGinn*)

in a visitors space. (*Exhs. 17 through 20, 27, 28 & 30; Testimony of Appellant, Lt. Brooks & Lt. Emmett*)

8. In October 2015, Lt. Emmett, the SP-Logan day shift supervisor, began taking note that most, if not all, visitor parking spaces were filled when he arrived for his shift around 6:00 am. Over the next month or two, he intermittently recorded the date/time and license plate numbers and checked later to see if the vehicles were still there. (*Exh. 15; Testimony of Lt. Emmett*)

9. At some point in October 2015, Lt. Emmett ran a query on one of the vehicles parked in a visitor space and determined that it belonged to J.S., a Trooper assigned to Troop F. He also noted that a vehicle he knew to belong to Tpr. Gillespie was parked in another visitor space. He informally spoke to both Troopers and reminded them that they were not to use a visitor space but to park in the gated lot. (*Exh. 15; Testimony of Lt. Emmett*)

10. Later that month, Lt. Emmett saw that Tpr. J.S. had, again, parked his personal vehicle in a visitor space. He again verbally instructed him not to do so. (*Exh. 15; Testimony of Lt. Emmett*)

11. Tpr. Gillespie spoke to Lt. Emmett and, later, to Lt. Brooks (the SP-Logan Station Commander) about the visitor parking situation.[6] Tpr. Gillespie explained that troopers (including himself) had suffered damage to their personal vehicles when parked in the gated lot, and complained that so long as TSA personnel were also using visitor spaces, it was not fair to enforce the rules against Troopers but not TSA personnel.[7] Lt. Brooks promised to look into these concerns but, as of January 2016, Tpr. Gillespie had not received a response. (*Exhs, 27, 28 & 30; Testimony of Appellant*)

12. On January 14, 2016, Tpr. J.S. reported late for duty, missing 7:00 am roll call. Later that morning, Lt. Emmett saw that Tpr. J.S. had, again, parked his personal vehicle in a visitor space and noted that the vehicle had remained there until Tpr. J.S. left work that afternoon. (*Exh.15 &16; Testimony of Lt. Emmett*)

13. On January 15, 2016, Lt. Emmett wrote a Supervisory Observation Report (also referred to as an EES, because it is part of the MSP Employee Evaluation System).[8] The EES cited the conduct of Tpr. J.S. the previous day, i.e. tardiness and parking in a visitor space. The EES informed Tpr. J.S. that he needed to make sure he allowed enough time to arrive for roll call and that, late or not, he must not park in a visitor space or he will be subject to other direct action. In addressing the EES with Tpr. J.S., Lt. Emmett also addressed other issues of concern that had been brought to his attention by Station Commander, Lt. Brooks, such as proper radio etiquette, wearing his issued cover (hat) while on patrol. (*Exhs. 15, 16 & 26; Testimony of Lt. Emmett*)

14. After the January 14, 2016 incident, Lt. Emmett again wrote up an EES on Tpr. J.S. for two subsequent instances of parking in a visitor space. Disciplinary action was not taken against him, however, as he was scheduled to retire, and did retire, in June 2016. (*Exh.18 & Post Hearing Exh. 35; Testimony of Lt. Emmett*)

15. Following roll call (at approximately 7:15 am) on January 20, 2016, having learned about the EES given to Tpr. J.S. (but not yet having seen the document itself), Tpr. Gillespie approached Lt. Emmett and brought up the conversation Lt. Emmett had with Tpr. J.S. on January 15, 2016 about the various issues that had been addressed in the EES and during the conversation with Tpr. J.S. (*Exhs. 15, 26ID & 30; Testimony of Appellant & Lt. Emmett*)

16. When the conversation turned to the subject of parking a personal vehicle in a visitor space, Tpr. Gillespie said something to the effect: "I am parked out front [in a visitor space] right now." (*Exhs.3,10, 12, 19 & 20; Testimony of Appellant & Lt. Emmett*)

17. Lt. Emmett and Tpr. Gillespie provided different versions of the encounter that then ensued. The preponderance of the credible evidence established the following:

- When Tpr. Gillespie stated that his car was then parked in a visitor space, this prompted Lt. Emmett to get up from his desk and peer out the window where he observed that, indeed, a personal vehicle Lt. Emmett knew to be that of Tpr. Gillespie was then parked in a space reserved for visitors.
- Upon observing Tpr. Gillespie's car in a visitor space, Lt. Emmett turned to face Tpr. Gillespie and said something to the effect: "You need to move your car. How can I EES one of your guys and not EES you?"[9]
- When Tpr. Gillespie did not respond, Lt. Emmett repeated: "Timmy you need to move your car."
- Tpr. Gillespie then stated something to the effect: "You can EES me if that's what you have to do. I'm OK with that. I have broad shoulders."
- Lt. Emmett responded: "Well, if that is the way it is, an EES will work your way".
- Lt. Emmett "left it at that" and Tpr. Gillespie went on patrol for the day.

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6. I infer that, at all times, in advocating for clarity about the MSP policy for using visitor parking, Tpr. Gillespie acted, in part, in his own self-interest and, in part, in his capacity as the Troop F union representative.

7. According to Tpr. Gillespie, the gated lot was also used by family, friends and local celebrities and was often near capacity, especially during school vacations. He also claimed that MSP senior management seemed to target "his" [Troop F's] "older guys" for what he called "minor infractions" and they had complained that they were "under a microscope." Specific corroborating evidence of these assertions was not produced. I note that, typically, a total of approximately 40 MPS personnel were on duty for each shift. (*Exhs. 3, 26ID & 30; Testimony of Appellant)*

8. An EES is used by MSP supervisors as a temporary record use to memorialize positive and negative performance to commend a job well done or to correct negative behavior, respectively, which is place in an employee's file for use in the next formal annual performance evaluation. An EES is not, in itself considered an award or discipline, but may be forwarded up the chain of command with a recommendation for such action if appropriate. (*Testimony of Maj. McGinn, Maj. Christianson, Lt. Brooks & Lt. Emmett*)

9. Lt. Emmett also testified that he thought he first stated that Tpr. Gillespie needed to move his car as he was moving from his desk to the window, but agreed that he probably spoke in a very low tone and agreed that Tpr. Gillespie may not have heard him this first time. (*Testimony of Appellant & Tpr. Gillespie*)

(*Exhs.3, 10, 12, 19 & 20; Testimony of Appellant & Lt. Emmett*)[10]

18. Later that morning, Lt. Emmett took a photograph showing Tpr. Gillespie's vehicle remained in the visitor's space and documented that the vehicle did belong to Tpr. Gillespie. (*Exhs. 17, 20 & 33; Testimony of Lt. Emmett*)

19. Lt. Emmett was in the process of writing up an EES incident report concerning the encounter with Tpr. Gillespie when Troop F Captain/Executive Officer (now Maj.) McGinn called (Lt. Emmett) to report to his office for his annual performance.[11] In the course of their discussion, Lt. Emmett mentioned that he was drafting an EES on Tpr. Gillespie, which prompted Capt. McGinn to inquire about the circumstances that resulted in the need for Lt. Emmett to write up such an EES. (*Exh. 15; Testimony of Maj. McGinn & Lt. Emmett*)

20. Upon learning that the nature of the EES involved a report that Tpr. Gillespie had refused to move his car from a visitor space after being told to do so, Capt. McGinn brought Lt. Emmett to the Troop F Commander, Maj. Christiansen, where he repeated the information that Lt. Emmett had just relayed to Capt. McGinn about the incident with Tpr. Gillespie that morning. (*Exhs. 15 & 28; Testimony of Maj. McGinn, Maj. Christiansen & Lt. Emmett*)

21. Maj. Christiansen ordered Lt. Emmett to draft a To/From memo to him and Capt. McGinn, which he later completed, along with the EES report, before leaving for the day. In addition to describing the initial incident, the To/From (entitled Refusal of Trooper Timothy Gillespie . . . to Obey Direct Order) also related the subsequent encounter between them when Lt. Emmett delivered the EES report to Tpr. Gillespie (who had stayed after hours on an overtime or detail shift). (*Exhs. 12, 15, 19 & 28; Testimony of Maj, Christiansen & Lt. Emmett*)

22. Later that day, Lt. Emmett called Tpr. Gillespie into his office and presented him with the completed EES. Tpr. Gillespie said he would not sign it and left the office without reading the document. (*Exhs. 3, 10, 12, 15, 19 & 30; Testimony of Appellant & Lt. Emmett*)

23. When Tpr. Gillespie eventually decided to read the EES, he went back to see Lt. Emmett, claiming that the EES was a complete fabrication that set him up for refusing to obey a direct order, which he knew, in effect, was insubordination. At this time, he also renewed his objections that nothing was being done to keep TSA employees out of the visitor spaces and stated an intention to begin to ticket them himself. (*Exh. 30; Testimony of Appellant & Lt. Emmett*)

24. Tpr. Gillespie also went to see Maj. Christiansen and vented his frustration for being set up for discipline on an EES that he, again, called a complete fabrication. Maj. Christiansen replied that Tpr. Gillespie needed to get union representation. (*Exh. 28 & 30; Testimony of Appellant & Maj. Christiansen*)[12]

25. After speaking with Maj. Christiansen, Trooper Gillespie moved his personal vehicle from the visitor space to the gated lot. (*Exh. 30; Testimony of Trooper Gillespie*)[13]

26. On January 21, 2016, Maj. Christiansen forwarded Lt. Emmett's To/From to his commanding officer, Lt. Col. Amodeo, Division of Field Services, with a request that an Internal Affairs investigation be conducted into Trp. Gillespie's actions. Maj Christiansen also spoke personally with Lt. Col. Amodeo to explain that he was requesting an investigation by Internal Affairs, rather than by anyone on the command staff at the Troop level, due to the nature of the incident and, in particular, the fact that Troop F command staff credibility was an issue, which warranted independent review. (*Exhs. 11 & 28; Testimony of Maj. Christiansen*)

27. On January 22, 2016, Tpr. Gillespie was informed that an Internal Affairs investigation was initiated into a complaint that he had been insubordinate towards Lt. Emmett as outlined in the January 20, 2016 To/From memo which was provided to Tpr. Gillespie. (*Exhs. 13 & 14*)

28. The Internal Affairs investigators collected over two dozen exhibits and held recorded interviews with Lt. Emmett (January 26, 2016), Tpr. J.S. (February 1, 2016), Lt. Brooks (February 2, 2016) Maj. Christiansen (February 9, 2016) and Tpr. Gillespie (August 23, 2016) Interviews were also conducted of certain TSA personnel who had been the subject of ticketing by Tpr. Gillespie following the January 20, 2016 incident. (*Exhs. 10, 15, 26ID, 27, 28 & 30*)

29. On September 22, 2016, the Internal Affairs investigator submitted a report that detailed the information gathered during the investigation and concluded with two recommendations:

> A. Regarding the allegation that Trooper Timothy M. Gillespie . . . was insubordinate when he refused to obey the order of Lieutenant Kevin Emmett to remove his personal vehicle from

10. According to Tpr. Gillespie, Lt. Emmet never got up from his desk, never looked out the window (claiming, initially, that his car was not visible from the window and, then, stating that maybe it was visible) and said he never heard Lt. Emmett tell him to move his car during the initial conversation right after roll call. The Internal Affairs investigator and the Trial Board did not find his "recollection" credible, and neither do I. (*Exhs. 3, 10: Testimony of Appellant & Det. Lt. O'Leary*)

11. Capt. McGinn was promoted in January 2017 and assumed the position of Troop F Commander upon the retirement of his predecessor, Maj. Christiansen. (*Testimony of Maj. McGinn & Maj. Christiansen*)

12. In February 2016, the MPS did issue a written directive that clarified the SP-Logan parking policy. (*Order 2016-FHQ-001*)

13. The To/From memo reported that, when presented with the EES report Tpr. Gillespie challenged Lt. Emmett to EES him again or charge him with insubordination because he would park there again. Tpr. Gillespie denies making such a statement. It is not disputed that, following his encounter with Maj. Christiansen, Tpr. Gillespie did move his car and never, again, parked it in the visitor lot. The discipline in this matter was imposed solely for Tpr. Gillespie's behavior in the initial colloquy right after roll call; Tpr. Gillespie was exonerated for his subsequent behavior, which is not disputed, in issuing parking tickets on vehicles parked in the visitor spaces that he claimed were owned by TSA employees or other unauthorized users. (*Exhs. 1 through 3, 9. 15, 23ID through 25ID, 28 through 30; Testimony of Appellant, Lt. Emmett, Lt. Brooks, Maj. McGinn & Maj. Christiansen*)

> the visitors parking area in front of SP-Logan on January 20, 2016, there is sufficient evidence to support employee misconduct - **SUSTAINED**.
>
> B. Regarding the allegation that Trooper Timothy M. Gillespie . . . inappropriately targeted TSA employees' vehicles in the visitors parking area in front of SP-Logan for issuance of parking tickets on several dates in January of 2016, this incident occurred, but the employee's actions were lawful and proper - **EXONERATED.**

(*Exh. 10; Testimony of Det. Lt. O'Leary*)

30. On April 14, 2017, a duly convened Trial Board issued unanimous Findings and Recommendations, to wit:

> "Regarding . . . Charge 1, Specification 1 (Insubordination) . . . Trooper Gillespie . . . on or about January 20, 2016, did fail to promptly obey a lawful order conveyed to him by a senior member of proper authority. This occurred when Trooper Gillespie failed to comply with a lawful order issued by Lieutenant Kevin D. Emmett . . . to remove his personal vehicle from the visitors' parking area in front of SP Logan . . .in direct violation of Article 5.12.1.[14] This is a Second Offence Class "B" violation."

(*Exhs. 3 & 6 through 8*)

31. The Trial Board found that Tpr. Gillespie's "intentions may have been honorable", but his actions constituted a failure to obey a lawful order. The Trial Board recommended the minimum punishment for a second Class B violation prescribed by the MSP Rules & Regulations, i.e., 10 days loss of accrued time (in lieu of suspension). (*Exhs.3 & 6 through 8*)

32. On April 19, 2017, MSP Colonel McKeon issued Personnel Order 17PER130 finding Tpr. Guilty of Charge 1, Specification [1] and ordering him to forfeit ten (10) days accrued time off. This appeal duly ensued. (*Exhs. 1 & 2; Claim of Appeal*)

33. By ruling dated July 12, 2018, the Commonwealth of Massachusetts Department of Labor Relations (DLR) issued rulings in two related administrative proceeding (SUP-17-5969, 6019) alleging charges of prohibited practices brought by SPAM for, among other things, alleged retaliation by the MSP against Trp. Gillespie for engaging in protected union activity by disciplining him for insubordination in April 2017. The rulings found ***no*** probable cause for the alleged prohibited labor practice based on the claim of retaliatory discipline by the MSP against Tpr. Gillespie.[15] The DLR administrative rulings (and the underlying DLR investigative recommendations) appear to be duly promulgated official records of the DLR. I take administrative notice of these rulings. (*PHExh.36*)

APPLICABLE LEGAL STANDARD

G.L. c. 31, §41-§45, made applicable to MSP members (Troopers) by G.L. c. 22C, §13, requires that discipline of a tenured member may be imposed only for "just cause" after due notice and hearing (which must be conducted prior to imposing discipline other than a suspension[16] from the payroll for less than five days) 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 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.

The Commission's role 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 Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997). *See also 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).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence[17], 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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 264-65 (2001).

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 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 politi-

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14. Article 5.12.1 states: "Members shall promptly obey any lawful order conveyed to them by any senior member of proper authority. For the purposes of this Article an order can be written or verbal." (*Exh. 5*)

15. The DLR did find that SPAM had shown probable cause of prohibited practices for certain unrelated statements by Maj. McGinn and Lt. Emmett's action in cutting a lock on a locker belonging to Tpr. Gillespie. (*PHExh.36; Testimony of Lt. Emmett*)

16. Forfeiture of accrued pay has been construed as equivalent to suspension and subject to hearing and notice requirements of c.31. *See Johnson* v. *Sup't of Mass. State Police*, 416 Mass. 616 (1993); *Doherty* v. *Mass. Civil Service Comm'n*, Suffolk C.A. 2016-02143-H (Sup.Ct.2018) (Ullmann, J.); *Dep't of State Police* v. *Civil Service Comm'n*, 24 Mass.L.Rptr.35, 2008WL1932961 (2008) (MacDonald, J.); *Mass. Dep't of State Police* v. *Civil Service Comm'n*, Suffolk C.A. 07-3766-A (Sup.Ct. 2008) (Qunlan, J.) The MSP notice of discipline acknowledged Trooper Gillespie's right to a c.31 appeal from the forfeiture decision (*Exh. 1*).

17. It is within the hearing officer's purview to determine the credibility of live testimony. *E.g*., *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 729 (2003). *See Embers of Salisbury, Inc.* v. *37 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) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

cal considerations, favoritism and bias in governmental employment decisions.'" *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. 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 "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, §1.

G.L. c. 31, Section 43 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") *Id.*, (*emphasis added*). *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).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. "[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." *Attorney General* v. *McHatton*, 428 Mass. 790, 793-74 (1999) and cases cited. *See also Falmouth* v. *Civil Service Comm'n*, 61 Mass. App. Ct. 796, 801-802 (2004); *Police Commissioner* v. *Civil Service Comm'n*, 39 Mass. App. Ct. 894, 601-602 (1996); *McIsaac* v. *Civil Service Comm'n*, 38 Mass. App. Ct. 473, 475-76 (1995); *Police Commissioner* v. *Civil Service Comm'n*, 22 Mass. App. Ct. 364, 371, *rev.den.* 398 Mass. 1103 (1986) *See also Spargo* v. *Civil Service Comm'n*, 50 Mass. App. Ct. 1106 (2000), *rev.den*., 433 Mass. 1102 (2001).

ANALYSIS

The MSP has proved that it had just cause to impose discipline upon Tpr. Gillespie for his failure to "promptly obey [the] lawful order" conveyed to him by a superior, i.e, the need to move his personal vehicle to the gated parking area designated for that purpose. I credit the testimony and other evidence presented by the MSP that proved Tpr. Gillespie was given such a lawful order and did not obey it in a timely fashion as MSP Rule 5.12 requires. Although he may have had bona fide reasons to believe that he had done nothing wrong (in choosing to park his personal vehicle in an area reserved for visitors), that belief does not excuse his failure to comply with a superior officer who made it clear that this underlying behavior was not acceptable and required prompt corrective action.

First, the issue before the Commission does not turn on whether Lt. Emmett was lawfully entitled to direct Tpr. Gillespie (and other Troop F personnel) to park their personal vehicles only in the designated gated area and demand that they not make use of visitor spaces. The authority of the MSP Troop F command staff to decide where MSP personnel are permitted to park, and to enforce its decisions, cannot be disputed. While there may be some reasonable dispute about the best practices for regulating the competing interests in providing appropriate parking access to SP-Logan personnel, compliance with the rules, as they may be established from time to time, is not a matter of personal discretion. The fact that MSP had not responded to Tpr. Gillespie's requests for action on the parking issues does not excuse his personal defiance. Tpr. Gillespie, especially, as a SPAM union representative and member of its Executive Board, knows that, when given a lawful order with which he may happen to disagree, he is obliged to comply with the order and, separately, follow through with a proper protest through appropriate channels (i.e., what is sometimes called the duty to "obey and then grieve").[18]

Second, I am persuaded by the preponderance of the credible evidence that, despite Tpr. Gillespie's assertion to the contrary, Lt. Emmett did, in fact, "convey" a "lawful order" that obliged Tpr. Gillespie "promptly" to move his car from the visitor area to the gated lot. Although the MSP's witnesses provided somewhat different recollections about the events of January 20, 2016, on the material issue of whether or not a lawful order was conveyed to Tpr. Gillespie "to move his car", I credit the testimony of Lt. Emmett that he did so, probably more than once, during the initial encounter with Trooper Gillespie right after roll call. While I find it plausible that Tpr. Gillespie may not have heard every word uttered by Lt. Emmett, it does not ring true to me that he did not see Lt. Emmett get up, walk past him, look out the window and state directly, at least once, to his face, words to the effect: "Timmy, you have to move your car." I do not credit Tpr. Gillespie's claim that Lt. Emmett's description of this aspect of the encounter was a "complete fabrication."

Third, I am convinced that, as the situation unfolded, Lt. Emmett found himself in a difficult position. Had Tpr. Gillespie's EES percolated up through the station commander (Lt. Brooks), rather than the Troop command structure (Capt. McGinn & Maj. Christiansen)—it is likely that Tpr. Gillespie might have escaped with a lesser discipline, if not entirely unscathed, and that may

18. The reasonableness of the SP-Logan parking arrangements is not before the Commission. I note, however, that some of the concerns expressed by Tpr. Gillespie seem less than compelling. For example, he claimed that there were only about four or five troopers with "high-end" cars who utilized the visitor spaces and, with 136 available spaces in the gated lot, it seems improbable that reasonable minds could not design suitable ways to accommodate those troopers' fear of having their cars "dinged" by unknown parties, assuming such a problem was considered a legitimate concern that needed to be addressed. Similarly, Tpr. Gillespie claimed that, between the MSP troopers and the TSA personnel using the visitor lot, it filled up early every day, which would only seem to exacerbate the problem that bona fides visitors would never be able to find a spot, giving more support to MSP's rationale for keeping troopers' personal vehicles from using those spaces for all-day or all-night parking.

well have been what Lt. Emmett and Tpr. Gillespie had originally expected.[19] However, upon coming to learn of the incident, Capt. McGinn and Maj. Christiansen were wholly within their lawful authority to direct Lt. Emmett to process the matter through them and, they, in turn, took the prudent and lawful steps to forward the matter further up the command structure. I need not consider what might have been, if Lt. Emmett had not be asked about the matter by his superiors or chosen to provide them less than the unvarnished truth, as I find he did.

Fourth, I have carefully considered Tpr. Gillespie's claim that he was treated differently, both procedurally and substantively, from other similarly situated troopers who had committed the similar violations. While it is true that his case was handled by Internal Affairs rather than through a more local investigation, I agree with the MSP's justification for following that process in this particular case. As Maj. Christiansen explained, his decision was actually intended to provide a more "independent" review of the matter than might have been the case if a member of the Troop F command structure was asked to investigate allegations of peers in the command structure. Similarly, I do not find that the situation involving Tpr. J.S. demonstrates that the MSP provided disparate treatment of that trooper over Tpr. Gillespie. As indicated above, Tpr. Gillespie was disciplined for insubordination; Tpr. J.S. was reprimanded for a parking violation, not insubordination. When he did subsequently violate the order to stay out of the visitor parking area, he, too was scheduled to be processed for further discipline, which never took place when that trooper decided to retire. Finally, I take note that Tpr. Gillespie's discipline included a four-day forfeiture for a prior (2011) "Class B" violation.

Fifth, I have also considered Tpr. Gillespie's contention that his discipline was retaliatory in nature, attributed to his position and/or advocacy as a SPAM representative. While there was no dispute that Tpr. Gillespie was engaged in a variety of union activities, including litigation, that challenged certain Troop F actions as unlawful labor practices, the evidence did not establish a sufficient nexus, through direct evidence or by inference, that his union activities—even those related directly to the parking issue—played a material role in the discipline involved. In this regard, I note that the Troop F command decision to devolve the investigation to Internal Affairs, and the ultimate recommendations being through a Trial Board, are significant indicators that show a lack of nexus to Tpr. Gillespie's advocacy on behalf of Troop F members. Finally, I take notice of the DLR decisions noted earlier, which found that Tpr. Gillespie's 2016 discipline was not taken in retaliation for any of his union activities. While the Commission may not be expressly bound by that decision, I find it persuasive and corroborative of the conclusion I reach in the matter from the other evidence described above that was presented to the commission. *See generally*, *Town of Dedham* v. *Labor Relations Comm'n*, 365 Mass. 392 (1974), *cited in Fernandes* v. *Attleborough Housing Auth.*, 470 Mass. 117 (2014)

Sixth, I have considered, whether the Commission should exercise its discretion to modify the discipline imposed. Here, save for the findings above that Tpr. Gillespie did move his car at the end of the day on January 20, 2016 and did not again park in a visitor space, the findings of fact set forth above do not materially differ from those upon which the Trial Board's recommendation was grounded and the penalty imposed by the MSP Colonel for the offense. Accordingly, I conclude that this is not a matter on which the penalty imposed should be modified.

For these reasons, the Appellant's appeal under Case No. D-17-78 is hereby **DENIED**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman [absent], Stein and Tivnan, Commissioners) on October 24, 2019.

Notice to:

Gregory P. Benoit, Esq.
Eden Rafferty
238 Shrewsbury Street
Worcester, MA 01604

Suzanne T. Caravaggio, Esq.
Departmental Prosecutor
Division of Standards and Training
Massachusetts State Police
470 Worcester RoadFramingham, MA 01702

* * * * * *

19. Lt. Brooks had suggested that he might have taken less umbrage at Tpr. Gillespie's behavior than did others did, noting that, in general, parking violations were typically addressed "verbally." (*Exh. 27;Testimony of Lt. Brooks*)

CORTLAND CARTWRIGHT and SAMANTHA ACKERSON

v.

CITY OF BROCKTON

G1-19-180 (Cartwright)
G1-19-183 (Ackerson)

November 7, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Municipal Police Officer-Failure to Pass Physical Abilities Test-Tougher Standards—Citing the grounds of fundamental fairness, Chairman Christopher C. Bowman ordered HRD to annul the rescission of two Brockton candidates' acceptances to the Police Academy. The two candidates were accepted into the academy having passed the Physical Abilities Test but were unable to pass the revised test put in place after their acceptance. Both candidates had resigned from their jobs in anticipation of attending the academy.

DECISION

The Civil Service Commission (Commission) received appeals from two (2) Appellants contesting their non-selection to the position of police officer by the City of Brockton (City). Cortland Cartwright (Mr. Cartwright) filed his appeal with the Commission on August 23, 2019 and Samantha Ackerson (Ms. Ackerson) filed her appeal with the Commission on August 28, 2019.

2. Pre-hearing conferences regarding both appeals were held at the offices of the Commission on September 17, 2019. The Appellants and counsel for the City attended each pre-hearing conference.

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

A. The City granted conditional offers of employment to the position of police officer to both candidates.

B. Among the conditions were the following: 1) Successful completion of a medical examination; 2) Successful completion of a psychological examination; 3) successful completion of the Physical Abilities Test (PAT) conducted by the state's Human Resources Division (HRD); and 4) successful completion of a Police Academy.

C. Both Appellants successfully completed the medical examination, psychological examination and the PAT.

D. Both Appellants were notified that they were accepted into the Police Academy.

E. Both Appellants, upon being notified of their acceptance into the Police Academy, notified their employers at the time that they would be resigning to accept a police officer appointment in Brockton.

F. Entrance requirements into a Police Academy fall under the Massachusetts Municipal Police Training Committee (MPTC).

G. Shortly prior to the Police Academy start date, both Appellants were notified of a new physical fitness entrance requirement to enter the Police Academy, above and beyond the already-completed PAT.

H. Specifically, the Appellants, prior to entering the Police Academy, were required by the MPTC to undergo a physical fitness examination that included completion of a 1.5 mile run, push-ups, sit-ups and a 300 meter run.

I. Mr. Cartwright failed to complete the sit-up and 1.5 mile run portion of the examination within the time limits.

J. Ms. Ackerson failed to complete the 1.5 mile run portion of the examination within the time limit (by 19 seconds).

K. The MPTC rescinded both Appellants' acceptance into the Police Academy.

L. The City rescinded the Appellants' conditional offers of employment. Mr. Cartwright's non-selection was not considered a bypass, as nobody ranked below him was appointed. Ms. Ackerson's non-selection was a bypass.

M. Mr. Cartwright was able to rescind his resignation at his current employer and is still employed.

N. Ms. Ackerson was not able to rescind her resignation with her former employer and is now unemployed.

4. A review of the MPTC minutes in 2019 shows that the MPTC has been debating the issue of new physical fitness standards and when/how they should be implemented for several months.

5. According to the May 28, 2019 MPTC minutes:

"The Boston and Worcester Police Academies have concerns about the new fitness standards and asked that the Committee revisit the previously-implemented ROC entry-level fitness requirements. Superintendent Cox from the Boston Police Department told the Committee that the academy staff administered the entry-level standards to the recruits in its current academy to estimate the impact of the standards. The fitness standards were not in effect when the Boston and Worcester police academies collected data from the physical fitness tests. **However, the data demonstrated that the majority of student officers in both police academies would not have passed the new entry level standards**. As a result, the Boston Police Department is asking the Committee to revisit the entry level standards before its implementation. One proposal was to allow academies flexibility when administering the entry level standards.

Joe Vieira commented that the decision to front load the entry level standard will benefit the smaller departments. If a recruit was unable to pass the entry level standards, a smaller department could send multiple people and still be able to secure a spot within an academy. Chief O'Donnell added that the entry level fitness standard ensures that people entering an academy are in shape and less likely to get injured while performing PT.

Superintendent Cox explained that implementing an entry level fitness standard for an entrance into the academy can have significant impact on larger departments. **The Boston Police Department attracts people with a variety of backgrounds who may not have the resources to prepare for these standards.** The Committee discussed whether the standard is too high and whether it should consider an exit standard.

There is a disparity in the numbers for Worcester, Springfield and Boston. U/S Reidy said that the standard is having a significant

> impact on the larger departments. One solution considered was postponing the implementation of the entry level fitness standards to see if the standard should be adjusted.
>
> Chief Hicks suggested keeping the process for entry level standards in place but deferring the requirement until July 2020. Deferring the standards would allow additional data to be collected. Ed Zivkovich recommended another option. The Committee could contract with a person who has a physiology degree who could collect data and make recommendations on what are reasonable fitness standards. There was further discussion about offering a standard and lowering the percentage. **U/S Reidy said that the Committee should hold off on implementing the entry level fitness standards until more data is collected. The standards are impacting the three (3) largest cities in Massachusetts and therefore it may not be beneficial to rush implementation for July 2019**." (emphasis added)

6. Ultimately, the MPTC, on May 28, 2019, by a 7-3 vote, voted to implement a 6-month moratorium on the new fitness standards until January 1, 2020.

7. According to the June 21, 2019 MPTC minutes:

> "At last month's meeting, concerns of a few of the Commonwealth's largest departments over the entry-level fitness standards that had been recently voted on for implementation July 1, 2019, produced a six-month moratorium on its implementation, moving it to January 1, 2020. Chairman Hicks commented that he has been receiving feedback that this was not a welcome change. He stated that the Committee needs to be sensitive to all cities and towns in the Commonwealth. There was much discussion about a lower entry standard, giving time to build to a predetermined higher standard of fitness. It was suggested that MPTC might develop a training video on how to properly prepare for training, available to those who are considering pursuing this career. A lower entry level would allow more students entry and with an opportunity for coaching in Health and Wellness on how to build strength and stamina, with a reasonable goal. Those departments that have cadet programs could be mentoring these students and help prepare them for application. Several ideas were offered with regards to working with candidates during the hiring process. Ultimately, a new Motion was made to reconsider the Motion of last month's meeting regarding the moratorium on entry-level fitness testing to enter a police academy and instead revise the fitness standard to establish a 30th percentile entry level (based on the Cooper Institute norms) for any academy beginning after September 1, 2019. Students must also then attain the 40th percentile in all four events by week 8. Those who fail to do so will be retested by week 10. Failure to meet the standard by week 10 will result in dismissal for non-disciplinary reasons. Participation requirements remain in effect. The Motion was seconded and passed, one abstention (Vieira). Jason Shea, MPTC SWC will be asked to amend the daily PT regimen to reflect the new standards."

8. Both of the Appellants were scheduled to begin the Police Academy in Randolph on September 9, 2019, nine (9) days after the new effective date referenced above.

9. The City of Brockton is a "consent decree" community and, thus, is required to submit any reasons for bypassing police officer candidates to HRD for approval.

10. There was nothing in the record showing whether the City sent the reason for bypassing Ms. Ackerson to HRD and/or whether such reason was reviewed and accepted by HRD.

11. On September 19, 2019, I issued a Procedural Order, requesting relevant information from the City and HRD, which was subsequently provided to the Commission.

12. That information provided confirmed that the City did not provide HRD with the reason for bypassing Ms. Ackerson, but, rather, notified her directly of the reasons for bypass.[1]

ANALYSIS / RELIEF TO BE GRANTED

The undisputed facts here show that the Appellants are aggrieved persons. They were harmed through no fault of their own when the entrance requirements for police officer were effectively modified mid-way through the hiring process.

Both of the Appellants met all of the required conditions of the conditional offer of employment to be a Brockton Police Officer with the exception of completing the Police Academy. Upon being notified that they were accepted into the Police Academy, they both resigned from their employment at the time. Then, with little notice, they were abruptly informed of new entrance requirements for the Police Academy which were not in place at the time they signed the Certification as willing to accept employment or at any point in the process, including, but not limited to, the time at which they resigned from their employment.

This is fundamentally unfair. As both of the Appellants stated at the pre-hearing conference, had they been aware of the new Police Academy entrance requirements at the time, they would have geared their physical preparation around those standards, as opposed to the standards of the PAT, which both of them successfully passed. This is of particular concern when, as here, the candidates are seeking a position in a City still subject to a consent decree and it appears that no data was collected by the MPTC regarding the potential impact the new standards would have regarding the disqualification of current or new recruits.

For these reasons, relief is warranted to ensure that both Appellants, now aware of the new physical fitness requirements, have at least one additional opportunity to be considered for appointment as a Brockton Police Officer, a job for which the City already granted them a conditional offer of employment.

The Appellants' appeals are ***allowed***.

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

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1. The correspondence provided by the City includes an email from the Brockton Police Department stating that Ms. Ackerson was not bypassed. This is incorrect. Since candidates ranked below Ms. Ackerson, who was willing to accept appointment, were appointed, a bypass occurred. The City, as a consent decree community, was required to provide HRD with the proposed reason for bypass.

1. HRD shall place the names of Cortland Cartwright and Samantha Ackerson at the top of any future Certification for permanent, full-time police officer in the City of Brockton until such time as they are appointed or bypassed.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 7, 2019.

Notice to:

Cortland Cartwright
[Address redacted]

Samantha Ackerson
[Address redacted]

Brittany E. Blye, Esq.
Assistant City Solicitor
City of Brockton
Brockton City Hall
45 School Street
Brockton, MA 02301

Patrick Butler, Esq.
Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

AUREL KODHIMAJ

v.

DEPARTMENT OF CORRECTION

G1-18-131

November 7, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Correctional Officer-Criminal Conviction for Marijuana Possession—The Commission affirmed the bypass of a candidate for original appointment as a Correction Officer based on a 2009 arrest for marijuana possession. The decision found that DOC's consideration of all criminal record information related to the Appellant was lawful and that its decision-making process was thoughtful and not unreasonable given the necessity of a zero-tolerance policy regarding illegal drugs in any DOC facility.

DECISION

On July 17, 2018, the Appellant, Aurel Kodhimaj (Appellant or Mr. Kodhimaj), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on August 14, 2018 at the offices of the Commission and I held a full hearing at the same location on November 5, 2018.[1] The hearing was digitally recorded.[2] DOC submitted a proposed decision on January 11, 2019. The Appellant, who appeared pro se, did not submit a proposed decision. FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing (Respondent Exhibits 1-9 (R1-R9)); Appellant Exhibit 1 (A1)); and Post Hearing Exhibit 1 (PH 1). I subsequently re-opened the record and requested that DOC submit additional documents which have all been marked as post-hearing exhibits. Based on the exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC;
- Jonathan Thomas, Correction Officer I (CO I), Background Investigator, DOC;
- Paul Dietl, then-Deputy Commissioner, Administration, DOC;

Called by the Appellant:

- Aurel Kodhimaj, 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. The Commission subsequently had the recording transcribed into a written transcript.

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 is thirty-two (32) years old. He was born in Albania. After his brother was kidnapped in 1997, his family moved to Greece. They eventually received asylum and moved to the United States in 2005, when the Appellant was eighteen (18) years old. The Appellant completed his senior year of high school and graduated from high school in Worcester. The Appellant became a United States citizen in 2011. (Testimony of Appellant)

2. The Appellant is fluent in English, Albanian and Greek and has a fair knowledge of Italian. (Testimony of Appellant)

3. While a senior in high school, the Appellant began working as a pizza delivery driver at a pizza shop in Worcester. Five (5) years later, the Appellant's family bought the pizza shop. The Appellant is a now a manager at the business and works there 55-60 hours per week. (Testimony of Appellant)

4. In March 2009, when the Appellant was twenty-one (21) years old, he was arrested and charged with possession of an illegal Class D substance (marijuana) with the intent to distribute. (Testimony of Appellant and Exhibit A1)

5. The charges were later amended to only include possession of an illegal Class D substance. (Testimony of Appellant and Exhibit A1)

6. The criminal docket sheet from Worcester District Court (provided by the Appellant), under Disposition Date, states "5/13/09". Under "Disposition Method" it states: "Decriminalized (277 §70c)". Under "Finding" it states: "Responsible" and under "Fine / Assessment" it states: 100. (Exhibit A1)[3]

7. The Appellant acknowledges that, for a two (2)-week period in 2009, he made "poor poor decisions" and sold marijuana illegally. (Testimony of Appellant)

8. Many correction officers patronize the pizza shop owned by the Appellant's family. Some of them encouraged the Appellant to consider a career as a correction officer. (Testimony of Appellant)

9. On March 19, 2016, the Appellant took and passed the civil service examination for Correction Officer I (CO I). (Stipulated Fact)

10. On January 19, 2018, the Appellant's name appeared on Certification No. 05164 ranked 67th among those willing to accept appointment as a CO I. (Stipulated Fact)

11. DOC appointed one-hundred fifty-six (156) candidates, sixteen (16) of whom were ranked below the Appellant, thus creating a "bypass" of the Appellant. (Stipulated Facts)

12. The one (1) reason for bypass stated on DOC's bypass letter to the Appellant was: "Failed background based on a 3/31/2009 Worcester Police Arrest Report where the applcaint (sic) was surveilled by Worcester Vice Detectives and then subsequently charged with Possession of an illegal Class D Substance with the Intent to Distribute." (Exhibit R2)

DOC'S REVIEW OF THE APPELLANT'S BACKGROUND

13. On February 23, 2018, the Appellant completed an "Application for Employment." The following two (2) questions appear on Page 16 of the application:

- "Has any member of your immediate family or a relative (including in-laws) ever been or is currently incarcerated in any Massachusetts State or County Correctional Institution?
- Are you aware of any acquaintance(s) or personal friend(s) who are or have been incarcerated?"

The Appellant truthfully answered "no" to both of these questions. (Exhibit R9)

14. DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). This information is accessed online by CJIS-authorized DOC employees. (Testimony of Jalette and Exhibit R4)

15. When requesting the information online, the DOC employee is prompted to indicate whether the purpose of the inquiry is: "Criminal", "Justice", or "Firearms". The DOC employee chose "Justice". (Testimony of Jalette)

16. Eugene T. Jalette is the Supervising Identification Agent at DOC responsible for overseeing the background investigations of DOC applicants. Based on his CJIS training, his understanding is that, by selecting the "Justice" category, you are indicating that you are a public safety agency seeking CORI information for the purpose of conducting an employment-related background investigation. (Testimony of Jalette)

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3. G.L. c. 277, § 70C states: "Upon oral motion by the commonwealth or the defendant at arraignment or pretrial conference, or upon the court's own motion at any time, the court may, unless the commonwealth objects, in writing, stating the reasons for such objection, treat a violation of a municipal ordinance, or by-law or a misdemeanor offense as a civil infraction …. If a motion to proceed civilly is allowed, the court shall not appoint counsel. If counsel has already been appointed, the court shall revoke the appointment. A person complained of for such civil infraction shall be adjudicated responsible upon such finding by the court and shall not be sentenced to any term of incarceration. The commonwealth shall maintain a copy of all objections filed under this section and shall report the number of such objections, delineated by divisions of the district court, every 6 months to the house and senate committees on ways and means. When the court has treated a violation of a municipal ordinance or by-law or a misdemeanor offense as a civil infraction under this section and the ordinance, by-law or misdemeanor in question does not set forth a civil fine as a possible penalty, the court may impose a fine of not more than $5,000. An adjudication of responsibility shall neither be used in the calculation of second and subsequent offenses under any chapter, nor as the basis for the revocation of parole or of a probation surrender. An adjudication of responsibility under this section may include an order of restitution."

17. In response to a CJIS inquiry regarding the Appellant on February 16, 2018, DOC received a report titled: "Criminal History NCIC/III (QH)". According to Mr. Jalette, this is "fingerprint-supported data submitted to the FBI and for use with local law enforcement and national law enforcement to examine criminal records." (Testimony of Jalette) That report showed that the Appellant had an "FBI Number" which can be used to make an additional query about the Appellant. (*Id*.)

18. Using the FBI Number, DOC conducted an inquiry which produced a report titled "Criminal History NCIC/III (QR)" stating: "This interstate identification index response is the result of your record request for FBI/[number redacted]. The record may be obtained from within your state. The interstate identification index contains no additional data." (Exhibit R4)

19. Using this information, DOC was able to query another report titled: "Criminal History Record Information (CHRI) (FQ)". This report stated in relevant part:

> "Arrest Date: 2009-03-31
>
> …
>
> Arresting Agency: WORCESTER PD
>
> Subject: KODHIMAJ, AURIEL
>
> Charge Literal Class D, Possession w/intent to Distribute
>
> Severity Unknown" (Exhibit R4)

20. Also on February 16, 2018, DOC obtained a certified "Docket Report" from Worcester District Court. This certified "Docket Report" appears to have been downloaded from a database and contains no hand-written information. The Docket Report submitted by the Appellant appears to contain the most accurate information, with hand-written check marks and hand-writing, presumably by the presiding Judge. The actual docket sheet indicates that the charges were amended to only include "possession" of marijuana and *not* the more serious charge of "intent to distribute." There is no indication on the automated docket sheet, submitted by DOC, that the more serious charge of intent to distribute was dropped.[4] Also, instead of stating explicitly that the case was "decriminalized", the automated docket sheet only makes a reference to the Appellant being "Responsible Under G.L. c. 277 § 70C."[5] (Exhibit R5 and Exhibit A1)

21. DOC also obtained a copy of the arrest report from the Worcester Police Department which contained a detailed description of the surveillance operation and the specific evidence related to the criminal charges. (Exhibit R6)

22. A background investigator reviewed all documents provided to him; interviewed the Appellant, his references, a neighbor and his father. As part of the background interview, the Appellant was asked a series of questions and the answers are noted by the investigator on an "interview checklist" form. Among the questions asked by the investigator are:

- Have you ever been convicted of a felony?
- Have you ever been convicted of a misdemeanor and served time in a jail of (sic) House of Correction for said conviction?
- Have you ever been convicted of any crime, which resulted in your being imprisoned?

The Appellant truthfully answered "no" to all of these questions. (Post Hearing Exhibit 1)

23. On March 11, 2018, the background investigator, after reviewing relevant documents and speaking with the Appellant, completed a summary of his findings.[6] Under "positive employment aspects", the investigator wrote: "Applicant has a high school degree and speaks three (3) languages; Applicant as (sic) extensive experience in customer service and skilled at responding to issues; Applicant has leadership experience working as a manager in a fast-paced environment; Applicant has strong family values." Under "negative employment aspects" the background investigator wrote: "Applicants (sic) past driving history and arrest for possession of marijuana." (Exhibit R3)

24. On March 14, 2018, Mr. Jalette conducted another CJIS inquiry and received a report with the heading: "MA Criminal History (BOP)." The report stated in relevant part:

> "ARRAIGNMENT: (0001)
>
> ARG-DATE: 04/01/09 PD: WOR COURT: WORCESTER DISTRICT
>
> OFF: POSS CLASS D CONT SUB
>
> STATUS: C WPD: WDT:
>
> DISP: C 5/13/09 CIVIL (277-70C) (Exhibit R4)

25. DOC did not see the actual criminal docket sheet obtained by the Appellant. (Testimony of Jalette)

26. A group of senior DOC officials, including the DOC Commissioner; Chief of Staff; Human Resources Director, the Deputy Commissioner of Administration and Mr. Jalette, met to discuss sixty-one (61) candidates that may potentially be bypassed for appointment. Of the sixty-one (61) candidates reviewed, approximately half were bypassed and half were not. (Testimony of Dietl)

27. Paul Dietl was the Deputy Commissioner of Administration at DOC at the time and he attended the meeting referenced above. Mr. Dietl does not have a specific memory of the details discussed about each candidate, but he recalls the general concern by senior

4. It is clear that, when the raw data from the actual docket sheet was data-entered as part of a court computer system conversion project, there was a failure to capture the information that the intent to distribute charge was dropped.

5. Mr. Jalette, during his testimony before the Commission stated: "It was continued 5/13/09, and then civilly adjudicated 270—I'm not sure what those numbers are."

6. As part of the background interview, the Appellant acknowledged to the investigator that he had sold marijuana illegally nine (9) years ago. (Exhibit R3)

officials that the Appellant had been illegally selling marijuana nine (9) years ago. Mr. Dietl stated: "… we have a national crisis with drugs in our prisons, state and county and federal prisons … so whether or not someone is distributing drugs at another point in life, I think that there are a lot of jobs where you would say there's no nexus and no danger. I think at DOC we think that there is a danger with that." (Testimony of Dietl)

28. As referenced above, on July 9, 2018, DOC sent a bypass letter to the Appellant. The one (1) reason for bypass stated on DOC's non-selection letter to the Appellant was: "Failed background based on a 3/31/2009 Worcester Police Arrest Report where the applcaint (sic) was surveilled by Worcester Vice Detectives and then subsequently charged with Possession of an illegal Class D Substance with the Intent to Distribute." (Exhibit R2)

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. "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).

ANALYSIS

This appeal presents three (3) issues:

I. Was DOC permitted to consider all criminal record information related to the Appellant as part of its decision-making process?

II. If so, was this information used properly in the decision-making process?

III. Does the Appellant's misconduct justify DOC's decision to bypass him for appointment as a CO I?

In regard to the first issue, DOC was provided with *all* of the Appellant's criminal offender record information from CJIS, including information that would generally not be provided to non-criminal justice employers. DOC's ability to receive all of the Appellant's CORI information from CJIS appears to be derived from that section of the state's CORI Law (G.L. c. 6, § 172) which 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 …"

Among the criminal justice duties that DOC must perform is the appointment of suitable candidates, such as CO Is, to provide for the care and custody of criminal offenders. In that context, it is appropriate for DOC to conduct a thorough review of a candidate's background, including the review of a candidate's entire criminal offender record information. This is consistent with years of Commission decisions involving the bypass of criminal justice candidates based on their entire criminal record. *See Brooks* v. *Boston Police Department*, 12 MCSR 19 (1999), (BPD was justified in bypassing a police officer candidate whose record included criminal charges without convictions); *Lavaud* v. *Boston Police Department*, 12 MCSR 236 (1999), (bypass justified based on assault and battery in which he was found not guilty and five additional court appearances since 1994.); *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.); *Thames* v. *Boston Police Department*, 17 MCSR 125 (2004), (Boston Police Department could rely on Appellant's long record of arrests to warrant his bypass, even where those arrests had led to charges that had all been eventually been dismissed.); *Preece* v. *Department of Correction*, 20 MCSR 152 (2007), (bypass upheld based on his criminal history of being charged with second degree murder and assault, even though the Appellant had been acquitted) *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); *Solbo* v. *Department of Correction*, 24 MCSR 519 (2011) (Appellant's arrest and arraignment for assault and battery, even though the charge was dismissed, coupled with a poor driving history, provided DOC with justification to bypass the Appellant for appointment as a CO I); *Feliciano* v. *Springfield*

Police Department, 25 MCSR 412 (2012), (even though a charge of murder against the Appellant was nol prossed, the City "after conducting a … reasonably thorough review of events and circumstances related to this murder charge, discovered information that justifies their decision not to hire [the Appellant]"; *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.); *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.)

In regard to the second issue, i.e.—whether, once DOC was provided with all of the Appellant's criminal record information, they used the information properly as part of the decision-making process, a careful review of the process shows that, with limited exception, they did.

G.L. c. 31, § 20 states in relevant part that:

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

G.L. c. 151B, § 4 states that it shall be an unlawful practice:

> "9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276. (emphasis added)
>
> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.
>
> Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.
>
> 9 1/2. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses."

As referenced in the findings herein, DOC's "interview checklist", which is effectively a supplement to the application, asks:

- Have you ever been convicted of a felony?
- Have you ever been convicted of a misdemeanor and served time in a jail of (sic) House of Correction for said conviction?
- Have you ever been convicted of any crime, which resulted in your being imprisoned?

All of these questions on the application are permissible, given that DOC must assess whether the candidate is statutorily disqualified from being appointed under G.L. c. 125, § 9 which states in relevant part:

> " … no person who has been convicted of a felony or who has been convicted of a misdemeanor and has been confined in any jail or house of correction for said conviction, shall be appointed to any position in the department of correction …"

These limited and permissible criminal record-related questions stand in sharp contrast to other cases that have been decided by the Commission. In *Kerr* v. *Boston Police Dep't*, 31 MCSR 25 (2018), a question on the BPD employment application asked: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" These type of broad questions on the employment application, designed to obtain information from the applicant, beyond what is provided for under Chapter 151B, are not permissible.

That turns to the question of whether, as part of the reasonably thorough review that DOC was required to undertake here, they were permitted to inquire with the Appellant about his entire criminal record information (beyond the questions in the application) after they had independently, and legally, obtained this information through CJIS. Based on the manner in which DOC's inquiry was conducted here, I believe the inquiry was permissible under the statute and encouraged under a relevant Executive Order.

G.L. c. 6, § 171A states in part:

> "In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record informa-

> tion shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information."

I listened carefully to the testimony of DOC's background investigator as well as the Appellant regarding the manner in which the criminal record information of the Appellant was discussed. Based on their consistent and credible testimony, there was no attempt by the background investigator to withhold any CORI-related information that he had obtained regarding the Appellant, nor was there any attempt to see if the Appellant would voluntarily acknowledge his entire criminal record before sharing it with him to assess his honesty. Rather, the background investigator was transparent and forthcoming during the one-on-one interview conducted at the Appellant's home. The background investigator informed the Appellant at the outset about the CORI-related information he had obtained and then offered the Appellant the opportunity to address the information that DOC had independently obtained about him. While the background investigator did not physically hand the Appellant a copy of the CORI information before the interview, which the statute appears to call for, I do not consider that misstep to be a fatal flaw here. The point is that DOC's process is consistent with the intent of the statute: be transparent, let the Appellant know what additional CORI-related information you have obtained; and then allow him/her to provide an explanation about the alleged or actual misconduct.

Sharing the CORI-related information with the Appellant and giving him the opportunity to discuss that information also appears to be consistent with Executive Order 495 (2008) (EO 495): "Regarding the Use and Dissemination of Criminal Offender Record Information.by the Executive Department." In 2009, speaking on behalf of his CORI reform legislation before the Joint Committee on the Judiciary, Governor Deval Patrick stated: "The only condition we impose is that the employer give the applicant a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before the employer makes a hiring decision." That is precisely what occurred here. When presented with the information that DOC had legally obtained from an independent source, the Appellant acknowledged that, for a brief period several years ago, he had illegally sold marijuana; and he provided confirmation and clarification that one charge had been dropped and another converted to a civil offense with payment of a $100 fine. The Appellant then told the investigator that, while he considered his conduct several years ago to be a serious error in judgment, it did not define who is he is today: a law-abiding citizen who works up to 60 hours per week in a family-owned business with a sincere desire to pursue a career in law enforcement.

In summary, the manner in which DOC obtained, inquired about, and considered the Appellant's entire criminal record is consistent with the longstanding civil service requirement to conduct a reasonably thorough review of a candidate's background before deciding to bypass him or her as well those laws meant to limit how a candidate's CORI information can be considered.

This balanced approach is consistent with the SJC's decision in *Bynes* v. *School Committee*, 411 Mass. 264, 581 (1991). In *Bynes*, the SJC held that the Boston School Committee had acted properly in accessing the CORI of two school bus drivers in 1985, as part of a broader inquiry into the background of its current and prospective drivers. The CORI check revealed that one driver had been convicted of assault by means of a dangerous weapon 12 years earlier, with a second similar charge a year earlier having been dismissed after payment of restitution. The other driver had a conviction in 1975 for possession of marihuana with intent to distribute, for which she received a suspended sentence and probation.

The SJC rejected the claim that G.L.c.151B,§ 4(9) had been violated, because the school committee was expressly authorized by the CORI law to obtain CORI records on such employees and was so certified by CHSB, so that such CORI information, *which came from a lawful source other than the drivers themselves*, did not constitute a violation of Chapter 151B. *Id*., 411 Mass. at 266-269, *See also*, *Ryan* v. *Chief Admin. Justice*, 56 Mass. App. Ct. 1115, 779 (2002) (no violation of c. 151B,§ 4((9) from denying promotion of a court officer based on knowledge of c.209A restraining order reported in the media).

In *Bynes*, the SJC also rejected the claim that the school committee violated the CORI law by obtaining information that exceeded the type of CORI it was certified to receive, holding that, under the facts presented, the responsibility for such oversight, if any, would lie with the CHSB and not the school committee. *Id.* 411 Mass. at 270-271, 581 N.E.2d at 1022-23. *Cf. Bellin* v. *Kelly*, 435 Mass. 261, 755 N.E.2d 1274 (2001) (authorizing police to disclose CORI to employer as part of investigation into employee's possible subsequent offenses). *See generally*, *Crete* v. *City of Lowell*, 418 F.3d 54 (1st Cir. 2005) (absolving municipality from liability for hiring police officer despite an adverse CORI in subsequent excessive use of force claim).

Further, I believe the balanced approach here is consistent with the Appeals Court's decision in *Kraft* v. *Police Commissioner of Boston*, 410 Mass.155 (1991). Kraft, a Boston Police Officer, was terminated, after the Department learned that he had failed to disclose on his application for employment that he had previously been a patient receiving psychological treatment at the Veterans' Administration Hospital. The Appeals Court, ruling in favor of Kraft, stated that, since the Boston Police Department was not permitted, under G.L. c. 151B, to ask that question on the application for employment, then Kraft could not be disciplined for providing a false answer. The Appeals Court went on to state, however, that the Boston Police Commissioner: " … could have obtained information concerning Kraft's qualifications [to carry

a firearm, which is a job requirement], however, without violating [the state's anti-discrimination law]." That is precisely what DOC did here. After legally obtaining criminal record information about the Appellant, and only after disclosing this information to the Appellant, DOC provided the Appellant with a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before making its hiring decision.[7]

Finally, as to the third issue, having determined that DOC properly obtained and was permitted to consider the Appellant's entire criminal record as part of its review, the question turns to whether, standing alone, the Appellant's prior misconduct provided DOC with reasonable justification to bypass him for appointment.

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. While the Commission, when there is no evidence of political or personal overtones, owes substantial deference to the judgment of criminal justice Appointing Authorities regarding hiring decisions, that deference is not without limits. In the matter of *Teixeira* v. *Department of Correction* 27 MCSR 471 (2014), DOC relied upon two (2) criminal matters that had occurred almost twenty (20) years earlier, when the candidate was a junior in high school, without ever giving the candidate the opportunity to address his criminal record and without even considering the candidate's life record over the intervening two (2) decades. The Commission, in overturning DOC's bypass decision, stated:

> "The wisdom of looking behind a CORI report was on full display here. Without doing the type of thorough review referenced in *Beverly*, DOC, when making its hiring decision, did not know that Mr. Teixeira was a junior in high school when the crime was committed. They did not know that, during the two decades that has transpired since then, Mr. Teixeira has become a father who is actively involved in his son's school and extracurricular activities, serving as a youth sports coach and chaperone for class trips. They did not know that, for the past eight (8) years, Mr. Teixeira has worked as the beverage coordinator for a popular restaurant in Southeastern Massachusetts, supervising many employees. In short, they knew almost *nothing* about Mr. Teixeira, his accomplishments, his character or his ability to perform the duties of a Correction Officer. DOC failed to conduct the type of thorough review that is required here; [and] they inappropriately relied on a stale CORI report without discussing the CORI with the candidate …"

Since 2014, DOC has significantly modified its hiring process and, except in cases where there is a statutory disqualifier, gives all candidates the opportunity to address issues in their CORI report *before* making a decision to appoint or bypass the candidate. This is consistent with the principles of the above-referenced Executive Order where an Appointing Authority is not required to look "beyond" a candidate's CORI, but, rather, look "behind" it, considering the candidate's entire life record, as opposed to a past snapshot.

As shown here, DOC now has a background investigator meet personally with the candidate and give him/her the opportunity to address any CORI-related issues, in addition to discussing any other negative or positive factors of the applicant. The background investigator then completes a summary which, in addition to CORI-related information, includes a thorough discussion of the Appellant's background, including employment history, military record, educational history, neighbor interviews, etc. Prior to any decision being made to bypass a candidate for appointment, a team of senior DOC managers, including the DOC Commissioner, now reviews the summary and discusses the merits of the applicant's candidacy.

I listened carefully to the testimony of then-Deputy Commissioner Paul Dietl regarding the senior management review that was completed here. The review was serious and substantive and senior managers did in fact consider the nature of the misconduct, the amount of time that had transpired since the misconduct occurred and balanced all of the many positive attributes regarding the Appellant that were listed in the background investigator's report. After considering all of those factors, the DOC Commissioner at the time decided that he didn't want to take the risk of appointing a correction officer who, albeit briefly and many years ago, had admittedly sold marijuana illegally. That judgment call was rooted in a legitimate concern surrounding the core need to enforce a zero tolerance policy regarding illegal drugs in any DOC correctional facility. There was no evidence of any impermissible political or personal factors in play here and the judgment call was made at the highest level of the DOC and only after a reasonably thorough review based on valid concerns directly related to critical care and custody functions of a Correction Officer I. The Appellant has much to commend him for appointment, if not now, perhaps in the future. Nevertheless, under the circumstances here, the Commission must defer to the judgment of DOC.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-18-131 is hereby ***denied.***

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 7, 2019.

Notice to:

Aurel Kodhimaj
[Address redacted]

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7. I also see no inconsistency with a recent United States Court of Appeals decision in *Heagney* v. *Wong*, 915 F.3d 805 (2019). That case is distinguishable from the instant appeal as it involved a decision to rescind an offer of employment to a Police Chief candidate in Fitchburg for failing to voluntarily disclose a prior criminal record that he was not required to disclose under G.L. c. 151B, Section 9. Here, the Appellant was not asked to disclose his entire criminal record nor was he bypassed for appointment based on his failure to disclose said information. Rather, he was bypassed for appointment based on his prior criminal behavior, which DOC learned about through legal means and then gave the Appellant the opportunity to address the criminal conduct.

Joseph Santoro
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

* * * * * *

CHARLES G. RILEY, JR.

v.

DEPARTMENT OF CORRECTION

D -17-109

November 7, 2019
Paul M. Stein, Commissioner

Disciplinary Action-Five Day Suspension of Bridgewater State Hospital Correction Lieutenant-Unprofessional Email to Superiors—The Commission upheld the five-day suspension of a now-retired lieutenant at Bridgewater State Hospital who had sent an unprofessional email to his superiors warning of employee dissatisfaction with the privatization of the facility and the bidding process for replacement jobs.

DECISION

The Appellant, Charles G. Riley, Jr., acting pursuant to G.L.c.31,§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 tenured position of DOC Correction Officer III (Lieutenant).[1] The Commission held a pre-hearing conference in Boston on June 6, 2017 and held a full hearing on July 18, 2017 at that location, which was digitally recorded.[2] The full hearing was declared private. Witnesses were not sequestered. Twenty-seven (27) exhibits were received in evidence at the hearing (*Exhs.1 through 27*). Post-hearing proposed decisions were not submitted. For the reasons stated below, Lt. Riley's appeal is denied.

FINDINGS OF FACT

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

Called by DOC:

- Daniel F. Callis, Jr., DOC Assistant Dep. Comm'r, Prison Division, Southern Sector

Called by the Appellant:

- Charles G. Riley, Jr., DOC Lieutenant, 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, Charles G. Riley, Jr., served as a DOC Correction Officer III (Lieutenant). At the time of this appeal he had thirty-seven (37) years of service with the DOC and 27 years of service as a DOC Lieutenant. Since May 2017 he had been assigned to the Massachusetts Treatment Center (MTC) which houses sex offenders and sexually dangerous persons. (*Exhs. & 10;Testimony of Appellant*)[3]

2. Lt. Riley's prior disciplinary record included:

- 11/24/1992 - One Day Suspension - Called in sick to attend a wedding
- 8/16/2002 - Written Reprimand - Failed to comply with direct order resulting in staff injury
- 8/3/2015 - Written Reprimand - Put foot on civil commitment to get his attention
- 10/7/2016 - Written Reprimand - Poor judgement as supervisor contributing to unrest and ensuing lockdown of MASAC

(*Exhs. 11 through 16*)

3. In March 2017, Lt. Riley was a shift commander at the Massachusetts Alcohol and Substance Abuse Center (MASAC), then located on the campus of Bridgewater State Hospital. (*Testimony of Appellant & Callis*)

4. At that time, the DOC was in the process of implementing a Governor's Initiative that, among other things, directed the privatization of the Bridgewater State Hospital as well as the transfer of MASAC's operations from Bridgewater to Plymouth. (*Testimony of Callis*)

5. On Friday afternoon, March 10, 2017, DOC posted notice that, on Monday, March 13, 2017, all MASAC personnel at the soon to be closed Bridgewater location would be required to bid for replacement jobs. (*Exh. 10; Testimony of Appellant & Callis*)

6. Lt. Riley reported for duty at approximately 6:30 am on Saturday, March 11, 2017. He was immediately "pummeled with questions in anger about the bids being released on Friday afternoon" from most of the two dozen officers on the 7-11 shift un-

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.

3. While this appeal was pending, Lt. Riley retired effective October 1, 2019. (*DOC e-mail 10/22/2019*)

der his command along with the officers on prior shift who were being relieved. He said the officers "weren't just mad, they were angry" about the surprise announcement and short notice. He said the "whole shift was abuzz as to how could this happen, its just not fair." (*Testimony of Appellant*)[4]

7. As the word of the bid notice spread, some affected officers contemplated protesting the action by refusing to bid, which, if they followed through, would complicate the closure and transfer of operations from Bridgewater to Plymouth within the timeframe DOC was expected to complete the move as directed by the Governor's Initiative. (*Testimony of Callis*)

8. At the end of his shift on March 10, 2017, Lt. Riley sent an internal e-mail message to MASAC Superintendent Lisa Mitchell, Assistant Deputy Commisioner Callis, and several other DOC senior managers. The message stated:

> "There is a very unhappy workforce currently at this facility."
>
> "Posting the bids at the end of the day (Friday) going into the weekend was not the best way."
>
> "Speaking as the most senior Lieutenant in this department with 25 years as a lieutenant. All ranks are not being treated fairly."
>
> "On Monday you will be walking into a hornets nest. If you are allergic bring your EPI-PEN."

(*Exh. 10*)

9. Lt. Riley testified that he knew, right after he "hit send", that he was "sunk". He agreed that the last line of his message was neither "professional" nor or "courteous". After leaving work, he had a "change of heart" and realized that he had "done something wrong". (*Testimony of Appellant*)

10. On March 13, 2017, Assistant Deputy Commissioner Callis issued Lt. Riley a five-suspension for his failure to exercise good judgment expected of. . . someone of your stature and tenure with the Department . . ." He found the email message violated DOC Rules and Regulations that mandated the exercise of good judgment, compliance with all DOC policies,[5] and the duty to exercise utmost patience, discretion and respect in all working relationships as becoming correctional professionals. (*Exhs. 8, 9 & 17 through 20; Testimony of Callis*)

11. Lt. Riley requested a hearing to contest the discipline and, eventually, appealed to the Commission. (*Exhs.1 through 7, 24 & 25; Claim of Appeal*)

APPLICABLE LEGAL STANDARD

G.L.c.31,§41-45 requires that discipline of a tenured civil servant may be imposed 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 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.

The Commission's role 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 Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997). *See also 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).

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); *City of Cambridge* v. *Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102 (1997); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928) *See also Mass. Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 264-65 (2001).

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 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. 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 "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, Section 43 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

4. Complicating the bid release notice to MASAC officers was the fact that a week or two earlier, the employees of Bridgewater State Hospital had already bid on their replacement jobs, which left far fewer options for MASAC employees to find comparable positions to their current assignments (in terms of shift and rotation schedules) at the relocated MASAC in Plymouth or other DOC facilities. (*Testimony of Appellant*)

5. Among the relevant policies, DOC E-Mail Policy, 103 DOC 758.02 puts all personnel on notice that "users shall regard e-mail messages as the equivalent of letters sent on official letterhead. As such, users shall write all e-mail messages in a professional and courteous tone . . . [Generally] e-mail messages are considered public records, copies of which may be requested by any member of the public." (*Exh. 20*)

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") *Id.*, (*emphasis added*). *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 established that the DOC had just cause to impose discipline upon Lt. Riley for the poor judgment that he exercised in sending the March 10, 2017 e-mail. Lt. Riley, himself admits that, in hindsight, he realized that sending the e-mail in the form he chose was "wrong". His actions were unprofessional and inconsistent with his duty as a superior officer to exercise good judgment commensurate with his position as a supervisor and role model.

I have not overlooked the fact that Lt. Riley may have had the best of intentions when he sent the e-mail to give senior management a "heads up" about the rebellious attitude that was percolating among the rank and file, but DOC is entitled to expect that such a message, properly, be confined to communicating relevant facts without inappropriate and sarcastic hyperbole. Especially, as a superior officer and role model, Lt. Riley, had a heightened duty to remain cool under pressure and not to let the heat of the moment influence his judgment or actions. I credit Lt. Riley for acknowledging his mistake in hindsight. Nevertheless, under the substantially undisputed facts of this case, the five-day suspension imposed on Lt. Riley was fully justified and should stand.

For these reasons, the appeal of the Appellant, Charles Riley, Jr., in Case Nos. D-17-109 is hereby **DENIED**.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 7, 2019.

Notice to:

Charles G. Riley, Jr.
[Address redacted]

Joseph S. Santoro
Department of Correction
P.O. Box 946—Industries Drive
Norfolk, MA 02056

* * * * * *

JOSEPH KELLEY, PHILLIP SIFFORD, MICHAEL FINN and LAWRENCE MACDOUGALL

v.

BOSTON FIRE DEPARTMENT

G2-09-230 (Kelley)
G2-09-231 (Sifford)
G2-09-232 (Finn)
G2-09-233 (MacDougall)

November 21, 2019
Christopher C. Bowman, Chairman

***Remand Decision from Superior Court-Temporary Promotions to Captain-Boston Fire Department-Appropriate Relief-Tolling of Default Filing Limitation*—**Ruling on the second remand from the Superior Court of 10-year-old appeals from Boston fire lieutenants challenging temporary captain promotions, the Commission found that the appropriate relief for these now retired Appellants would be monetary based on pay differentials between lieutenant and captain. The awards ranged from $1,072 up to $9,208 before the addition of what will be significant pre-judgment interest calculated at 12% from 2009. The Commission rejected the Boston Fire Department's argument that the 30-day default filing limitation in its rules should be applied, citing BFD's ongoing failure to comply with civil service laws.

DECISION AFTER SECOND REMAND

These appeals were first filed with the Civil Service Commission (Commission) approximately ten (10) years ago. This "Decision After Second Remand" relates solely to complying with the instructions, on remand, of the most recent Superior Court Decision related to this matter.

The Appellants, who were Fire Lieutenants with the Boston Fire Department (BFD)[1] , brought these appeals to the Civil Service Commission in 2009 claiming to be aggrieved by the BFD's alleged practice of making "out-of-grade" or "acting" promotional appointments outside of the civil service system to fill vacancies in the position of Fire Captain, rather than from the 2007 eligible list for Fire Captain on which their names appeared. In January 2012, the Commission dismissed the appeals. *Kelley, et al.* v. *Boston Fire Dep't.*, 25 MCSR 23, *reconsideration denied*, 25 MCSR 168 (2012). (*Kelley I*) The Commission, in *Kelley I,* found that, although BFD's appointments appeared to be inconsistent with Section 7 of the civil service law, the BFD was allowed to make emergency appointments under Section 31 of the civil service law for up to thirty days without approval from the state's Human Resources Division (HRD) and an additional thirty (30) days after notifying and obtaining permission from HRD. Although the BFD had not sought or obtained approval for the additional thirty (30) days, when applicable, the Commission concluded that this notification and approval was "ministerial." As the Commission found that none of the appointments in question lasted for more than sixty (60) days, the appeals were dismissed. Also, as part of that

1. Indicative of the lengthy nature of these appeals, all of the Appellants have now retired from the Boston Fire Department.

decision, the Commission found that the Appellants had failed to prove actual harm because they had failed to identify which illegal appointments they were aggrieved by.

The Appellants duly appealed to the Suffolk Superior Court and, by "Memorandum and Order on Cross-Motions for Judgment on the Pleadings", dated August 5, 2013 (Memorandum and Order), the Superior Court (Leibensperger, J.) allowed the Appellants' Motion for Judgment on the Pleadings. *Kelley* v. *Massachusetts Civil Service Comm'n et al*., No. SUCV 12-00571-H (2013). (*Kelley Court Remand I*) The Court, in *Kelley Court Remand I*, found that the Commission erred when it concluded that the BFD's failure to obtain approval to renew emergency appointments for thirty (30) additional days was "ministerial", stating in part:

> "The [Commission's] determination to give BFD a 'pass' for its failure to obtain consent of HRD for emergency appointments that were, concededly, in excess of thirty days, was an error of law and an abuse of discretion."

The Court, in *Kelley Court Remand I*, also concluded that the Commission had erroneously put the burden on the Appellants to prove that the emergency appointments failed to meet the statutory criteria. The instructions to the Commission on the first remand were:

> " … to conduct a new evidentiary hearing. [Appellants] should be allowed to offer proof of specific appointments to temporary captain positions in the May 2007 to May 2009 period that (a) were in violation of the civil service law, and (b) they should have received because of their position on the promotional list."

On remand, the Commission, after conducting a new evidentiary hearing over two (2) days, denied the Appellants' appeals for a second time on March 17, 2016. *Kelley et al* v. *Boston Fire Department*, 29 MCSR 176 (2016) (*Kelley II*) The Commission concluded that the BFD had made four temporary Captain appointments for which one or more Appellants was bypassed without compliance with civil service law. Even if the vacancies were treated as emergency appointments, the Commission, consistent with *Kelley Court Remand I*, concluded that the BFD still violated the civil service law because it failed to obtain approval from HRD to renew these appointments beyond thirty (30) days. The appeals were dismissed, however, because the Commission concluded that the appointments resulted in a "bypass" of the Appellants and that, under the Commission's rules, the Appellants had only sixty (60) days to file an appeal with the Commission, which they failed to do. Further, the Commission found that two (2) of the Appellants' appeals were moot because they were now retired.

Although the appeals were dismissed by the Commission based on timeliness and mootness, the Commission did make specific findings regarding the assignments that each of the Appellants would have been eligible for had the BFD not used impermissible, acting, out-of-grade temporary appointments. Specifically, the Commission found that: a) Lt. Kelley would have been eligible for 126 additional tours; b) Lt. Sifford would have been eligible for 76 additional tours; c) Lt. Finn would have been eligible for 22 additional tours; and d) Lt. MacDougall would have been eligible for 36 additional tours.[2] *Kelley II* at p. 25.

The Appellants again appealed to the Suffolk Superior Court and, by "Memorandum of Decision and Order on Plaintiffs' and Defendant City of Boston Fire Department's Cross-Motions for Judgment on the Pleadings, dated February 19, 2018, the Superior Court (Tochka, J.) allowed the Appellants' Motion for Judgment on the Pleadings, vacated the Commission's and, for a second time, remanded the case back to the Commission. *Kelley* v. *Massachusetts Civil Service Comm'n et al*., No. SUCV 1684-01233 (2019). (*Kelley Court Remand II*)

The Court stated in relevant part that:

> " … the Commission's determination that BFD bypassed the Plaintiffs is an incorrect interpretation of G.L. c. 31, s. 27 and its own rules. The Commission committed an error of law by classifying BFD's actions as a bypass and by applying the bypass limitations period [60 days] to dismiss the Plaintiff's appeal[s]."

The Court, in *Kelley Court Remand II*, further stated that:

> "BFD also argues that the Commission's decision in Kelley II must be affirmed insofar as it found that Lieutenant Kelley and Finn's appeals were moot. BFD contends that the Commission can only grant prospective relief to the Plaintiffs, which is unavailable to Lieutenants Kelley and Finn because they are retired. The Commission's determination that only prospective relief was appropriate was premised on its finding that the Plaintiffs were unlawfully bypassed. Given that the Plaintiffs were not bypassed, the Court remands the case back to the Commission to exercise its broad discretion to determine the appropriate equitable relief for each of the Plaintiffs under Chapter 310 of the Acts of 2003."

The BFD filed a motion for reconsideration of *Kelley Court Remand II* which was denied. The BFD then filed an interlocutory appeal with the Appeals Court which was denied without prejudice on May 15, 2019. *Kelley & Others* v. *Boston Fire Dep't. & another*, 2019-P-0455 (2019).

On June 11, 2019 and August 5, 2019, I held two (2) status conferences at the offices of the Commission, with the primary goal of encouraging the parties to reach a settlement agreement in lieu of any further orders by the Commission. The parties were unable to reach such agreement. As such, I issued a Procedural Order, providing each party with the option of submitting a brief "regarding the 'appropriate relief' to be awarded, consistent with the February 14, 2018 Superior Court Order." The parties submitted briefs to the Commission on September 30, 2019.

In its brief, the BFD argues that: a) the Commission "must remain true to its longstanding precedent and reject the [Appellants]' arguments that monetary relief should be awarded"; and b) the Appellants lacked standing and their appeals were time barred, under either the 60-day filing deadline for bypass appeals (previ-

2. Tours are generally equivalent to 12 hours.

ously rejected by the court) or, in the alternative, the default limitation of thirty (30) days contained in the Standard Adjudicatory Rules of Practice and Procedure. (801 CMR 1.01(6)(b)).

In their brief, the Appellants effectively ask the Commission to: a) revisit its findings in *Kelley II* regarding how many tours (at the higher title of temporary Captain) each of the Appellants lost out on due to the use of acting, out-of-grade appointments; b) issue relief that is punitive in nature in consideration of the BFD's illegal use of these appointments; and c) direct that any relief be "paid to [their] pension[s]."[3] Finally, the Appellants ask that the BFD be ordered to pay $70,000 for legal fees.

It is time to bring closure to this matter.

The Commission's prior findings regarding how many tours (at the higher title of temporary Captain) each of the Appellants lost out on due to the use of acting, out-of-grade appointments are well supported by the record. Also, these findings were not vacated by the Superior Court. Rather, the Superior Court vacated the Commission's conclusions regarding timeliness and mootness and remanded the case to the Commission for the sole purpose of determining the "appropriate relief." For these reasons, the relief to be ordered here is based on the amount of tours specified in the findings in *Kelley II*.

In regard to timeliness, the Superior Court has already vacated the Commission's conclusion that these appeals were not timely based on the Commission's sixty (60)-day filing deadline regarding bypass appeals. The BFD's argument that the Commission should now reject these appeals, filed a decade ago, based on the thirty (30)-day default limitation in the Commission's rules, is not persuasive. To the extent that the 30-day limitation is applicable, there are multiple reasons justifying the tolling of this rule including, but not limited to the BFD's then-ongoing failure to follow the civil service law. As a result of the BFD's flouting of the civil service law, the Appellants never had their names placed on a Certification; were never notified of their right to be considered for a temporary appointment; and were never provided with notice regarding their right to appeal to the Commission. Under these circumstances, it is appropriate for the Commission to toll its own rule relating to filing deadlines. *See City of Worcester* v. *Civ. Serv. Comm'n & Karen Walsh*, 83 Mass. App. Ct. 1112 (Rule 1:28 Decision), *rev.den.*,464 Mass. 1100 (2013) (The Appeals Court rejected the City's argument on timeliness where the ten-day day complaint for filing a complaint with the Commission was linked to failures by the City to comply with the statute); *See also Boston Police Dep't.* v. *Civ. Serv. Comm'n & another*, Suffolk Sup. Crt. No. 16CV00748 ("The Commission, however, maintains the discretionary power [under Chapter 310 of the Acts of 1993] to allow a candidate to appeal, even if they fail to comply with the statutory requirements.")

That leaves the issue regarding the appropriate relief to be ordered here. It is true, as argued by the BFD, that the Commission has a long-standing precedent of only granting prospective relief regarding bypass appeals or, as the Court has effectively deemed these appeals, non-bypass equity appeals. Put another way, the relief ordered by the Commission in these types of appeals has never included the payment of lost wages. Rather, the Commission's relief regarding these types of appeals has always been non-monetary in nature (i.e.—retroactive adjustment of civil service seniority dates regarding original appointments; the placement at the top of the next Certification for consideration for the next permanent (or temporary) appointment, etc.). This contrasts with other types of appeals, such as disciplinary appeals, in which G.L. c. 31, s. 43 explicitly requires a successful Appellant to " … be returned to his position *without loss of compensation* or other rights." (emphasis added)

Given the unique circumstances of these appeals, including the specific instructions of the Court on remand, and due to the fact that the Appellants have now retired, non-monetary relief, such as that referenced above, is not possible. Thus, in accordance with *Kelley Court Remand II*, and consistent with the Commission's findings in *Kelley II*, the Appellants appeals are hereby ***allowed***. Pursuant to its authority under Chapter 310 of the A cts of 1993, the Commission hereby orders the Boston Fire Department to compensate the Appellants for the difference in pay between Fire Lieutenant and Fire Captain as follows:

Appellant	Tours	Total Hours (Tours x 12)
Joseph Kelley	126	1512
Phillip Sifford	76	912
Michael Finn	22	176
Lawrence MacDougall	36	432

I inquired with counsel for the BFD, with a copy to counsel for the Appellants, regarding the hourly pay differential, between the position of Fire Lt. and Fire Captain during the applicable time period. According to the BFD, the applicable hourly pay differential at the time was $6.09. Assuming this to be the case, the Appellants would be owed the following retroactive payments:

Appellant	Hours	Retroactive Payment (Hours x $6.09)
Joseph Kelley	1512	$9208
Phillip Sifford	912	$5554
Michael Finn	176	$1072
Lawrence MacDougall	432	$2631

Although the Court is the appropriate forum to address any disputes related to accrued interest due regarding these payments, I offer the following in what is likely to be an unsuccessful attempt to fend off further litigation regarding this matter. Consistent with *Boston Police Dep't.* v. *Jones & others*; Suffolk Sup. Crt.

3. To the extent that a reply is warranted to this request by the Appellants, the Commission does not issue relief that is tailored toward bolstering a retiree's pension.

No. 2013-01250-A (2019) & *Thompson & Others* v. *Civ. Serv. Comm'n & another,* Suffolk. Sup. Crt No. 2013-01256-A (2019), it would appear that the Appellants are entitled to pre-judgment interest on the above payments pursuant to G.L. c. 231, s. 6 at a rate of twelve percent annum from the date their appeals were filed with the Commission in 2009 until at least the issuance of this decision (2019).

Finally, in regard to legal fees, neither Chapter 31 nor Chapter 310 of the Acts of 1993 authorizes the Commission to order the payment of legal fees in this matter.[4]

SO ORDERED.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on November 21, 2019.

Notice to:

Richard Heavey, Esq.
Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Robert J. Boyle, Jr., Esq.
City of Boston
Office of Labor Relations
Boston City Hall
Boston, MA 02201

* * * * * *

JORDAN BLAIR

v.

QUINCY HOUSING AUTHORITY

D1-19-026

December 5, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge Appeal-Laborer for Quincy Housing Authority-Progressive Discipline—The Commission dismissed the appeal from a discharged Quincy laborer with the Housing Authority where he engaged in an inappropriate physical interaction with the authority's executive director after disagreements about changes in vacation time. The Appellant had a disciplinary history of aggressive and insubordinate conduct toward superiors and the discharge was consistent with progressive discipline.

DECISION

On January 23, 2019, Jordan Blair (Mr. Blair), pursuant to G.L. c. 31, §§ 41-43 and G.L. c. 121B, § 29, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Quincy Housing Authority (QHA) to terminate his employment as laborer. On March 5, 2019, I held a pre-hearing conference at the offices of the Commission. On May 1, 2019, I held a full hearing at the QHA's Maintenance Building at 15 Bicknell Street in Quincy, Massachusetts.[1] The QHA called four (4) witnesses. Mr. Blair testified on his own behalf and called one (1) additional witness. Seven (7) exhibits were received into evidence. The hearing was digitally recorded.[2] The parties submitted Proposed Decisions on June 4, 2019.

FINDINGS OF FACT

Based on the seven (7) documents entered into evidence, my viewing of the spaces where the relevant conduct occurred, and the testimony of the following witnesses:

For the Quincy Housing Authority:

- James Marathas, Executive Director, Quincy Housing Authority
- BC, Maintenance Clerk, Quincy Housing Authority
- RW, Public Housing Inspector, Quincy Housing Authority
- WO, Maintenance General Foreman, Quincy Housing Authority

For Mr. Blair:

4. G.L. c. 31, s. 45 requires the reimbursement of defense expenses, up to a maximum of $900, only for " … 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 …"

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 the recording transcribed into a written transcript.

- Jordan Blair, Appellant
- HC, Laborer, Union Steward

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. Mr. Blair is an employee of the Quincy Housing Authority, and is a member of the Laborers' International Union of North America, AFL-CIO, Local 133 (Union). (Testimony of J. Marathas; Testimony of Appellant)

2. Mr. Blair began his employment with the QHA in 2008 through a grant-funded position to work on "modernization projects." (Testimony of Appellant)

3. In 2012, Mr. Blair was appointed as a permanent, full-time Laborer in the Maintenance Department, which is the position he held at all relevant times since. (Testimony of J. Marathas; Testimony of Appellant)

4. James Marathas has been the Executive Director of the QHA since June of 2017. As Executive Director, Mr. Marathas oversees and operates all QHA departments. Prior to becoming Executive Director, Mr. Marathas was the Director of Facilities for the QHA for two years. Prior to that, Mr. Marathas was the Director of Facilities for the Massachusetts Department of Housing & Community Development. (Testimony of J. Marathas)

5. Mr. Marathas holds weekly staff meetings with all employees in the Maintenance Department. The weekly staff meetings typically occur at the Maintenance Building at 15 Bicknell Street in Quincy, Massachusetts. (Testimony of J. Marathas)

6. On December 13, 2018, Mr. Marathas held the weekly staff meeting in the kitchen area of the Maintenance Building. There were approximately thirty (30) employees present at the meeting. (Testimony of J. Marathas; Testimony of BC; Testimony of RW; Testimony of HC; Testimony of Appellant)

7. During most of the meeting, Mr. Blair was standing in front of the sink in the kitchen area. (Testimony of J. Marathas; Testimony of BC; Testimony of RW; Testimony of WO)

8. BC, a maintenance clerk for the QHA, had mistakenly posted a document in the administrative offices regarding a proposed change in vacation time. Instead of receiving all vacation hours at the beginning of the year, the QHA was discussing with the unions a proposal that would allot such time quarterly. (Testimony of BC)

9. HC, a Union Steward, raised this issue of potential changes to the vacation time policy at the meeting. Other employees also asked questions about the potential changes. (Testimony of J. Marathas; Testimony of BC; Testimony of WO; Testimony of Appellant; Testimony of HC)

10. Mr. Marathas responded to the employees' questions by advising them that he was still in the process of discussing the policy with the relevant unions, and therefore it was premature to discuss the vacation policy at that time. (Testimony of J. Marathas; Testimony of BC; Testimony of RW; Testimony of WO; Testimony of HC)

11. Subsequently, Mr. Blair asked Mr. Marathas about the vacation policy, specifically whether the issue was "personal" for Mr. Marathas. Mr. Marathas told Mr. Blair that the issue was not personal and that it was not to be discussed. (Testimony of J. Marathas; Testimony of BC; Testimony of WO)[3]

12. As the meeting concluded and employees were exiting the room, Mr. Blair walked up to where Mr. Marathas was seated in the front of the room and again asked Mr. Marathas about the potential changes to the vacation policy and again asked whether the issue was "personal." Mr. Marathas advised Mr. Blair that the meeting was over and they were not going to discuss the matter further.[4] (Testimony of J. Marathas)

13. From there, Mr. Marathas went into the Maintenance Clerk's Office, which is located a short distance down the hall from the kitchen area where the staff meeting occurred. Inside the Maintenance Clerk's Office, Mr. Marathas was talking to Maintenance Clerk BC, who was seated at her desk, and Public Housing Inspector RW who was standing at BC's desk along with Mr. Marathas. (Testimony of J. Marathas; Testimony of BC; Testimony of RW)

14. The door to the Maintenance Clerk's Office, which has a square glass window in the center of it, was closed. BC's desk is located immediately on the left inside the Maintenance Clerk's Office. (Testimony of J. Marathas; Testimony of BC; Testimony of RW)

15. Mr. Marathas looked out the window in the door and observed Mr. Blair standing up close to the door, seemingly leaning against it, with his cell phone out in his hand. Mr. Marathas did not observe Mr. Blair holding anything other than his phone out in front of him. Mr. Marathas believed that Mr. Blair was attempting to record him speaking to BC and RW. (Testimony of J. Marathas; Testimony of BC; Testimony of RW)

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3. Mr. Blair testified that he never asked whether the issue was "personal." Rather, Mr. Blair testified that he asked if there was "precedence" for the proposed change. For reasons discussed in the analysis, I did not credit Mr. Blair's testimony in this regard.

4. I have not overlooked Mr. Marathas's testimony that Mr. Blair, when speaking to him at the conclusion of the meeting stood unusually close to him in a confrontational manner. No other witness who testified before the Commission saw or heard this interaction and, standing alone, I was unable to credit his version of events regarding these observations. I do, however, credit his testimony that Mr. Blair, once again, was asking if the proposed change in how vacation would be accrued was "personal." For reasons discussed in the analysis, I did not credit Mr. Blair's testimony that he approached Mr. Marathas to discuss an upcoming request for vacation time.

16. In a prior incident, Mr. Marathas had told Mr. Blair that recording conversations in the maintenance office without permission was not allowed. (Testimony of J. Marathas)

17. Mr. Marathas opened the door and asked Mr. Blair if he was recording their conversation. In response, Mr. Blair told Mr. Marathas to "relax" at least twice. (Testimony of J. Marathas; Testimony of BC; Testimony of RW)[5]

18. Mr. Marathas, speaking in a loud voice, told Mr. Blair not to tell him to relax. Mr. Marathas directed Mr. Blair to leave the building and get to work at his assigned building. (Testimony of J. Marathas; Testimony of BC; Testimony of RW)

Actions Taken by the Four (4) Percipient Witnesses Immediately After the Verbal Confrontation

19. BC remained at her desk in the Maintenance Clerk's Office. (Testimony of BC)

20. RW walked to a connecting room and sat down at his desk. (Testimony of RW)

21. Mr. Blair walked away from the door of the Maintenance Clerk's Office and entered a nearby conference room where HC, the union steward, was participating in an asbestos meeting.[6] Mr. Blair told HC that he wanted to talk to HC about the incident that had just occurred with Mr. Marathas. (Testimony of Appellant) HC told Mr. Blair that he (HC) would come visit him at his work site after the asbestos meeting. (Testimony of HC)

22. Mr. Marathas stepped back into the Maintenance Clerk's Office and shut the door. (Testimony of BC)

Subsequent Physical Interaction at Exit Door

23. Mr. Marathas walked to the connecting room where RW's desk is located in order to leave the building through the exit door that is next to or near RW's desk.

24. Mr. Blair entered the Maintenance Clerk's Office, put his vacation request slip in a folder in the office and walked toward the same door in the connecting room that Mr. Marathas was going to use as an exit. (Testimony of Appellant and RW[7])

25. RW was sitting at his desk in the connecting room. His view of the door is partially obstructed by a vending machine and filing cabinet. (Testimony of RW)

26. RW saw Mr. Marathas open the exit door and hold it open with his back against the door at a ninety-degree angle. (Testimony of RW)

27. RW then saw Mr. Blair walk toward the door but, due to his obstructed view, could not see the physical interaction between Mr. Marathas and Mr. Blair. (Testimony of RW)

28. RW heard Mr. Marathas say words to the effect of "why did you hit me?" or "why did you bump me?". (Testimony of RW)

29. RW then heard Mr. Blair say words to the effect of "I didn't mean to" or "no big deal." (Testimony of CW)

30. Mr. Marathas and Mr. Blair have divergent recollections regarding the physical interacdtion that occurred at the exit door. (Testimony of Appellant; Testimony of R. Marathas)

31. Mr. Marathas recalls walking toward the exit door with Mr. Blair walking behind him. Mr. Marathas then recalls "as we got to the door, I held open the door; and as [Mr. Blair] went through, his shoulder banged into me as he was going through the door." Mr. Marathas viewed the contact as deliberate and recalls saying words to the effect of "why did you just hit me?" to Mr. Blair. (Testimony of R. Marathas)

32. Mr. Marathas recalls that he (Marathas) was holding the door completely open at a 90-degree angle with his back up against it, leaving plenty of room for Mr. Blair to exit without the need to make any physical contact with him. (Testimony of R. Marathas)

33. Mr. Blair recalls entering the Maintenance Clerk's Office and dropping off the vacation request slip when Mr. Marathas entered from the connecting room and told Mr. Blair to "go down to your building and actually do some fucking work" pointing at the exit door near CW's desk. (Testimony of Appellant)

34. Mr. Blair recalls being "escorted" to the exit door by Mr. Marathas at which time Mr. Marathas opened the door "a fraction of the way"[8] with his back towards the door. Mr. Blair then recalls: a) "putting his (Blair's) hands up; b) "saddling by him [Marathas]"; and c) saying "excuse me" Mr. Blair then recalls that: " … the first half of my body gets out fine, but when I leave, my pinky touched his hand, and that's when he just got really animated, really loud and said, 'Did you just shoulder barge me? What's wrong with you? Did you just shoulder barge me?" (Testimony of Appellant)

35. Mr. Blair jogged or ran away from the door and toward his car. He then left the Maintenance Building property. (Testimony of J. Marathas; Testimony of Appellant)

36. On December 19, 2018, Mr. Blair submitted an unsolicited "sworn statement" to the QHA regarding the events of December 13th. (Ex. 2)

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5. I did not credit Mr. Blair's testimony that Mr. Marathas was using profanity, including the f-word. He was, however, speaking in a loud voice, based on the credible testimony of BC.

6. Although BC could not see Mr. Blair from her desk, she heard his voice trailing off and is certain that Mr. Blair briefly walked away from the office door. (Testimony of BC)

7. Although BC does not recall whether Mr. Blair dropped a vacation request slip in the office, RW does recall seeing him do this. I credit RW's testimony.

8. On cross-examination, Mr. Blair clarified that he believed the door was open "30%".

37. On January 2, 2019, Mr. Blair was issued a Memorandum indicating that the QHA was contemplating terminating his employment. The letter stated in part that:

> " … The above matters, which include insubordination, disrespect, engaging in physical contact with a superior and lying, each constitute just cause for termination of your employment. The Housing Authority will not tolerate this type of behavior from any employee. This is especially true given your past discipline history, which unfortunately includes multiple similar incidents."

Prior Discipline

38. Mr. Blair received a written warning for an incident that occurred on May 19, 2016 for engaging in aggressive, accusatory behavior and being insubordinate toward Mr. Marathas. (Ex. 6; Testimony of J. Marathas)

39. Mr. Blair grieved the written warning for the May 19, 2016 incident. After the QHA and the Union discussed the grievance, Mr. Blair agreed to accept the written warning provided that it was removed from his personnel file after six (6) months if no similar incidents occurred during that time. The written warning was subsequently removed from Mr. Blair's file, in accordance with the parties' agreement. (Testimony of J. Marathas)

40. On or about January 23, 2017, Mr. Blair received another written warning. That warning documented an incident in which Mr. Blair was disrespectful and insubordinate toward Maintenance General Foreman WO after he asked Mr. Blair to turn over a vacant unit on January 18, 2017. The written warning was also issued because Mr. Blair engaged in disrespectful, insubordinate, and distracting behavior toward Mr. Marathas based on where Mr. Blair positioned himself and how he conducted himself during weekly staff meetings, as described above. (Ex. 7; Testimony of J. Marathas; Testimony of WO)

41. The January 23, 2017 written warning further advised Mr. Blair that it is illegal to record audio of someone talking without permission from the party being recorded. That reminder was in response to Mr. Blair possessing an audio and video recording of a previous staff meeting. Mr. Blair denied making the recording, but refused to identify who did record it. (Ex. 7; Testimony of J. Marathas)

42. Mr. Blair submitted a written rebuttal and he grieved the warning. As he did before, Mr. Blair agreed to accept the written warning provided that it would be removed from his personnel file after six (6) months if no similar incidents occurred during that time. The January 23, 2017 written warning was subsequently removed from Mr. Blair's file. (Testimony of J. Marathas)

43. On January 8, 2019, the Appointing Authority held a hearing before Hearing Officer Terry Champion regarding the contemplated termination of Mr. Blair's employment, pursuant to G. L. c. 31, § 41. Mr. Blair attended the hearing, was represented by the Union, and testified on his own behalf. (Ex. 3)

44. On January 14, 2019, the Hearing Officer issued her findings of fact. (Ex. 3)

45. Based on the Hearing Officer's findings, Mr. Marathas recommended to the QHA's Board of Commissioners that Mr. Blair's employment be terminated. The Board of Commissioners accepted Mr. Marathas's recommendation and voted to terminate Mr. Blair's employment. (Ex. 4; Testimony of J. Marathas)

46. On or about January 23, 2019, Mr. Blair appealed his termination to the Commission.

LEGAL STANDARD

The Commission's authority in this matter is drawn from G.L. c. 121B, § 29 which provides, in relevant part, that:

> "No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter." (emphasis added)

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); *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 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 accom-

plished 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'," *Id*., 823-24, quoting internally from *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

ANALYSIS

This case required me to weigh the credibility of witnesses to resolve the following factual dispute: Did Mr. Blair intentionally make physical contact with Mr. Marathas while walking out of the QHA's maintenance facility in Quincy on December 13, 2018? As referenced in the findings, Mr. Blair and Mr. Marathas offered two conflicting accounts of what occurred.

I listened carefully to each of the witnesses that testified at the May 1, 2019 hearing, including Mr. Blair and Mr. Marathas and those in a position to corroborate or contradict them. Since the hearing took place at the QHA maintenance facility, I was aided by the ability to view the location where the events of December 13th occurred. I also carefully reviewed all of the exhibits submitted. Finally, given the divergent testimony provided, I had a transcript of the hearing prepared to assist me in reviewing the testimony provided a second time. After a careful and thorough review, I credit the testimony of Mr. Marathas for the following reasons.

Significant portions of Mr. Blair's testimony were contradicted by the testimony of other reliable witnesses and documentary evidence. For example, Mr. Blair testified that, during the staff meeting, he never asked if the proposed change was "personal." Rather , Mr. Blair testified that he asked if there was any "precedence" for the policy. In addition to Mr. Marathas, two other reliable witnesses (BC and WO) specifically recalled that Mr. Blair asked if the proposed policy change was "personal" and did not hear him use the word "precedence." The only support for Mr. Blair's testimony on this matter came from HC. Though stating that he heard the word "precedence" when asked, he testified that he could not remember any specific words Mr. Blair used. I did not find this testimony on this matter to be credible.

Mr. Blair's testimony regarding why he was standing outside the Maintenance Clerk's door with his phone in his hand was also contradicted by other reliable testimony, as well as documentary evidence. Mr. Blair claims that he was outside the door to the Maintenance Clerk's Office because he needed to write his days off on the calendar and take a picture of his vacation form. Mr. Marathas testified that when he looked out the window on the door, he observed Mr. Blair leaning against or near the door, holding his cell phone out in his hand, and not holding anything else near his phone. Based on his knowledge of Mr. Blair's past, Mr. Marathas believed that Mr. Blair was attempting to use his phone to record Mr. Marathas's conversation. Mr. Blair, by stark contrast, claims that he was holding his phone in one hand and the completed vacation form in his other hand, taking a picture of the form with his phone's camera. The credible evidence, however, undercuts Mr. Blair's account. Mr. Marathas testified that Mr. Blair was holding his phone out in front of him near the door, and that Mr. Blair was not holding a form or anything else near his phone. That testimony was detailed and credible. Mr. Marathas and Mr. Blair were only a short distance apart when Mr. Marathas observed him through the window. There is no evidence suggesting that Mr. Marathas's view of Mr. Blair was obstructed. Had Mr. Blair actually been holding his phone out in front of him to take a picture of the vacation form, Mr. Marathas would have readily seen the form somewhere near the cell phone, and he would not have had reason to believe Mr. Blair was attempting to record Mr. Marathas's conversation as he did. Moreover, the photograph that Mr. Blair provided to the QHA from his cell phone directly contravenes his testimony about what he was doing while standing outside the door to the Maintenance Clerk's Office. The picture clearly shows that the form was resting on some brown surface, as the picture clearly shows a brown edge around each of the four sides of the picture. Moreover, the brown edge on the border clearly matches the color and even pattern of the tables in the kitchen area of the lunch room in the Maintenance Building. There was no similarly brown object in the hallway outside the Maintenance Clerk's Office. Mr. Blair was not able to explain the discrepancy between the picture and his account in his testimony and his account in his Sworn Statement. In short, Mr. Blair's testimony that he was holding his phone out in front of him at the Maintenance Clerk's door to take a photograph of the vacation request form was false.

Mr. Blair also testified that Mr. Marathas repeatedly threw the proverbial f-bomb at him during each of their encounters that morning. At least two (2) other credible witnesses corroborated Mr. Marathas's testimony that he did not.

All of the above-referenced misrepresentations by Mr. Blair cast significant doubt on his credibility as it relates to the nature and extent of physical contact that occurred at the exit door.

Even, however, if I did not consider Mr. Blair's untruthful testimony regarding the above-referenced events, Mr. Marathas's testimony regarding the physical interaction at the door is more plausible.

There is no dispute that some contact occurred between the two men at the exit door. What is disputed, however, is the nature and extent of that contact. Only Mr. Marathas and Mr. Blair witnessed the contact directly, yet their accounts of what transpired are substantially divergent.

The context in which this interaction occurred is important. Mr. Marathas, having suspected that Mr. Blair was secretly recording his conversation, had just ordered Mr. Blair to leave the maintenance facility and return to his work site. Mr. Blair, in turn, had just told the Executive Director to "relax" at least twice. Yet, after this order, and verbal confrontation, Mr. Blair chose to enter the Maintenance Clerk's Office; walk into a connecting administrative office; and then follow Mr. Marathas to the exit door in that connecting office. I was shown multiple other exit doors that would

have provided Mr. Blair with a more direct and advisable route to his car that morning.[9] Yet, he chose the one exit door which would cause him to come in close proximity to Mr. Marathas. I do not credit Mr. Blair's testimony that the door was open only "30%" of the way. Even, however, if this was true, having viewed the doorway at issue, Mr. Blair could have exited without making contact with Mr. Marathas. Finally, Mr. Blair's testimony that he recalls his "pinky" brushing up against Mr. Marathas came across as contrived—and absurd.

I did consider those factors that could call into question the testimony of Mr. Marathas. The words used by Mr. Marathas to describe what happened at the door have ranged from being brushed, bumped and hit. Further, there is no doubt that Mr. Marathas was agitated that day, which could cause him to have heightened sensitivity regarding the degree of physical contact that occurred between the two men. Even after considering those factors, I found Mr. Marathas's version of events to be more plausible and his overall testimony to be credible.

After considering all of the above factors, I have concluded that Mr. Blair made deliberate and avoidable contact with Mr. Marathas while exiting the maintenance facility on December 13, 2018. This constitutes substantial misconduct which adversely affects the public interest and warrants discipline against Mr. Blair.

Having determined that Mr. Blair did engage in some misconduct, I must determine whether the level of discipline here (termination) was warranted.

As stated by the SJC 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], 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.' *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 town on the basis of essentially similar fact finding without an adequate explanation." *Id*. (citations omitted).

First, my findings of fact do not differ from those reported by the QHA. As stated above, after a de novo hearing, the preponderance of the evidence does support the QHA's conclusion that Mr. Blair made deliberate and avoidable physical contact with Mr. Marathas while exiting the maintenance facility on December 13th. Further, Mr. Blair, as part of an affidavit that he submitted to the QHA, was untruthful regarding key events that occurred that morning.

The Commission has consistently held that progressive discipline is consistent with the basic merit principles of the civil service law. In that respect, I must consider any prior discipline against Mr. Blair.

Mr. Blair objects to consideration of his prior discipline, arguing that written warnings issued in 2016 and 2017 were eventually removed from his QHA personnel file. That argument, however, fails. "While time limitations contained in the reprimands or discipline may apply with regard to the CBA and the grievance process, the Commission is not barred from considering prior reprimands or discipline." *Paone* v. *City of Lynn*, 26 MCSR 61 (2013). It is undisputed that written warnings were issued and that although Mr. Blair initially contested the warnings, he eventually agreed to accept the discipline. Moreover, there is no evidence indicating that the parties' agreements resolving Mr. Blair's grievances prohibited consideration of the circumstances underlying the discipline in future disciplinary proceedings involving Mr. Blair. Accordingly, the Commission's analysis of this matter includes the 2016 and 2017 written warnings.

The incidents underlying the 2016 and 2017 written warnings both involved Mr. Blair being insubordinate and aggressive toward his supervisors, including Mr. Marathas on more than one occasion. Despite those warnings, Mr. Blair's insubordination toward Mr. Marathas has escalated to the point of making physical contact. Furthermore, Mr. Blair was warned in connection with both of those written warnings that future conduct of a similar nature could result in his termination. It is indisputable that Mr. Blair was on notice of the QHA's expectations. In light of those clear and relatively recent warnings, and Mr. Blair's most recent serious misconduct, the Quincy Housing Authority's decision to terminate Mr. Blair for the substantial misconduct outlined above is consistent with progressive discipline.

CONCLUSION

Mr. Blair's appeal under Docket No. D1-19-026 is hereby ***denied***.

* * *

9. Mr. Blair's revisionist tale that he was being "escorted" to this particular exit by Mr. Marathas is not believable.

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 5, 2019.

Notice to:

Joseph McArdle
Massachusetts & Northern New England
Laborers' District Council
7 Laborers' Way
Hopkinton, MA 01748

Kier Wachterhauser, Esq.
Murphy, Hesse, Toomey & Lehane, LLP
300 Crown Colony Drive, Suite 410
Quincy, MA 02169

* * * * * *

Request by: RANDOLPH S. BLAKE for the Civil Service Commission (Commission) to investigate "the Springfield Fire Department's investigatory and disciplinary practices."

RE: Tracking Number: I-19-216

December 5, 2019
Christopher C. Bowman, Chairman

Investigation by Commission-Springfield Fire Department Investigatory and Disciplinary Practices-Lack of Disciplinary Appeal— The Commission declined to initiate an investigation into the Springfield Fire Department's investigatory and disciplinary practices at the request of a Springfield fire lieutenant where he was not the subject of any discipline and was not contesting his own nonselection for promotion.

RESPONSE TO REQUEST FOR INVESTIGATION

On October 21, 2019, Randolph Blake (Lt. Blake), a Fire Lieutenant in the Springfield Fire Department (SFD), 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 "the Springfield Fire Department's investigatory and disciplinary practices."

2. On November 13, 2019, I held a show cause conference at the Springfield State Building to provide Lt. Blake with the opportunity to show cause why the Commission should open an investigation regarding this matter. In addition to Lt. Blake, the show cause conference was attended by counsel for the SFD and the SFD's collective bargaining agent.

3. As part of the show cause conference, Lt. Blake referenced alleged incidents, and complaints that he has filed, which, according to Lt. Blake, the SFD has failed to sufficiently investigate and/or take appropriate disciplinary action against the alleged offender(s).

4. Counsel for the SFD responded that the SFD has thoroughly investigated all complaints filed by Lt. Blake, and, in cases where the misconduct has been proven, imposed discipline against the offender, including a recent suspension.

5. Further, counsel for SFD argued that the Commission is not the forum to hear these grievances, and stated that these same issues had been and/or are currently being litigated in other administrative agencies and/or federal court. (*See Marc Savage and Randolph Blake* v. *City of Springfield and Springfield Fire Department*, United States District Court No. 3:13-cv30164 (Filed: 10/9/18).

6. Lt. Blake, citing the Commission's decision and Orders in *Rowe* v. *Boston Fire Department*, CSC Case No. D1-18-074 (2019) *& Boston Fire Department Section 72 Inquiry*, CSC Tracking No. I-19-81 and the Superior Court's decision in *Alston* v. *Brookline Fire Department*, Suffolk Sup. Crt. No. 2017-1489 (2018), argued that the Commission should initiate an investigation, even if these matters are currently being litigated elsewhere.

APPLICABLE CIVIL SERVICE LAW AND RULES & FINAL 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).

The cases cited by Lt. Blake are starkly distinguishable from his request for investigation.

In *Alston*, a tenured civil service employee was terminated from his employment. The question before the Court was whether the statute divested the Commission of determining whether there was just cause for *Alston's* termination because of related MCAD proceedings that had been dismissed. Here, since Lt. Blake has not been disciplined, there is no disciplinary action for him to appeal to the Commission, unlike the matter in *Alston*.

The genesis of the *Boston Fire Department Section 72 Inquiry* is a claim of disparate treatment in the *Rowe* case in which Rowe, a tenured civil service employee *who was terminated from his employment*, had filed a just cause appeal with the Commission and claimed that other firefighters who engaged in similar behavior did not face the same discipline. Again, as Lt. Blake has not been disciplined, there is no disciplinary appeal before the Commission; and no argument that a similarly situated employee did not receive the same discipline as Lt. Blake.

In sum, Lt. Blake, who is not the subject of discipline, and is not contesting a non-selection for promotion, is asking the Commission

to investigate whether the SFD has taken appropriate steps to investigate his complaints, including those of discrimination. Those are serious concerns, but the Civil Service Commission, based on the facts here, is not the agency charged with adjudicating such matters.

For these reasons, an investigation is not warranted and the Commission has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) December 5, 2019.

Notice to:

Randolph S. Blake
[Address redacted]

Maurice Cahillane, Esq.
Egan Flanagan and Cohen P.C.
P.O. Box 9035
Springfield, MA 01102

* * * * * *

GREGORY R. LAVALLEE

v.

BOSTON FIRE DEPARTMENT

D1-19-059

December 5, 2019
Christopher C. Bowman, Chairman

Disciplinary Action-Discharge of Boston Fire Fighter-Racism-Off Duty-Section 41 Hearing-Copy of Accuser's Personnel File and EEOC Complaint Withheld—The Commission dismissed an appeal from a Boston firefighter discharged for racist epithets he hurled at a black colleague while the Appellant was off-duty and drunk. The Commission found that the Boston Fire Department had proven most, if not all, of the odious racist commentary of which the Appellant had been accused and that the Department had not denied him a fair Section 41 hearing by refusing to provide him with a copy of his black colleague's personnel file and EEOC complaint.

DECISION

On March 18, 2019, the Appellant, Gregory R. LaVallee (Mr. LaVallee), 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 terminate his employment as a permanent, full-time firefighter.

On April 30, 2019, I held a pre-hearing conference at the offices of the Commission. A full hearing was held at the same location on June 17, 2019.[1] The hearing was digitally recorded and both parties were provided with a CD of the recording.[2] The hearing was private. The parties submitted post-hearing briefs on August 9, 2019.

FINDINGS OF FACT

Twenty-four (24) exhibits were entered into evidence (BFD Exhibits 1-19 and APP Exhibits 1-5; APP Exhibit 1 includes multiple documents marked as APP Exhibits 1A through 1M.) Based on the these documents, the testimony of:

Called by the BFD:

- CB; BFD Firefighter;
- CH, CB's fiancée;
- BS, BFD Fire Lieutenant;
- MH, BFD Fire Lieutenant;
- JS, BFD Fire Lieutenant;
- JR, BFD Fire Captain;

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. In a separate, but related appeal, *Summering and Hayhurst* v. *Boston Fire Department*, the parties had a transcript of this appeal (*LaVallee* v. *BFD*) prepared and I have added that transcript to the record.

- David Walsh, BFD Deputy Chief of Personnel;

Called by Mr. LaVallee:

- Scott Malone, BFD Deputy Fire Chief;
- SB, retired BFD Firefighter;
- BB, BFD Firefighter;

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:

1. At the time of his termination on March 15, 2019, Mr. LaVallee had been employed by the BFD for fourteen (14) years. He is a white male; thirty-nine (39) years old, married and has a young daughter. Prior to his employment as a firefighter, he had been honorably discharged after serving eight (8) years in the United States Navy. His last assignment with the BFD was with Ladder 1, Group 3 on Hanover Street in the North End. (Testimony of LaVallee)

2. FF CB, a black male, has been a Boston firefighter for about twelve (12) years, and is also currently employed as a nurse at several local hospitals. Previously, FF CB served eight years as an Army Reservist, specializing in nuclear, biological, and chemical warfare. (Testimony of CB)

3. FF CB is assigned to Ladder 1, Group 4 at the same firehouse that Mr. LaVallee was assigned to. (Testimony of Mr. LaVallee and FF CB)

4. Although they are assigned to different Groups (3 & 4), the two firefighters occasionally worked together as a result of overtime shifts or shift swaps. (Testimony of Mr. LaVallee and FF CB)

5. CH, FF CB's girlfriend, is a nurse in a psychological ward at a local hospital, as well as a clinical nursing educator at a different local hospital, and at a local university. CH and FF CB have been in a romantic relationship for about five years. They have one child together, were expecting another at the time of the hearing, and share a home. (Testimony of FF CB and CH)

6. FF CB worked a shift swap at the Hanover Street station beginning December 12, 2018 at 6PM and extending through December 13, 2018 at 8AM. (Testimony of FF CB)

7. Between 12AM and 1AM on December 13, 2018, FF CB was in the station's TV room sitting in a recliner playing a video game called "Ark" on his Playstation gaming console. (Testimony of FF CB)

8. Mr. LaVallee, who was not on duty that night, entered the TV room with Chinese food, stumbling and smelling strongly of alcohol on his person and breath. Mr. LaVallee sat in a chair to the right of the recliner, and asked FF CB if he would like any Chinese food. FF CB declined and Mr. LaVallee left the room. (Testimony of FF CB)

9. Shortly thereafter, Mr. LaVallee returned to the TV room, and sat in a recliner chair approximately nine (9) feet behind FF CB. FF CB heard the sounds of Mr. LaVallee eating food from a bowl. (Testimony of FF CB)

10. FF CB was, at that point, conversing with his girlfirend, CH, via the online "party chat" feature on the Playstation console. (Testimony of FF CB)

11. FF CB and CH sometimes use the online "party chat" feature on the Playstation gaming console to communicate over Bluetooth headsets, which feature a microphone and speaker allowing the users to converse in real time. When users who are "friends" in the system have activated their Playstation console, each can see that the other is online, and can invite the other to chat over the headset. (Testimony of FF CB and CH)

12. While FF CB was communicating with CH through the party chat, he heard Mr. LaVallee say "you fucking [n-word]," and then he heard Mr. LaVallee "hock a louie," a noise that indicated to FF CB that Mr. LaVallee was clearing his throat to spit. (Testimony of FF CB)

13. CH, while communicating with FF CB through the party chat, heard Mr. Lavallee say "fucking [n-word]" and then heard Mr. LaVallee "clear his throat as if to spit." (Testimony of CH)

14. FF CB stood up from his recliner, and exited the TV room to inform his commanding officer that night, Lt. BS, of the incident. Lt. BS was in his quarters located down a hallway outside the TV room. (Testimony of FF CB and Lt. BS)

15. When FF CB knocked on Lt. BS's door, Lt. MH, commanding officer on the engine that night, also opened the door to his adjacent quarters. (Testimony of Lt. BS and Lt. MH)

16. FF CB told Lt. BS: "You better get fucking LaVallee out of the TV room before I punch him in the face. He's drunk, he's saying [n-word] this, [n-word] that, and spitting on the floor." (Testimony of Lt. BS)

17. Lts. BS and MH walked down the hall to the TV room, followed by FF CB. Mr. LaVallee was slouched on a couch. One of the Lts. said "come on, Greg, get up," or similar words to that effect. Mr. LaVallee complied, and they guided him out of the TV room to the bunk room. (Testimony of FF CB, Lt. BS and Lt. MH)

18. When the Lts. addressed him as he was slouched on the couch, Mr. LaVallee's demeanor indicated that he was intoxicated. (Testimony of Lt. BS).

19. Lt. BS told FF CB that the incoming Captain would handle the situation in the morning. FF CB informed Lt. BS that he wanted Mr. LaVallee to transfer out of the firehouse. (Testimony of Lt. BS)

20. Approximately an hour after this incident, FF CB called his girlfriend to tell her he was fine and to say good night. (Testimony of CH)

21. FF CB slept in the TV room that night, which is his normal practice. (Testimony of FF CB)

22. Lt. JS arrived at the firehouse at around 6:30AM on December 13, 2018. Firefighter CB recounted to Lt. JS that Mr. LaVallee, who was off-duty, had come into the TV room, intoxicated, started using the n-word and spat in FF CB's direction. (Testimony of Lt. JS; BFD Ex. 13 (Lt. JS "5A" report))

23. Fire Captain JR also arrived at the firehouse around 6:30 A.M. on December 13, 2018. Lt. BS met him on the street outside the station and told Captain JR about the events of the early morning hours. Specifically, Lt. JS told Captain JR that FF CB had knocked on his door and told him that Mr. LaValle was in the TV room "using the N-word and spitting all over the place." Around that same time, Lt. MH confirmed Lt. BS's version of events to Cpt. JR. (Testimony of Captain JR)

24. Captain JR then saw FF CB on the apparatus floor, and asked FF CB to accompany him to his office upstairs. Once in his office, FF CB told Cpt. JR that, earlier in the morning, Mr. LaVallee entered the TV room intoxicated, with Chinese food and started calling FF CB the n-word multiple times. FF CB told Captain JR that he wanted Mr. LaVallee to transfer out of the station. (Testimony of Captain JR)

25. Captain JR and Lt. JS then met with Mr. LaVallee to question him about what had occurred. Captain JR told Mr. LaVallee that FF CB had accused Mr. LaVallee of using the n-word and spitting in his direction hours earlier in the TV room. In response, Mr. LaVallee: a) said he had been trying to watch a movie in the TV room at the time; b) referenced a movie by the name of *Once Upon a Time in America*; and c) said "no, I didn't say that" in reference to the n-word. (Testimony of Captain JR)

26. Mr. LaVallee acknowledged to Captain JR and Lt. JS that he had been drinking the night before and that he had just lost a close friend. (Testimony of Captain JR)

27. Captain JR observed that Mr. LaVallee looked "out of it" and he (Captain JR) could smell alcohol on Mr. LaVallee's breath. (Testimony of Captain JR)

28. After that meeting, Mr. LaVallee approached FF CB on the apparatus floor of the firehouse. Mr. LaVallee stated "I could kiss you right now," which FF CB interpreted as being "fake nice." Mr. LaVallee further stated "I'm sorry if I said something that offended you," or something similar, referring to the incident in the early morning hours. (Testimony of FF CB)

29. Mr. LaVallee told FF CB that Cpt. JR had asked to see the two of them, and so FF CB agreed to accompany Mr. LaVallee back to Cpt. JR's office upstairs. (Testimony of FF CB)

30. In Cpt. JR's office, FF CB stated that Mr. LaVallee called him the n-word and spit in his direction while drunk earlier that morning in the TV room, adding that he could not work with Mr. LaVallee anymore, and wanted him to transfer. Mr. LaVallee told FF CB that he was sorry if he said anything to offend FF CB. (Testimony of Cpt. JR)

31. The incident traumatized FF CB, and he later discussed the incident with a therapist because it weighed heavily on his mind. (Testimony of FF CB)

32. Following the incident of December 13, 2018, Mr. LaVallee took leave and sought medical treatment for about one month. (Testimony of Mr. LaVallee)

33. When Mr. LaVallee returned to work, the BFD placed Mr. LaVallee on paid administrative leave while the BFD conducted an investigation of FF CB's allegations. (Testimony of Dep. Walsh)

34. The BFD asked everyone with information to complete a "5A" report and then interviewed each of them. (Testimony of Dep. Walsh).

35. FF CB's 5A report, completed on December 14, 2018 states in part:

> "I was in the TV room on my playstation 4 wearing headphones and talking to my girlfriend in a party chat … Around 12:10, I observed FF Greg Lavalle stumble into the TV room with a plate of food in his hand, visibly intoxicated. It was then confirmed through the smell of alcohol on his breath when he asked me 'if I wanted some Chinese food' to which I shook my head no.
>
> Around 12:20, I was sitting on the brown leather recliner chair approximately 9 feet from FF Lavalle. He then said with a loathsome tone, 'Nigger….fucking nigger' and then proceeded to hock a loogie and spit twice. FF then follows with 'Nigger…I'll fuckin' fuck you up right now nigger." He continued this rant for approximately 30-40 seconds. I then turned around to see if FF Lavalle (sic) was possibly on the phone or watching a video, to which he was not.
>
> My girlfriend who heard the entire interaction because FF Lavalle (sic) wasn't quiet about it asked me if 'she heard what she thought she just heard' to which I replied 'yes, I'm gonna go now." I then ended the playstation party chat and proceeded to walk to the officers quarters." (BFD Ex. 13)

36. During an interview on January 18, 2019, FF CB's statement to investigators largely mirrored his 5A report, except that he told investigators that Mr. LaVallee also said "Do you want to fight me?" while in the TV Room. (BFD Ex. 9)

37. During an interview on January 25, 2019, Mr. LaVallee told investigators that he had been drinking whiskey and beers prior to entering the firehouse; that he could not remember entering the firehouse that morning; that he did not remember using the n-word; and that the first thing he remembers is Fire Captain JR telling him, at around 6:30 A.M., that he (LaVallee) had been in a confrontation with FF CB. (BFD Ex. 9)

38. The BFD prepared a written summary of its investigation at the conclusion of the investigation. Under the heading "Findings" on the final page of the 8-page summary dated February 20, 2019, it states:

> "The investigators find that FF LaVallee violated BFD's Rules and Regulations, including, but not limited to Rule 18.41, the City of Boston's Policy on Discrimination, Harassment and Retaliation and Zero Tolerance for Violence Policy when he made the following racial, threatening comments:
>
> • "Nigger…fucking nigger"
>
> • "Nigger…I'll fuckin' fuck you up right now nigger" and
>
> • "You fucking nigger…do you want to fight me, I'll fuck you up"
>
> and spit at FF [CB]. We base this finding on the totality of the information collected during the investigation, not merely on FF LaVallee's inability to remember the incident and his resulting inability to contradict or deny FF [CB]'s report. Rather, for the reasons detailed above, we find FF [CB]'s report credible." (BFD Ex. 9)

39. Two (2) days later, on February 22, 2019, FF CB signed and submitted an Equal Employment Opportunity Commission (EEOC) charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). That charge states in part:

> "In or around December 12, 2018 I was working on Group 3 at the Boston Fire Department. Another firefighter, Mr. Greg LaValle (sic) (White), entered the fire house after having been out drinking. Mr. Lavalle (sic) was noticeably drunk, stumbling while walking around. At this point, I was speaking with my girlfriend, [CH], via headset.
>
> Mr. Lavalle (sic) began to say 'F***ing n***r' or words to that effect and spitting towards me. [CH] overheard these comments and was surprised. I ended the call with [CH] and walked out of the room to inform Mr. [BS] and Mr. [MH] of what had happened. Mr. [BS] and Mr. [MH] removed Mr. Lavalle (sic) from the room and put him into the bunkroom. Mr. [BS] and Mr. [MH] did not inform the chief of this incident, as is standard protocol, stating that they would 'deal with it in the morning' or words to that effect." (App. Ex. 4)

40. On February 27, 2019, the BFD preferred eight charges and specifications against Mr. LaVallee for violations of BFD Rules and City policies. (BFD Ex. 4). On March 5, 2019, the BFD again notified Mr. LaVallee of the specifications against him and an upcoming hearing on the charges scheduled for March 14, 2019. (BFD Ex. 5).

41. The BFD held the hearing on March 14, 2019. The BFD gave Mr. LaVallee the opportunity to cross-examine witnesses and present evidence. (BFD Ex. 16)

42. Following the hearing, the three-member Hearing Board sustained all of the charges against Mr. LaVallee. (BFD Ex. 17). Fire Commissioner Joseph Finn adopted the Board's findings and terminated Mr. LaVallee's employment on March 15, 2019. (BFD Ex. 19).

43. In March 2011, Mr. LaVallee was suspended for four (4) tours for entering a firehouse while off-duty for making an "inappropriate racial comment" to two black firefighters. Deputy Chief Malone confirmed that the "inappropriate racial comment" included the n-word.

LEGAL STANDARD

The Civil Service Commission is charged with ensuring that employment decisions are made consistent with basic merit principles. Basic merit principles requires, among other things:

> " … retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected"; and … 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; "assuring that all employees are protected … from arbitrary and capricious actions." G.L. c. 31, § 1)

G.L. c. 31, § 41 states in part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days …"
>
> "Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof … "

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); *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); *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).

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 states in part:

> "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 … The commission may also modify any penalty imposed by the appointing authority."

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'," *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 Mr. LaVallee, 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.

The BFD notified Mr. LaVallee of the specific allegations and charges against him well in advance of the pre-termination hearing. Mr. LaVallee's attorney appeared at the pre-termination hearing on Mr. LaVallee's behalf. Mr. LaVallee's attorney submitted documentary exhibits into evidence at the pre-termination hearing and called a witness in his defense. Mr. LaVallee's attorney cross-examined the BFD's witnesses. The BFD provided Mr. LaVallee with a detailed written explanation of the BFD's decision to terminate him following the pre-termination hearing including information regarding his right to file an appeal with the Commission. The BFD's decision to not provide Mr. LaVallee with a copy of FF CB's personnel file, which the Commission also denied as part of the discovery process, was justified. The BFD's decision to not provide Mr. LaVallee with a copy of FF CB's EEOC complaint, while different from the Commission's decision, was grounded in a good faith belief by the BFD that providing such information was not warranted. More importantly, that decision, standing alone, did not constitute the type of procedural error that prevented the full hearing that Section 41 requires.

That turns to the issue of whether the BFD had just cause to terminate Mr. LaVallee from his employment as a Boston Firefighter. In that regard, the Commission is, once again, faced with an appeal involving the use of the repugnant n-word. The context in which it occurred here is particularly ugly. Mr. LaVallee, a white firefighter, does not dispute that, while off-duty, he walked into the North End firehouse during the early morning hours so intoxicated that he cannot remember what transpired in the TV room where on-duty Firefighter CB, a black firefighter, was sitting.

I credit FF CB's testimony that Mr. LaVallee entered the TV room in a drunken state, sat down in a chair next to FF CB, smelling of alcohol and eating Chinese food. I also credit FF CB's testimony that Mr. LaVallee: a) briefly left; b) then re-entered the TV Room, sitting down on recliner chairs approximately nine (9) feet behind FF CB; c) began spitting on the floor; and d) then said, "fucking n-word".

I credit FF CB's testimony in this regard for the following reasons. First, FF CB appeared to be genuinely outraged during his testimony before the Commission when recounting what he heard Mr. LaVallee say in the TV Room that morning. His testimony, standing alone, rang true to me. Second, FF CB immediately reported to two (2) Fire Lieutenants on duty that night that Mr. LaVallee was in the TV Room, drunk, using the n-word and spitting all over the place. The spontaneity of FF CB's decision to report the matter reinforces that his anger and disbelief that Mr. LaVallee had used the n-word was genuine, as opposed to something that was concocted in an attempt to falsely accuse Mr. LaVallee of misconduct. Third, FF CB's girlfriend, CH, offered credible, corroborating testimony before the Commission, stating that she heard Mr. Lavallee say "fucking n-word" when she was chatting with FF CB on the play station headset that morning. She spoke only to what she recalled hearing that morning and did not attempt to perfectly sync her testimony with FF CB's testimony.

I did consider those factors that could potentially detract from FF CB's testimony regarding whether Mr. LaVallee used the n-word that morning, including that FF CB has offered what appear to be conflicting statements regarding whether Mr. LaVallee made *other* statements in the TV Room that morning, discussed in more detail below. Ultimately, however, FF CB's testimony that he recalled hearing Mr. LaVallee use the n-word that morning has been consistent and unwavering in each of his verbal and written statements that are part of the record. I also considered the testimony of a retired Boston firefighter that recalled an event many years ago in which, according to the retired firefighter, FF CB made a false allegation against a local restaurant after he (FF CB) was required to wait outside the establishment with several others because the restaurant was nearing capacity. Even if true, that information did not change my assessment of FF CB's credibility regarding whether he heard Mr. LaVallee use the n-word on December 13, 2018. Finally, I considered testimony that Mr. Lavallee and FF CB had a verbal argument months earlier that ended with FF CB allegedly referring to Mr. LaVallee as an "asshole" and FF CB suggesting that Mr. LaVallee transfer to another firehouse. The fact that this verbal altercation occurred, however, did not change my opinion that FF CB was telling the truth regarding Mr. LaVallee using the n-word in the firehouse on December 13th.

By entering the firehouse in a drunken state and using the n-word while spitting on the floor, Mr. LaVallee engaged in substantial (and abhorrent) misconduct which adversely affects the public in-

terest and constitutes a violation of various rules and regulations of the BFD, including conducting unbecoming a firefighter. BFD policy forbids "[c]onduct unbecoming a member, whether on or off duty, which tends to lower the [fire] service in the estimation of the public," and "[c]onduct prejudicial to good order."

The BFD also found that: a) Mr. LaVallee spat *at* FF CB in the TV Room that morning; and that b) Mr. LaVallee stated: "Nigger…I'll fuckin' fuck you up right now nigger" and "You fucking nigger… do you want to fight me, I'll fuck you up". Those findings are not supported by a preponderance of the evidence. First, a review of the record shows that FF CB never actually stated (verbally or in writing) that Mr. LaVallee spat *at* him. It appears that the word "at" was first used *by the BFD* in its investigative report. FF CB has, at different times, reported that Mr. LaVallee was "spitting"; "spitting all over the place"; and/or "spitting toward me." Further, based on FF CB's own testimony and the enlarged color photographs he submitted during his testimony, FF CB was sitting in a large recliner chair with a tall back, facing in the opposite direction of Mr. LaVallee, who was sitting on recliner chairs approximately nine (9) feet away. While the unsavory act of Mr. LaVallee spitting on the floor while eating Chinese food and uttering the n-word, standing alone, represents substantial misconduct, the record doesn't support the allegation that Mr. LaVallee was spitting *at* FF CB that morning.

The preponderance of the evidence also does not support the finding that Mr. LaVallee stated "I'll fuck you up" and/or that he challenged FF CB to a physical fight. Based on FF CB's own 5A statement, his girlfriend heard the entire interaction between FF CB and Mr. LaVallee. As referenced above, she testified only to hearing Mr. LaVallee state: "you fucking n-word", but did not testify to hearing the additional statements referenced above. FF CB has offered divergent statements and testimony in an apparent attempt to explain this discrepancy, including belated statements that he was "muting" and "unmuting" the headphones or that he temporarily removed the headphones at one point. That's not consistent with his 5A statement and doesn't ring true to me—at all. Further, based on the credible testimony of Fire Lt. BS and Fire Lt. MH, FF CB, immediately after the interaction, did not tell them that Mr. LaVallee had made these additional threatening statements. Finally, although FF CB made this allegation regarding the additional comments in this 5A report, his own EEOC complaint does not allege that Mr. LaVallee made these additional threatening comments.

Having determined that Mr. LaVallee did engage in the alleged misconduct, I must determine whether the level of discipline (termination) 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).

First, although my findings do differ from the BFD regarding whether Mr. LaVallee spat at FF CB and whether Mr. LaVallee physically threatened FF CB, I have reached the same conclusion regarding the most serious allegation—that Mr. LaVallee used the n-word in the firehouse in a conversation with a black, on-duty Boston Firefighter.

Prior Commission decisions have stated unequivocally that racist behavior by a public employee is grounds for termination, stating in *Duquette* v. *Department of Correction*, 19 MCSR 337, 341 (2006): "One would have hoped that this century's workplace had been purged of such offenses ... There is no place for such behavior in the workplace and there is no place for [Mr. Duquette]—or others that would engage in such behavior at the Department of Correction." When the Appellant in that appeal argued that employees who engaged in similar behavior were not terminated in the past, the Commission stated that it would not " ... use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements ..." *Duquette* at 340.

In *Davis* v. *Newton Fire Department*, 27 MCSR 16 (2014), the Commission upheld the termination of a fire fighter based primarily on his engagement in racist harassment. Specifically, the Appellant in that case, Davis, who is African American, referred to another firefighter, who is biracial, as a "house n-word"; a "corn bread" and "home grown," all derogatory references to the firefighter's race, during a conversation about shift swaps.

In *Green* v. *Harvard Vanguard Medical Associates, Inc*., 79 Mass. App. Ct. 1 (2011), the Appeals Court, describing the n-word as a " ... racial epithet that is widely regarded as the most hateful and offensive in our culture", concluded that " ... as a matter of law, a supervisor's use of an offensive and racial epithet in a single, brief

conversation was sufficiently severe or pervasive to give rise to a claim of a racially hostile work environment ...".

Mr. LaVallee argues that alcoholism, for which he has sought treatment, was the cause of his behavior and should be taken into consideration regarding whether termination is the appropriate penalty here. I am not unsympathetic to Mr. LaVallee's challenges with alcoholism and applaud his efforts to seek treatment. However, this is the second time that Mr. LaVallee has been disciplined for using the n-word. In 2011, he engaged in the exact same egregious misconduct, entering a firehouse while off-duty, and using the n-word in reference to two (2) black firefighters. In that context, a downward modification of the penalty is not warranted here.

CONCLUSION

For all of the above reasons, Mr. LaVallee's appeal under Docket No. D1-19-059 is hereby ***denied***.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on December 5, 2019.

Notice to:

Kevin R. Mullen, Esq.
John Greene, Esq.
15 Foster St.
Quincy, MA 02169

Devin T. Guimont, Esq.
Barbara Parker, Esq.
Connie Wong, Esq.
City of Boston
Boston City Hall, Rm. 624
One City Hall Plaza
Boston, MA 02201

* * * * * *

J. OTAVIO S. DePAULA-SANTOS

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

C-19-211

December 19, 2019
Christopher C. Bowman, Chairman

Reclassification Appeal-Department of Environmental Protection-Environmental Analyst III to IV-Scope of Duties-Cross Connection Control Program—An administrator in DEP's Cross Connection Control Program failed in his bid to secure an upward reclassification from Environmental Analyst III to IV where his duties were distinguishable from those in the sought-after classification in that they involved administrative reviews rather than a qualitative view of the agency's programs. The Appellant has worked at DEP for 28 years.

DECISION

On October 7, 2019, the Appellant, J. Otavio S. DePaula-Santos (Appellant), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the September 18, 2019 decision of the state's Human Resources Division (HRD) in which HRD affirmed the decision of the Department of Environmental Protection (DEP) to deny his request to be reclassified from Environmental Analyst III (EA III) to Environmental Analyst IV (EA IV).

On October 29, 2019, I held a pre-hearing at the offices of the Commission and a full hearing was held at the same location on December 3, 2019.[1] The hearing was digitally recorded and one CD was made of the hearing.[2]

FINDINGS OF FACT

Thirty-five (35) exhibits were entered into evidence (Respondent Exhibits 1-6 (R1 - R6) and Appellant Exhibits 1-29 (A1 - A29). Based on the documents submitted into evidence, the testimony of:

Called by Mr. DePaula-Santos:

- J. Otavio S. DePaula-Santos, Appellant;
- Ted Saad, EA V / Information Manager, DEP;

Called by DEP:

- Ana Maria Yvette DePeiza, Director, Drinking Water Program, DEP;
- Damon Guterman, EA VI, Drinking Water Program, DEP;

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.

- Andrew Durham, EA V, Drinking Water Program, DEP;

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 Biology and Mathematics and a Master's degree in Environmental Studies. (Testimony of Appellant)

2. Prior to working for DEP, the Appellant worked for an environmental consulting company. (Testimony of Appellant)

3. The Appellant has worked for DEP for twenty-eight (28) years. (Stipulated Fact; Testimony of Appellant)

4. For the past ten (10) years, the Appellant has served in the title of EA III. (Testimony of Appellant)

5. The Appellant works at 1 Winter Street in Downtown Boston from 5:30 A.M. to 3:00 P.M. (Testimony of Appellant)

6. The Appellant reports to Andrew Durham, an EA V. (Testimony of Appellant)

7. The Appellant does not supervise any employees. (Testimony of Appellant)

8. Not all EA IVs at DEP supervise employees. (Testimony of Appellant, DePeiza, Guterman)

9. The Appellant spends more than 50% of his time administering the Cross Connection Control Program (CCCP) within DEP's Drinking Water Program. (Testimony of Appellant, Saad, DePeiza, Guterman and Durham)

10. Pursuant to state regulations, every public water system in Massachusetts must have a CCCP. to prevent "cross-connections". (Testimony of Appellant)

11. A "cross-connection" is "any actual or potential connection between the public water supply and a source of contamination or pollution." (https://www.mass.gov/service-details/cross-connection-control-a-best-practices-guide-for-small-systems)

12. The Appellant did not establish the guidelines for the CCCP Program at DEP. Rather, the guidelines were established many years ago by the current Director of the Drinking Water Program. (Testimony of Appellant and DePeiza)

13. Using those pre-existing guidelines, the Appellant reviews new applications and renewal applications for individuals seeking to be certified as "Back-Flow Testers" and "Cross-Connection Surveyors." Approximately 891 individuals hold such certifications in Massachusetts, which must be renewed every three (3) years. (Testimony of Appellant)

14. Once certified, these individuals may approve local permits on behalf of a public water system (i.e. - a local water department) that has a CCCP. (Testimony of Appellant)

15. As part of his job duties and responsibilities, the Appellant provides information to applicants seeking one of the above-referenced certifications. (Testimony of Appellant)

16. Once the application is received, the Appellant is responsible for data-entering the application information into a tracking system. (Testimony of Appellant)

17. The Appellant then verifies that the applicant has submitted the appropriate fee. (Testimony of Appellant)

18. The Appellant then reviews the application to ensure that the applicant has provided the appropriate supporting documentation. (Testimony of Appellant)

19. New applicants must provide supporting documentation showing that he/she has successfully passed an examination from an approved provider. (Testimony of Appellant)

20. Applicants seeking a renewal must show that they have completed a minimum number of tests and three (3) hours of approved training. (Testimony of Appellant)

21. If the applicants provide the above-referenced documentation, and the appropriate fee, the Appellant approves the initial certification or renewal and mails the approved certification to the applicant. (Testimony of Appellant)

22. The Appellant spends a minority of his time attending meetings of water supply system organizations and reviewing water vending machine applications. Although he has not done so in approximately two (2) years, the Appellant also occasionally "audits" a public water system to ensure that appropriate certifications have been issued. (Testimony of Appellant)

23. The Job Specifications for the EA series were developed and approved in 1989, approximately thirty (30) years ago. (Exhibit R1)

24. Each title in the series (EA I - EA VI) has level distinguishing duties (LDDs). (Exhibit R1)

25. Partly because of the passage of time (30 years) since they were developed, the LDDs for the EA series do not always accurately reflect the actual job duties of employees serving in those titles. (Testimony of DePeiza)

26. In addition to reviewing the language in the LDDs, DEP, when determining the correct job title to assign in the EA series, also looks at the work typically performed by incumbents in the various titles. (Testimony of DePeiza)

27. When reviewing the Appellant's request for reclassification to EA IV, DEP looked both at the LDDs in the EA series as well as the type of work being performed by incumbent EA IVs. (Testimony of DePeiza)

28. The LDD most relevant to this appeal is EA IV LDD #5 which states: "Recommend approval/disapproval of applications for permits for hazardous waste or other projects." (Exhibit R1)

29. Upon review, Ms. DePeiza determined that employees classified as EA IVs at DEP administered programs that required more qualitative review, including the need to consult publications and other material to determine whether a certification and/or approval was appropriate. Further, EA IVs at DEP typically work independently to develop guidelines and standard operating procedures. (Tesitmony of DePeiza)

30. Ms. DePeiza found that the Appellant's job duties and responsibilities were distinguishable from EA IVs because the majority of his duties involved a more straightforward, administrative review (i.e. - either the applicant did or did not have a passing grade from an approved training provider.) Further, the Appellant does not work independently to develop program guidelines or standard operating procedures. (Testimony of DePeiza)

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, § 49.

The Appellant must show that he performs the distinguishing duties of the [title sought] more than 50% of the time. *See Gaffey* v. *Dept. of Revenue*, C-11-126 [24 MCSR 380] (July 18, 2011); *see also 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 duties encompassed within the higher level position the majority of the time….").

ANALYSIS

The Appellant has not shown that he spends a majority of his time performing the level distinguishing duties of an EA IV. Here, DEP has appropriately applied LDDs developed thirty (30) years ago to the current work environment, including LDD #5. The Appellant, based on a rigid, literal application of LDD #5, argues that this LDD describes the work that he performs a majority of the time.

However, based on the credible testimony of Ms. DePeiza, the long-time DEP employee who currently serves as Director of the Drinking Water Program, and who created the CCCP, a literal interpretation of that LDD is not appropriate thirty years later. Today, EA IVs meet LDD #5 by working independently to develop program guidelines and review and approve applications that require a more qualitative review. She found that the Appellant's job duties and responsibilities were distinguishable from EA IVs because his review is effectively an administrative review.

Importantly, I do not think that Ms. DePeiza's conclusion here was based on a result-driven attempt to deny the Appellant's request for reclassification. Rather, Ms. DePeiza, who hired the Appellant many years ago, spoke favorably of the Appellant and the important role that he plays administering the CCCP.

Although this appeal must be denied, it should not be viewed as a negative reflection on the Appellant or his work. His commitment, organization skills and dedication were evident in the documents submitted as well as his professional presentation to the Commission. DEP is fortunate to have someone with his skill set in this mission-critical position.

CONCLUSION

The Appellant's re-classification appeal under Docket No. C-19-211 is hereby ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 19, 2019.

Notice to:

J. Otavio S. DePaula-Santos
[Address redacted]

Julia O'Leary, Esq.
EOEEA
100 Cambridge Street, Suite 900
Boston, MA 02114

* * * * * *

WILLIAM GREEN

v.

CITY OF LAWRENCE

D1-17-104

December 19, 2019
Cynthia A. Ittleman, Commissioner

Disciplinary Action-Discharge of Lawrence Police Officer-Abandoned Detail-Absence From Duty Without Leave-Insubordination-Intimidation-Untruthfulness—Commissioner Cynthia A. Ittleman secured a unanimous Commission vote adopting her decision that upheld the discharge of a Lawrence police officer for abandoning a detail, being absent from duty without authorization for five days, threatening a superior officer, and lying to the Chief of Police about these threats.

DECISION

On May 22, 2017, William Green (the Appellant or Mr. Green) filed the instant appeal with the Civil Service Commission (the Commission) under G.L. c. 31, ss. 42 and 43, challenging the decision of the City of Lawrence (the Respondent, the City or Lowell) to terminate his employment as a Patrol Officer in the Lawrence Police Department (the LPD or the Department). The Commission held a prehearing conference in this regard at the Mercier Community Center in Lowell on July 10, 2017 and a full hearing was held at the same location in Lowell on August 14, 2017.[1] Having not received a written request for a public hearing, the hearing was private. The hearing was digitally recorded and copies of the recording were sent to the parties.[2] The witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Thirty-six (36) Exhibits (Ex.) were entered into evidence at the hearing.[3] Based on the Exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Sergeant (Sgt.) Sandy Picard, LPD
- Officer Wayne Taylor, LPD
- Lieutenant (Lt.) Michael McCarthy, LPD
- Then-Chief James Fitzpatrick LPD

Called by the Appellant:

- William Green (Appellant)

and taking administrative notice of all matters filed in the case; stipulations[4]; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant was hired by the LPD in 2005 as a Patrol Officer. (Testimony of Appellant) As a member of the LPD, the Appellant was subject to the Department's Rules and Regulations. (Exs. 28 (Rules effective March 2016) and Ex. 29 (Rules effective prior to March 2016))

2. On March 20, 2017, the Respondent terminated the Appellant's employment for: 1) arriving late and in improper uniform to a day-long detail on November 2, 2016, expressed anger when ordered to produce a memo explaining his tardiness arrival, and left the detail twenty (20) minutes after he arrived after he was instructed to remain at the detail until a replacement could arrive; 2) he was absent without leave on November 23, 26, 27, 28 and 29 and December 2, 3 and 4, 2016; 3) intimidated a witness and was insubordinate to Lt. McCarthy, who was investigating allegations that the Appellant committed an assault and battery on another officer; and 4) was untruthful when he told the Police Chief that he did not recall telling Lt. McCarthy that he (Lt. McCarthy) may become "collateral damage" regarding his investigation of the Appellant. (Ex. 1)

Charge 1: Abandoned Detail

3. Police details are administered by the Administrative Division of the LPD, which is led by Lt. Sean Burke. Sgt. Sandy Picard assists Lt. Burke in this regard. (Testimony of Picard) Details are assigned to police officers through a system established by the collective bargaining agreement (CBA) between the city and the union representing patrol officers. (Testimony of Picard) Since 2005, the list of officers eligible for details was administered by Patrol Officer Wayne Taylor, who would contact officers, in the order of eligibility, to offer them available details. (Testimony of Taylor)

4. On November 1, 2016, LPD Chief Fitzpatrick issued a "Road Job Order" to all personnel via email messages and by posting it in LPD headquarters, establishing a new process for monitoring details that would begin on November 2, 2016. (Ex. 7; Testimony

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 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. 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 Exhibits were entered into the record at the hearing as Joint Exhibits, with the understanding that the parties did not contest the authenticity of the documents but reserved their rights to argue the relevance of the Exhibits. After careful review of all of the evidence in the record, I have found the Exhibits relevant and assigned them the weight they are due.

4. At the prehearing conference in this case, the parties stipulated to certain facts. (Administrative Notice)

of Picard) The new process required Sgt. Picard to make sure that details were staffed on time by officers who were properly uniformed. (*Id*.)

5. The Appellant accepted an assignment to work a series of security details requested by the Greater Lawrence Family Health Center (Health Center) at 150 Park Street in Lawrence from 8 a.m. to 5 p.m. (Testimony of Picard)

6. On November 2, 2016, Sgt. Picard began her duties by visiting the details that were to begin at 7 a.m. At approximately 7:45 a.m., Sgt. Picard was at a detail at the intersection of Lawrence Street and Park Street, which was close to the Health Center. Since Sgt. Picard was near the Health Center and the Appellant was expected to begin a detail there at 8 a.m., Sgt. Picard went to the Health Center to wait for the Appellant. (Testimony of Picard)

7. The Appellant's November 2, 2016 detail was a "security" detail because there had been two (2) recent shooting incidents in that area. The Health Center had non-LPD security guards but they were unarmed. (Testimony of Picard)

8. When the Appellant had not arrived a few minutes before the detail was to begin at 8 a.m., Sgt. Picard texted the Appellant and contacted him by LPD radio, creating a time-stamped chronology of these matters. (Ex. 5)

9. The Appellant arrived at the Health Center approximately seventeen (17) minutes late. (Ex. 7) When the Appellant arrived, Sgt. Picard noted that the Appellant arrived without his hat and without displaying his badge, which are part of the required uniform for an officer on detail, as required by LPD. Sgt. Picard had to instruct the Appellant to get his hat from his car and to put his badge on his uniform. Further, Sgt. Picard told the Appellant to write a standard "to/from" memorandum to her regarding the reason for his tardiness. (Exs. 5, 6 and 7; Testimony of Picard)

10. After the Appellant retrieved his hat and put on his badge, the Appellant told Sgt. Picard that he did not want to work the detail and that he'd speak to the details administrator to obtain a replacement for himself. Sgt. Picard did not object to what the Appellant said but she advised him that there could be no gap in coverage at the detail because the Health Center was having "trouble in the neighborhood". (Testimony of Picard; Ex. 5)

11. On November 2, 2016, Officer Wayne Taylor was administering the details. He had assigned the Appellant to the Health Center detail. After the Appellant spoke to Sgt. Picard, the Appellant contacted Officer Taylor and complained that he had been asked to write a "to/from memo". The Appellant complained to Officer Taylor that he was being "watched", he would not put up with "any of this shit", and that he was leaving the detail. Officer Taylor told the Appellant that he (Officer Taylor) would find a replacement for the Health Center detail but he did not authorize the Appellant to abandon his post. The Appellant left the detail at or around 8:35 a.m. before a replacement was identified to report to the Health Center detail. (Testimony of Taylor; Ex. 5)

12. By memo dated November 2, 2016, the Appellant provided Sgt. Picard with his explanation for his tardiness that day, citing several factors, including a broken boot lace and having to drop his wife off at work. (Ex. 10)

13. When staffing details, the LPD gives the highest priority to security details, which are filled first, prior to traffic control details. If circumstances require an officer to leave a security detail, the LPD will fill it immediately, and, if no replacement is available, the department will have a police car from that day's shift report to that location. (Testimony of Taylor)

14. The Appellant was interviewed regarding the November 2, 2016 detail incident. In the interview, the Appellant admitted that he was late to the detail and that Sgt. Picard had to tell the Appellant to find and put on his hat and badge. The Appellant further stated that after Sgt. Picard left, he contacted Officer Taylor and asked if he could find another officer for the detail and told Officer Taylor that he was leaving. The Appellant also admitted that he left the detail at or around 8:35 a.m. before his relief, Officer Angel Lopez, arrived. (Ex. 5)

15. LPD Rule 7.11.2, Neglect of Duty, states,

> "Members shall not be absent from their assigned duty without leave; leave their post, sector, beat, or assignment without being properly detailed, relieved or making required notifications." (Ex. 28)

16. LPD Rule 8.23.2, Reporting for Duty, states,

> "All members shall report for duty promptly at the time and place required by their assignment or as otherwise directed by the Chief or Officer in charge. They shall be properly attired with uniforms cleaned, pressed and serviceable. They shall report for duty having achieved an acceptable level of personal hygiene. They shall be properly equipped and ready to immediately assume their duties." (Exs. 28)

17. The Appellant was the only LPD officer to abandon a detail without being excused in the twelve (12) years that Officer Taylor administered details. (Testimony of Taylor) The Appellant was not the only LPD officer cited for failure to be on time for his detail on November 2, 2016 as Sgt. Picard also asked Officer L to prepare a "to/from" memo for being late to his detail at another location on November 2, 2016. (Ex. 7)[5]

18. On November 8, 2016, then-Chief Fitzpatrick directed Lt. Michael McCarthy to investigate the Appellant's conduct on November 2, 2016 in connection with the detail to which he was assigned. Lt. McCarthy interviewed the Appellant, Officer Taylor and Sgt. Picard and obtained memoranda from Lt. Burke to Chief Fitzpatrick, from Sgt. Picard to Lt. Burke, and from the Appellant to Sgt. Picard. Lt. McCarthy prepared an investigation report in which he concluded that the Appellant was tardy for the Nov. 2,

5. Ex. 7 includes records showing the officers whose details were checked on November 1, 2 and 3 in 2016, indicating that the Department was not only checking the Appellant's detail. Exhibit 7 also includes the to/from memo that Officer L was ordered by Sgt. Picard to write.

2016 detail and that he abandoned the detail before he could be replaced in violation of LPD Rules 7.11.2 (neglect of duty) and 8.23.2 (reporting for duty). (Exs. 5, 6 and 8)

Charge 2 - Absence from Duty Without Leave

19. The LPD maintains a record of officers assigned to each shift which indicates their attendance. The record shows the assignments by platoon (indicating the shift) to which officers are assigned. Each platoon is divided into three (3) groups. Two (2) groups are assigned to work each day and one (1) group is off. (Testimony of Fitzpatrick; Ex. 11 (the group not scheduled to work is marked with a shaded block))

20. Front desk duty, as indicated on the LPD schedule, is a regular duty assignment. (Testimony of Fitzpatrick; Ex. 11) For most of the days that the Appellant was scheduled to work from November 1 - December 8, 2016, he was assigned to the front desk. In the days and/or shifts that the Appellant was not scheduled to work, other officers were assigned to the front desk. (Ex. 11)

21. The Appellant was scheduled for duty on November 23, 26, 27, 28 and 29, 2016 but he failed to report to duty and was marked "AWOL" on the LPD attendance records. (Ex. 11 (see record for November 2016))

22. On Sunday, November 27, 2016, the Appellant contacted the LPD for the first time since his "AWOL" period began. The Appellant spoke to Detective (Det.) Sgt. Aguilar, the Platoon Officer in charge, at approximately 2:45 p.m. The Appellant asserted that he was sick and would not report for duty. The Appellant had exhausted his sick leave, as well as all other available leave time so Sgt. Aguilar called him back to advise him that he was required to report for duty or he would be marked AWOL. (Ex. 14)

23. The Appellant told Sgt. Aguilar that "he needed to make some phone calls" and would call Sgt. Aguilar back. (Ex. 14) At or about 3:10 p.m., the Appellant called Sgt. Aguilar and told him that he would not be working that night. Sgt. Aguilar told the Appellant about "potential disciplinary consequences of his refusal to report for duty" to which the Appellant responded that he "recognized" that but that he disagreed with the LPD's position and that he would "take the night off" and "let the department do whatever it [the department] wants to do." (*Id.*)

24. On Monday, November 28, 2016, following three (3) shifts of unexcused absences, the Appellant appeared at the office of Lt. Daniel Fleming, the Officer in Charge, at approximately 3:15 p.m. (Ex. 15) The Appellant told Lt. Fleming that he would not report for duty that day as scheduled and that he would not be coming to work in the "foreseeable future". (*Id.*) Lt. Fleming asked the Appellant to clarify that he was refusing to work. The Appellant said "until things get resolved, I won't be coming to work" but he did not explain what things had to be resolved. (*Id.*)

25. The Appellant failed to report for duty as scheduled on December 2, 3 and 4, 2016 and was marked AWOL for each of those dates. (Exs. 11 - 15) At the time that the Appellant was marked AWOL, he had no leave time available. (Ex. 18)

26. On December 8, 2016, the City sent the Appellant a letter pursuant to G.L. c. 31, s. 38[6] indicating that the Appellant had voluntarily and permanently separated himself from employment with the City. (Ex. 16)

27. After the City sent the Appellant the separation letter under G.L. c. 31, s. 38, the City learned that the Appellant had attended a matter in Lawrence District Court as an LPD police officer. (Ex. 17) The City concluded that while the Appellant failed to report for scheduled duty, the Appellant's court appearance in connection with LPD matters constituted a break in the sequence of the Appellant's absences from work under G.L. c. 31, s. 38. (Testimony of Fitzpatrick; Ex. 18)

28. By letter dated January 3, 2017, the City rescinded the Appellant's termination under G.L. c. 31, s. 38. (Ex. 18) The City paid the Appellant back pay for the period December 8, 2016 to January 10, 2017. (Testimony of Fitzpatrick)

29. The Appellant returned to work on January 10, 2017 and by a letter of the same date, the Mayor informed the Appellant that he was being placed on paid administrative leave pending an investigation regarding the Appellant's alleged violation of Rules 1.1.1, 1.5.1, 7.3.1, 7.9.1, 7.11.2, 8.23.2 and other Rules cited. (Ex. 19) The Rules listed here, in effect in November and December 2016, provide:

> Rule 1.1.1, "Absent Without Leave", "Members shall not be absent from duty without permission for a proper reasons and only for a limited time. A Commanding Officer of the Chief of Police may excuse a member from reporting or being present for duty." (Ex. 28)
>
> Rule 1.5.1, "[o]nly the appointing authority (the Mayor) may grant a leave of absence, with or without pay. A request for a leave of absence must be made in writing, stating fully the reasons for the request and shall be submitted to the Mayor and copied to the Chief of Police. Leaves will be granted in accordance with MGL c. 31, s. 37." (Ex. 28)
>
> Rule 7.3.1, members shall not engage in the commission of any felony or misdemeanor. (Ex. 28)
>
> Rule 7.9.1, members shall not be insubordinate, which "shall include: Any disrespectful, mutinous, insolent, or abuse language or action toward a Superior Officer …." (Ex. 28)
>
> Rule 7.11.2 (Ex. 28 - *supra*)
>
> Rule 8.23.2 (Ex. 28 - *supra*)

30. Then-Chief Fitzpatrick did not receive any request from the Appellant for a leave of absence under LPD Rules. [7] (Testimony of Fitzpatrick)

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6. Under G.L. c. 31, s. 38, an "… unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven."

7. [See next page.]

Charge 3 - Insubordination, Intimidation and Untruthfulness

31. In or about May 5, 2015, LPD officer M alleged that the Appellant committed an assault and battery upon him. Lt. Michael McCarthy was directed to conduct an investigation of officer M's allegation. (Testimony of McCarthy; Ex. 22)

32. In connection with the assault and battery investigation, and in response to the request of officer M, Lt. McCarthy filed an application for a criminal complaint against the Appellant and requested a Clerk Magistrate's hearing. The Appellant was served notice of such application in hand at the LPD. (Testimony of McCarthy; Exs. 20 - 25)

33. On November 10, 2015, shortly after the Appellant was served with the criminal complaint in connection with officer M's allegations that the Appellant committed an assault and battery on him, the Appellant sent an email message to Lt. McCarthy about the Department's investigation. The email message stated, in part, that the investigation was taking too long, in comparison to the Mass. State Police investigation of the Appellant's prior claim against LPD officer S; white officers do not receive the same level of scrutiny as minority officers; the Department maintains secret files, refusing to comply with related Massachusetts laws and LPD's contractual obligations; and the Department "engages is (sic) wholesale racial discrimination". (Ex. 23)

34. Shortly after the Appellant sent the email message to Lt. McCarthy, he phoned Lt. McCarthy complaining about the investigation and he told Lt. McCarthy that he did not want the Lieutenant "to become collateral damage" as a result of the investigation. Lt. McCarthy understood the Appellant's comment about "collateral damage" to be a threat to him (McCarthy) as the investigating officer. (Ex. 21)

35. Lt. McCarthy immediately reported the Appellant's "collateral damage" statements to then-Chief Fitzpatrick. By a letter dated December 18, 2015, the Appellant received written notice that he would be the subject of an investigative interview on Dec. 22, 2015 regarding his comments to Lt. McCarthy. (Exs. 20, 21, 23 - 25). The notice further indicated that 1) the subject of the interview was alleged violation of the law, intimidation of a witness and insubordination; 2) the Appellant has the right against self-incrimination, which he may invoke at any time, and the right to "legal and union representation"; 3) the interview will be "solely administrative in nature" and it may result in the Appellant's discipline, including dismissal; 4) if the Appellant refused to testify or answer questions he would be subject to discipline; and 5) the Appellant's statements cannot be used against him in a criminal proceeding, except for false statements, but they may be used in a subsequent LPD charge. (Ex. 25)

36. On December 21, 2015, Chief Fitzpatrick conducted a recorded interview of Lt. McCarthy for approximately one-half hour. At this interview, Lt. McCarthy recalled specific details about the email message he had received from the Appellant on November 10, 2015 about the investigation of the Appellant's alleged assault and battery investigation of another LPD officer and the Appellant's phone call to him after he sent Lt. McCarthy the email message. Lt. McCarthy also said at the interview that he took the email as a criticism of how he had handled the investigation. Lt. McCarthy recalled when the Appellant called him shortly after he received the Appellant's critical email message and that the Appellant said the email was not meant for Lt. McCarthy, that Lt. McCarthy had always treated him fairly and that Lt. McCarthy told the Appellant he was offended by the email message. Lt. McCarthy further recalled in his interview that the Appellant said in the phone call that he did not want to see Lt. McCarthy become "collateral damage", that he asked the Appellant to repeat that statement, and that the Appellant repeated it. In his interview, Lt. McCarthy added that he understood the Appellant's "collateral damage" statements to mean that something bad could happen to him (Lt. McCarthy) because of his investigation of the Appellant, whether it would involve a lawsuit against Lt. McCarthy or other action taken against him. (Ex. 26)

37. On December 22, 2015, Chief Fitzpatrick interviewed the Appellant. The interview was recorded by the Chief and, by agreement, by the Appellant. Also present were Capt. Scott McNamara and Officer Robert Moody, the Appellant's shift union steward. At the 15-20 minute interview, much of the time involved then-Chief Fitzpatrick repeating the information in the December 18 letter informing the Appellant of his rights and related discussion, with Chief Fitzpatrick stating that he had no intention of pursuing criminal charges against the Appellant for witness intimidation but that the Chief could not "guarantee" that another entity would not prosecute him.[8] Chief Fitzpatrick further stated, in part,

> "[y]ou are required to answer all questions asked of you honestly and truthfully and to the best of your knowledge. Failure to do so will result in disciplinary action up to and including dismissal. The intentional making of false statements or reports and/or the intentional omission of significant or pertinent facts is considered untruthfulness and will be treated as such." (Ex. 27, p. 6)

At one point in the interview, there was some discussion about consulting a union attorney by phone. Officer Moody indicated that he had spoken to a union attorney the night before this interview but that union attorneys were unavailable. The Appellant remained at the interview and answered a number of questions about the email he had sent to Lt. McCarthy and the phone call he made to Lt. McCarthy. He did not invoke his right against self-incrimination during this interview. Although he asked Chief Fitzpatrick if he needed an attorney, the Appellant did not ask to reschedule the interview. (Ex. 27) The Appellant had experience with similar interviews and he did not see the need for an attorney for the interview with Chief Fitzpatrick. (Testimony of Appellant) In response to Chief Fitzpatrick's questions, the Appellant stated at the interview that he recalled that he had had a phone conversation with

7. The Appellant previously requested and received leave under the federal Family and Medical Leave Act, Pub.L. 103-3, but the leave period lapsed. (Testimony of Fitzpatrick)

8. The Appellant was not prosecuted for intimidation of a witness. (Testimony of Appellant)

Lt. McCarthy after he sent him an email message complaining about the assault and battery investigation, that he recalled telling McCarthy that he always treated the Appellant fairly and that the Appellant recalled McCarthy telling him that the Appellant's complaint about the investigation was now in writing. Then-Chief Fitzpatrick also specifically asked the Appellant if he told Lt. McCarthy that he "may be collateral damage in the process of this investigation". (Ex. 27, p. 6) The Appellant answered, "I don't remember saying that ...." (*Id.*), even though Lt. McCarthy stated in his interview that the Appellant said it once and, when Lt. McCarthy asked the Appellant to repeat the statement, the Appellant said it a second time. (Exs. 26 and 27; Testimony of Fitzpatrick) Chief Fitzpatrick found that the Appellant's response to his question at the interview was untruthful. (Testimony of Fitzpatrick)

38. Under the LPD Rules in effect prior to March 7, 2016, Chapter 28, section 2 provided that officers may be disciplined for "offenses and violations includ[ing]",

> "s. 2(m) Insubordination or disrespect toward an officer of rank …
>
> s. 2(u) Violation of the law or of any ordinance of the city or any rule or regulation having the force of law of any board officer, (sic) or Commissioner having power to make rules and regulations." (Ex. 29)

In addition, Chapter 29, s. 2 of the LPD Rules prior to March 7, 2016 provided that,

> Members of the Department shall conform to and abide by the Rules and Regulations of the Department, observe the laws and ordinances in force in the City of Lawrence, and render their services to the City with zeal, courage, discretion and fidelity. He must have the following qualifications: …
>
> (d) Be truthful at all time (sic) whether under oath or not. …" (Ex. 29)

39. The criminal complaint in court against the Appellant for allegedly assaulting LPD officer M was dismissed in March 2017. While the criminal complaint was pending in court, the LPD did not pursue disciplinary action against the Appellant for the alleged assault and battery in order to avoid the Appellant's invoking of his rights against self-incrimination during the LPD's discipline investigation. (Testimony of Fitzgerald)

History of Discipline[9]

40. The Appellant's prior discipline includes:

> February 2009 - the Appellant received a one (1)-day suspension for being absent without leave and insubordination for using sick leave when he did not have sick leave time available. (Ex. 30)
>
> February 2014 - the Appellant received a ninety (90)-day suspension for misappropriating the City's funds from outside club details that paid officers in cash. (Ex. 31)
>
> November 2014 - the Appellant received a two (2)-day suspension for leaving an arrested prisoner unguarded and allowing him to escape. (Ex. 32)
>
> May 2015, the Appellant received a reprimand for failing to provide police reports in a complete and timely manner. (Ex. 33)
>
> November 2015, the Appellant received a two (2)-day suspension for insubordination for putting LPD internal personnel matters on social media. (Ex. 34)

Termination of Appellant's Employment

41. By a detailed letter dated March 20, 2017, Mayor Rivera informed the Appellant that a hearing would be held at 10 a.m. on April 11, 2017 to address allegations that the Appellant violated cited LPD Rules when he,

> 1) arrived late in improper uniform at the November 2, 2016 daylong detail in a troubled location in the city, he expressed anger when ordered to produce a to-from memo to explain his late arrival and he left the detail approximately twenty (20) minutes after he arrived even though he was instructed to remain at the detail until a replacement could arrive;
>
> 2) was AWOL on November 23, 26, 27, 28 and 29, and December 2, 3 and 4 dates that he was scheduled for duty;
>
> 3) intimidated a witness and was insubordinate to Lt. McCarthy when Lt. McCarthy investigated allegations that the Appellant committed an assault and battery on officer M, twice telling Lt. McCarthy that he (McCarthy) could be "collateral damage" for investigating the criminal allegation against the Appellant and reporting the matter to court for prosecution; and
>
> 4) was untruthful when he told then-Chief Fitzpatrick that he did not recall telling Lt. McCarthy that he (Lt. McCarthy) may become "collateral damage" in connection with his investigation of the Appellant.

(Ex. 1)

42. The hearing was held on April 21, 2017. (Exs. 1 and 3) While the hearing officer was reading the Mayor's notice of hearing into the record at the beginning of the hearing, union Attorney Dwyer asked to speak with the Appellant. The two (2) left the hearing room at or around 10:43 a.m. Attorney Dwyer returned alone, remained in the hearing room and informed the hearing officer that the Appellant did not want to participate in the hearing. The hearing officer indicated that the hearing would go forward as scheduled and there were no objections to proceeding. Then-Chief Fitzpatrick was the only witness. The hearing officer entered thirty (30) exhibits into the record for the Respondent and nine (9) for the union. In his eight (8)-page report to the Mayor, the hearing officer listed numerous findings of fact, accepted the recommendation of then-Chief Fitzpatrick to terminate the Appellant's employment, and concluded that the Respondent established by a preponderance of the evidence that,

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9. The Appellant, who is African-American, filed a complaint with the Mass. Commission Against Discrimination (MCAD) in July 2014 alleging that the city of Lawrence, the LPD and certain members of the LPD discriminated against him, in part, when they disciplined him in regard to certain matters. In April 2017, MCAD issued a ruling finding that the complaint lacked probable cause, which finding Mr. Green could then appeal. (Ex. 36) There is no indication in the record whether the Appellant appealed the MCAD 2017 ruling.

> 1) the Appellant was late for the November 2, 2016 detail, he was not in uniform and he abandoned the detail in violation of LPD Rules 7.1.2 and 8.23.2;
>
> 2) the Appellant was absent without leave on November 23, 26, 27, 28, 29 and December 2, 3 and 4 (2016)[10] in violation of LPD Rules 1.1.1 and 1.5.1 ; and
>
> 3) the Appellant made inappropriate statements to Lt. McCarthy in the course of his investigation of another officer's allegation that the Appellant committed an assault and battery on him; such statements were "unacceptable, insubordinate and unprofessional" and were intended "to intimidate, threaten, and influence Lt. McCarthy's participation" in the assault and battery investigation "which … a reasonable person would readily have construed as threatening and intimidating"; and the Appellant was untruthful to then-Chief Fitzpatrick when he interviewed the Appellant regarding the Appellant's inappropriate statements to Lt. McCarthy, all in violation of LPD Rules Chapter 28, s. 2(m) and 2(u) and Chapter 29, s. 2(d), and G.L. c. 208, s. 13B(1)(intimidation of a witness).

(Ex. 3)

43. By letter dated May 10, 2017, the Mayor informed the Appellant that he had reviewed and accepted the hearing officer's report and, therefore, was terminating the Appellant's employment on May 12, 2017. The Mayor's letter suggests that each of the violations warrant termination of the Appellant's employment.[11] (Ex. 4)

APPLICABLE LAW

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, s. 43. Under section 43, the appointing authority carries burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. *Id*.; *see e.g.*, *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006); *Police Dep't of Boston* v. *Collins*, 48 Mass. App. Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000). Under G.L. c. 31, s. 42, a person who believes that an appointing authority has failed to follow the procedural requirements of G.L .c. 31, s. 41 relating to disciplinary matters may file an appeal at this Commission.

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). 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); *Cambridge* v. *Civil Service Common*, 43 Mass. App. Ct. 300, 304, *rev.den*., 426 Mass. 1102, (1997); *Selectmen of Wakefield* v. *Judge of First Dist. Ct.*, 262 Mass. 477 (1928).

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 264-65 (2001).

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. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, s.1.

G.L. c. 31, § 43 vests the Commission with authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated with "considerable discretion" in this regard, albeit "not without bounds" so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *See e.g*., *Police Comm'r* v. *Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; *Falmouth* v. *Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); *Faria* v. *Third Bristol Div.*, 14 Mass. App. Ct. 985, 987 (1982)(remanded for findings to support modification). However, the Supreme Judicial Court has added,

> "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."

Town of Falmouth v. *Civil Service Comm'n*, 447 Mass. 815, 824.

Further, "[t]he Commission is permitted, but not required, to draw an adverse inference against an appellant, as is the case here, who fails to testify at the hearing before the appointing authority …." *Merricks* v. *Boston Police Department*, 31 MCSR 169 (2018), citing *Town of Falmouth* v. *Civil Service Comm'n*, 447 Mass. 814, 823 (2006). *See also Clark* v. *Boston Housing Authority*, 24 MCSR 193 (2011), *Clark* v. *Boston Housing Authority*, Suffolk

10. The hearing officer's report states that the Appellant was also absent without leave on December 5, 2016. However, December 5 is the date on which the Appellant appeared in court on an LPD matter, although he did not report for duty to the LPD after his court appearance. Based on the Appellant's appearance in court on December 5, the Respondent retracted its prior notice to the Appellant that he had been deemed to have voluntarily abandoned his job under G.L. c. 31, s. 38.

11. The third paragraph of the Mayor's letter begins, "Each of the above-cited violations, collectively and separately, together with your prior disciplinary record, which includes a one day suspension …" (Ex. 4) The rest of the sentence lists some of the Appellant's disciplinary record but does not complete the sentence to indicate that each of the Appellant's violations found here warrant the Appellant's termination. The Respondent's post-hearing brief asserts that each such violation warrants termination.

Superior Court, C.A. No. SUCV2011-2554E, *aff'd* (Feb. 13, 2015).

ANALYSIS

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant based on his violation of the cited LPD Rules. With regard to the November 2, 2016 detail, there appears to be no dispute that the Appellant arrived at the detail approximately seventeen minutes late, he was not wearing his hat and badge and he walked off the detail approximately twenty (20) minutes after he arrived. Upset with Sgt. Picard's order to write a to/from memo explaining his tardiness, the Appellant said he was leaving the detail. In view of the recent shootings in the detail neighborhood, Sgt. Picard told the Appellant that there could be no gap in time in detail coverage. The Appellant contacted the detail coordinator and informed him that he was leaving the detail. The Appellant left the detail approximately twenty (20) minutes after he arrived, prior to the arrival of his replacement, notwithstanding Sgt. Picard's instruction. The Appellant had not asked for leave to depart prior to the replacement's arrival.

The Appellant argues that he should not be disciplined in connection with the November 2 detail for a variety of reasons. The Appellant was assigned to a detail at the Health Center where there had been recent shootings. Regarding his tardiness at this detail for the Health Center, the Appellant avers that he was not at the LPD offices on November 1, 2016 when the new details policy was issued and, therefore, did not know about it even though it had also been emailed to all members of the Department. The Appellant also asserts that he was angry when Sgt. Picard ordered him to write a to/from memo explaining the reason for his tardiness because she allegedly used profanity when she ordered him to write the memo. Further, the Appellant asserts that it was common practice to leave a detail before a replacement arrived. None of the Appellant's arguments in this regard are availing. It cannot be a defense to tardiness that an officer did not know of a policy to be on time when officers are scheduled for details for specific time periods. The Appellant was not treated in a disparate manner because Sgt. Picard also ordered another officer to write a to/from memo for being late for a detail that day. Any concerns that the Appellant had about Sgt. Picard's manner of delivery of the order to write the memo could have been conveyed through appropriate channels after the Appellant complied with the order, not by leaving a detail like the one at the Health Center, where there had been trouble recently, before a replacement has arrived and because, as the Appellant argues, other officers do it. Thus, the Appellant's arguments lack merit.

There also appears to be no dispute that the Appellant was absent without leave on November 23, 26, 27, 28, 29 and December 2, 3 and 4, 2016 when he was scheduled to work. In fact, it wasn't until November 27, 2016 that the Appellant even contacted the LPD to indicate that he would not be reporting for duty, alleging that he was sick. When he called, the Appellant spoke to Sgt. Aguilar, the Platoon Officer in charge. Sgt. Aguilar learned that the Appellant had no remaining sick leave or other leave available and called the Appellant back to say that he was required to report for duty or he would be marked AWOL. The Appellant responded that he needed to make some calls and would call the Sergeant back. Sgt. Aguilar told the Appellant about the potential disciplinary consequences that the Appellant faced if he failed to report to work. The Appellant indicated that he was aware of the potential consequences but added "let the department do whatever it wants to do." (Ex. 14) The next day, the Appellant went to the office of Lt. Fleming, the Officer in Charge and told him he would not be returning to work in the "foreseeable future". Lt. Fleming asked the Appellant to clarify if he was refusing to work and the Appellant said "until things get resolved, I won't be coming to work", without explaining what needed to be resolved. (Ex. 15) On December 8, 2016, with the Appellant having failed to return to work, the Respondent sent the Appellant a letter stating that the Appellant had voluntarily and permanently abandoned his job and that he may request a hearing within ten (10) days, pursuant to G.L. c. 31, s. 38. When the Appellant provided proof that he had appeared in court, on LPD business, on December 5 (although he did not report to the Department before or after his court appearance that day), interrupting the period of time in which he failed to report for duty as scheduled, the Respondent rescinded the notice under G.L. c. 31, s. 38 and compensated him for the time between December 8, 2016 and January 10, 2017. The Appellant argues that he did not show up for his scheduled duty because he was assigned to the LPD front desk duty, which he asserts constitutes punishment duty, which is prohibited under G.L. c. 31, ss. 62 and 62A.[12]

The Appellant's arguments against the Respondent's findings that he was AWOL for work scheduled over a two (2)-week period lack merit. As indicated in then-Chief Fitzpatrick's testimony at the Commission hearing and in work assignment records (Ex. 11), desk duty does not constitute punishment duty. Moreover, repeatedly failing to appear for scheduled work, not requesting leave, and telling the LPD that you will not return "for the foreseeable future" is simply not an option for any employee, especially not for a police officer. That the Appellant waited until the third day that he was AWOL to even contact the Department to tell them that he would not report to work and that he then told his superior that he would not report for scheduled duty for an unspecified time is inexcusable and constitutes substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and warrants discipline.

The Respondent also established by a preponderance of the evidence that the Appellant was insubordinate and that he intimidated a superior officer. After Lt. McCarthy conducted an investigation of another officer's allegation that the Appellant had committed

12. At the Commission, the Appellant testified that he asked the union to grieve his front desk assignment but that it refused to do so because the front desk duty is a police duty. The Appellant asserted that he subsequently filed a claim that the union failed to represent him. There is no indication in the record of the result of the Appellant's claim against the union.

assault and battery on him, he presented his findings to court and criminal charges against the Appellant issued. Upon receiving the criminal complaint against him, the Appellant sent an email message to Lt. McCarthy with highly critical statements about Lt. McCarthy's investigation that lead to the issuance of the criminal complaint against the Appellant. The email message was copied to two (2) other members of the LPD. Within minutes of sending Lt. McCarthy the email message, the Appellant called Lt. McCarthy and twice said that he did not want McCarthy to become "collateral damage" for having led the investigation that led to the issuance of a criminal complaint to the Appellant. Lt. McCarthy stated that he found the Appellant's repeated reference to "collateral damage" to be an attempt to intimidate him and that he (Lt. McCarthy) did not want anything bad to happen, such as being sued by the Appellant for having conducted the investigation of the Appellant. Lt. McCarthy promptly informed then-Chief Fitzpatrick of what the Appellant had done and Chief Fitzpatrick sent the Appellant detailed notice that he would be conducting investigative interviews, explaining the subject of the interview and the Appellants rights in connection with the interview. I find that the Appellant's highly critical email message to Lt. McCarthy constitutes insubordination and that it was unprofessional and disrespectful. Further, I find that the Appellant's phone call to Lt. McCarthy, with repeated references to "collateral damage", constitutes intimidation of Lt. McCarthy as the officer who conducted the investigation that led to the issuance of criminal charges against the Appellant. The Appellant's argument here is that the LPD did not make specific findings regarding insubordination and intimidation prior to the Respondent's local hearing. Since the Appellant was notified by the Respondent that these issues would be addressed at the local hearing, the Appellant was provided sufficient notice in this regard. Having left the local hearing shortly after it began, the Appellant missed the opportunity to address this and the other reasons the Respondent provided for his discipline and, for that reason, I draw an adverse inference from his failure to participate in the local hearing.

The Respondent also established by a preponderance of the evidence that the Appellant was untruthful when then-Chief Fitzpatrick interviewed him about the highly critical email message he sent to Lt. McCarthy and the phone call that the Appellant made to Lt. McCarthy shortly after he sent the critical email message. In the interview, Chief Fitzpatrick asked the Appellant what he recalled of his phone call with Lt. McCarthy following the email he sent him. While the Appellant recalled certain details of the phone call, he stated that he did not recall telling Lt. McCarthy that he did not want him to become "collateral damage", certainly a memorable phrase, even though Lt. McCarthy credibly reported that he asked him to repeat it and he did repeat it. Since Lt. McCarthy promptly reported to then-Chief Fitzpatrick what the Appellant said to him and the phone call between Lt. McCarthy and the Appellant occurred shortly after the Appellant received the criminal complaint, which was based on Lt. McCarthy's investigation, I find it more likely than not that the Appellant was untruthful during his interview with Chief Fitzpatrick in which that he said that he did not remember telling Lt. McCarthy that he (Lt. McCarthy) may be "collateral damage" in connection with the investigation of the Appellant.

Having found that there was just cause for discipline, we must now address whether modification of the discipline issued is warranted. The Respondent terminated the Appellant's employment based on his conduct at the November 2, 2016 security detail, including his tardiness, lack of complete uniform and abandonment of the detail prior to arrival of his replacement despite Sgt. Picard's instruction; his absence without leave on certain days in November and December 2016, telling the Department that he would not return for the "foreseeable future"; his intimidation of, and insubordination toward a superior officer; and his untruthfulness to the Police Chief when the Chief interviewed the Appellant regarding the Appellant's insubordination and intimidation of Lt. McCarthy. While the Appellant's tardiness and lack of complete uniform at the November 2, 2016 detail constitute substantial misconduct that adversely affects the public interest by impairing the efficiency of such public service, it does not typically warrant termination. However, the Appellant's abandonment of the detail prior to the arrival of his replacement, knowing that there had been recent shootings in the area, certainly constitutes substantial misconduct as it jeopardizes public safety, when securing the public safety is the essence of a police officer's job and warrants discipline that reflect the seriousness of such misconduct. I also find that the Appellant's subsequent failure to report to work as scheduled for a number of days in November and December, 2016, his intimidation of and insubordination to Lt. McCarthy in connection with his investigation of the Appellant, and his untruthfulness to the Police Chief each constitute grave misconduct that adversely affect the public interest by impairing the efficiency of public service. Such misconduct is especially intolerable in a police department. Combined, the Appellant's actions and/or failure to act, justify the most serious discipline meted out by the Respondent. Furthermore, since the findings here do not differ significantly from those rendered by the Respondent, there is no reason to modify the discipline issued by the Respondent.

Finally, the Appellant alleges that his termination was the result of political bias against him. However, at the Commission hearing, the Appellant admitted that he is "outspoken", having criticized the LPD at local government meetings, and he asserted that he was running for Mayor against Mayor Rivera. While we enjoy free speech, our public statements have consequences. That said, I find no evidence of bias here. Rather, unfortunately, the Appellant has provided the Respondent with multiple reasons which provide just cause for discipline.

CONCLUSION

For all of the above-stated reasons, the Appellant's appeal under Docket No. D1-17-104, filed pursuant to G.L. c. 31, ss. 42 and 43, is ***denied***.

* * *

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 19, 2019.

Notice to:

William Green
[Address redacted]

Robert D. Hillman, Esq.
Deutsch Williams
One Design Center Place, Suite 600
Boston, MA 02210

* * * * * *

JARED SAUNDERS

v.

DEPARTMENT OF LABOR STANDARDS

C-17-123

December 19, 2019
Paul M. Stein, Commissioner

Reclassification Appeal-Department of Labor Standards-Industrial Safety and Health Inspector II to III-Scope of Duties—A longtime Industrial Safety and Health Inspector II at the Department of Labor Standards was unable to obtain an upward classification to Inspector III where he admitted to spending at least 60% of his time on asbestos and lead abatement compliance work that fell squarely within his current classification. Hearing Officer Paul M. Stein did find that the Appellant performed more complex work than described in his current classification that arguably fit within the desired classification. However, these duties were sporadic and not the main focus of his responsibilities.

DECISION

The Appellant, Jared Saunders, 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 Department of Labor Standards (DLS) within the Executive Office of Labor and Workforce Development (EOLWD) from his current title of Industrial Safety and Health Inspector II (ISHI-II) to the title of Industrial Health and Safety Inspector III (ISHI-III). The Commission held a pre-hearing conference at the Commission's Boston office on June 27, 2017 and held a full hearing at that location on October 2, 2017 and November 20, 2017, which was digitally recorded.[2] Eighteen (18) exhibits (*Exhs. 1 through 6, 8 through 10, 12 through 20*) were taken into evidence.[3] The Commission received a Proposed Decision from the Respondent on January 6, 2018 and a Proposed Decision from the Appellant on January 24, 2018. For the reasons explained below, Mr. Saunders appeal is denied.

FINDINGS OF FACT

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

Called by DLS:

- Michael Flanagan, DLS Chief of Safety and Health Programs
- Karen McGonagle, EOLWD Staffing & Payroll Manager

Called by the Appellant:

- Jared Saunders, DLS ISHI-II, Appellant
- Brian T. Wong, former DLS Program Manager/Chief of Investigations

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, Jared Saunders, was employed in 2012 with the DLS Investigations and Enforcement Unit (IEU), initially as an ISHI-I in the Springfield office. His prior experience included military service in the United States Air Force and 14 years of experience with lead and asbestos abatement in the private sector. In 2014, he was promoted to ISHI-II and relocated to the Haverhill office about that same time. He completed the Commonwealth Supervisory Certificate Program in 2014. (*Exhs.2,5-6,8,19-20; Testimony of Appellant & Wong*)

2. The DLS is the agency within EOLWD tasked with protecting workers' safety and health, wages and working conditions, headed by a Department Director. (*Exh. 6; Testimony of Flanagan*)

3. Until his retirement in April 2016, the IEU was managed by a Program Manager, Brian Wong, reporting to Michael Flanagan, DLS Chief of Safety & Health Programs, who, in turn, reported directly to the DLS Director. In 2017, Michael Weakley was appointed to the position of an ISHI-IV as the direct supervisor of the IEU. In the interim, Mr. Flanagan directly supervised the IEU staff.[4] (*Exhs. 2, 5-6 & 19-20;Testimony of Flanagan & Wong*)

4. The IEU is staffed with approximately eight inspectors, primarily ISHI-IIs except for new hires who are ISHI-Is, working out of one of the DLS's five offices. The core mission of the IEU is to perform on-site workplace inspections, conduct state and federal safety standard compliance investigations and ensure that workers and contractors are properly licensed and trained to provide lead

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.

3. Two (2) exhibits were marked for identification (*Exhs. 7ID & 11ID*)

4. As noted below, the job classification of ISHI-IV was created as part of a 2016 Classification Specification revision. Mr. Weakley was the first IEU supervisor to be appointed to that title. (*See Finding of Fact No. 6; Exhs. 1 & 15; Testimony of Flanagan*)

paint and asbestos abatement services. (*Exhs. 1, 5-6, 15, & 19-20: Testimony of Appellant, Flanagan & Wong*)

5. Prior to January 2016, the Industrial Safety and Health Inspector Series Class Specification (dated 4/89) promulgated by the Massachusetts Human Resources Division (HRD) contained three job titles: ISHI-I was the "entry-level technical job" in the series; ISHI-II was the "second-level technical job" in the series; and ISHI-III was the "first level [and only] supervisory job in the series. (*Exhs. 2 & 15*)

6. Effective January 24, 2016, pursuant to a Memorandum of Agreement (MOA) between the Commonwealth and MOSES Unit 9 (the bargaining unit which includes IEU inspectors), HRD promulgated new ISHI Classification Specifications consisting of four job titles and pay grades: ISHI-I (Grade 21); ISHI-II (Grade 23); ISHI-III (Grade 25); and ISHI-IV (Grade 27).[5] (*Exh. 1; Administrative Notice [MOA cited in Sutliff* v. *Executive Office of Labor & Workforce Dev*., 32 MCSR 26 (2019)*]*

7. According to the 2016 ISHI Class Specifications, the job of employees within the ISHI series is to "protect the health and safety of working people and the public by investigating and evaluating workplaces for health and safety hazards, hazardous exposures, violations of safety procedures, compliance with established health and safety standards . . ." The four levels in the series are further defined as follows:

- ISHI-I - the entry-level technical classification. Incumbents focus on gaining knowledge and seek guidance from more experienced colleagues

- ISHI-II - the fully competent professional classification. Incumbents have mastered the technical job content, perform work of greater complexity, exercise greater independence in making decisions, handle most cases independently and provide leadership through guidance and advice to others. Examples of specific functions performed at the ISHI-II level include: (1) functional direction, assignment of work, and acting as mentor to employees of lower grade; (2) represent agency at meetings with outside governmental and private sector organizations; (3) provide on-the-job training; (3) draft rules, regulations, procedures, forms, manuals, directives and descriptive and/or educational bulletins; (4) assist in preparation of grant applications and progress reports; (5) assist with laboratory operations as assigned; and (6) interpret data, apply policies, rules and regulations, and render decisions on complex cases.

- ISHI-III - the first-level supervisory classification. Incumbents perform complex work in a specialty area requiring judgment in determining approaches, interpreting and applying agency policies, standards and procedures. Incumbents are expected to be able to perform the duties of ISHI-Is and ISHI-IIs but, at this level, the primary focus is to provide formal and informal supervision and act as the liaison with agency management. Examples of specific duties of an ISHI-III include: (1) supervise program operations; (2) exercise overall management of training programs; (3) grant hearings to aggrieved individuals; and (4) coordinate major activities of the department on a statewide level.

- ISHI-IV - the second-level supervisory classification. Incumbents perform advanced work in a specialty field, handle more complex projects, and exercise significant independence in making program decisions and assisting in policy development. Examples of specific duties of an ISHI-IV include: (1) supervision over, assign work to and review the performance of other employees of lower grade; (2) represent the agency in high-level policy discussions; (3) assist management in strategic planning; (4) oversee design and development of training programs and other forms of outreach; (5) oversee the drafting of regulations and policies; and (6) develop, implement changes to, and review program design for best practices and evidence based data to support program goals.

8. By his own estimate, corroborated by his former supervisor, Mr. Wong, Mr. Saunders devotes approximately 60% of his time on his core functions of "conducting compliance inspections on contractors to ensure they are properly trained and licensed and are conducting their work in compliance with Massachusetts Asbestos, Lead and Lead Safe Renovation regulations." He also estimated that an additional 20% of his time was devoted to "licensing of various lead and asbestos disciplines [sic] on Wednesday of each week" and "deposit[ing] checks from licensing into state bank account." (*Exh. 2; Testimony of Appellant & Wong*)

9. Mr. Saunders contends, however, that he performs additional duties that fall outside the scope of an ISHI-II and, instead, fit the job responsibilities of an ISHI-III. These additional duties include:

- Beginning in or about 2013, he began to assist Mr. Wong in the preparation of periodic reports submitted by the DLS to the federal Environmental Protection Agency (EPA) as required to support three grants awarded to the DLS by the EPA. His work primarily involved collecting statistics and preparing spreadsheets on the activities of the IEU used to measure the objectives prescribed by the grants to be accomplished during the two-year grant cycle and, beginning with the grant request for the two-year grant cycle 10/1/2014 through 9/30/2016, also assisted in preparing the grant request for Mr. Wong's approval. These data were provided to Mr. Wong who is identified in the grants as the Commonwealth's designated Project Manager on the grants.[6] He also prepared similar spreadsheets and summaries of the IEU's lead and asbestos program activities for submission to his supervisor to be included in the DLS's departmental monthly and annual reports.

- In 2014, he spoke at a meeting of approximately 80 realtors from the Springfield area "to teach them about Lead Safety Renovation Requirements."

- In 2014, he was assigned to convert Mr. Wong's "outline" form Mr. Wong used for in-house inspector training into a "more presentable" Power Point format which he presented to the IEU staff and for which he received favorable feedback.

- In 2014, while working out of the Springfield office, he took primary (but not exclusive) responsibility for training two new hires (ISHIs) who were assigned to that office. He mentored them in the field and in preparation of paperwork. He did not have formal supervisory responsibility, however, and did not perform any formal reviews or performance evaluations (EPRSs).

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5. Prior to the group reclassification, the position of ISHI-II had been allocated to Grade 21. (*See Exh.5*)

6. According to Mr. Wong, when EPA had substantive program-related issues to discuss it would contact him; only when EPA sought statistical information, it would often contact Mr. Saunders directly. (*Exh.16; Testimony of Wong*)

- In 2014, he was assigned by Mr. Wong to obtain quotes for Mr. Wong's review from two health care clinics to replace the current vendor who performed the annual examinations of inspectors with whom Mr. Wong was not satisfied.
- In 2015, he proposed, and upon Mr. Wong's approval, implemented a new "Winter Project Protocol" that involved identifying hardware and paint stores in each ISHI's territory and providing guidelines for the ISHI's to visit these businesses during down-time in the winter. In addition to coming up with the idea, he requested reports from each ISHI to monitor their progress.
- In November 2016, he revised the form of compliance citation called the "Written Warning and Order to Correct" for approval by his superiors.
- From time to time, he would fill in for Mr. Wong at "outreach" meetings with the public when Mr. Wong was not available. Mr. Wong estimated that Mr. Saunders filled in about 3 or 4 of the ten (10) times this occurred, with other ISHIs filling in for the others.
- He also performed outreach to city and town building departments at the direction of Mr. Wong to provide information (sometimes in the form of a meeting with town personnel and sometimes leaving informational literature) on developments in the applicable Renovation Repair and Painting Rule (RRP) promulgated by EPA.

(*Exhs. 2, 7, 9-14, 16-18; Testimony of Appellant & Wong*)

10. On March 30, 2016, Mr. Saunders filed a reclassification appeal with EOLWD, which denied his request on April 26, 2017. (*Exhs 2 & 3; Testimony of McGonogle*)

11. Mr. Saunders duly appealed the EOLWD decision to HRD which, on May 23, 2017, informed Mr. Saunders that HRD concluded that EOLWD had properly determined that he was correctly classified as an ISHI-II and denied his appeal. (*Exh. 4*)

12. Mr. Saunders appeal to the Commission ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE 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 Mr. Saunders performs the "distinguishing duties" of the RN-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

Mr. Saunders is clearly a master of his field of expertise in lead and asbestos abatement regulatory work. He is regarded by his superiors and colleagues as a dedicated public servant who works hard at his job. However, reclassification of a position by the Commission requires proof that specified distinguishing duties at a higher title are actually being performed as the major part of his current work (i.e. more than 50 percent of his time is spent on the distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

The evidence establishes that substantially all of Mr. Saunders's job duties fit squarely within his current level of an ISHI-II. While he does occasionally perform at a higher level, the preponderance of the evidence falls well short of establishing that he performs above the ISHI-II level more than 50% of the time, which is the Commission's core requirement to allow a reclassification appeal.

First, even Mr. Saunders acknowledges that approximately 60% of his time is devoted to performing on-site inspections and that an additional 20% (one day a week) involves contractor license processing. These functions represent the core duties of an ISHI-I and IHSI-II. While an ISHI-III is also expected to devote some time to performing these tasks, they are not level distinguishing duties of the higher title. Rather, the "primary focus" that distinguishes the "first-level supervisory" title of ISHI-III from the second-level "fully competent professional" level of ISHI-II is that the higher title is expected to spend more than 50% of the time in "formal and informal supervision" of subordinates and "liaison with agency management".

Second, while some of the interaction Mr. Saunders has with subordinates in performing inspections and licensing activities might broadly be considered what the ISHI-III Classification Specification calls "informal supervision", those interactions, in the aggregate, are clearly not the "primary focus" of his job. Furthermore, virtually all of that "informal" supervision of subordinates is equally consistent with the duties of an ISHI-II, who is expected to provide "functional direction", assign work and mentor employees of lower grade, as well as provide "on the job training". None of Mr. Saunders' duties fall within the category of "formal" supervision. Where 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.

Third, the non-supervisory work Mr. Saunders performs beyond his core duties of inspections and processing licenses, similarly,

represents work that largely falls well within the duties he has long performed, and are generally expected of, an ISHI-II. For example, his research and compilation of data needed for his supervisor, Mr. Wong, to submit monthly, quarterly and annual reports to DLS management and to the EPA is precisely the type of work expressly delineated by the Classification Specification as ISHI-II duties. They do not rise to the level of serving as a "liaison" to management, supervision of "program operations" or other higher level duties of an ISHI-III. Similarly, from time to time, Mr. Saunders has drafted forms and technical and training materials, but always subject to review and approval of his superiors. He (and other ISHIs) occasionally met with others as the "eyes and ears" of Mr. Wong, but not as a policy or decision maker. His role in these ancillary functions fits squarely within the functions of the "fully competent" professional ISHI-II. Moreover, even if some part of this work could be considered more complex than the work he typically does, the record simply does not show that such work, even in the aggregate, comprises any significant and regular part of his job, let alone, show that it occupies more time than his core ISHI-II level duties.

Fourth, I do credit Mr. Saunders's testimony that he has been responsible for several initiatives that could fairly be regarded as more "complex" work than what an ISHI-II is typically assigned. For example, his proposing and implementing the "Winter Project Protocol" to identify and connect with local businesses who supplied contractors who required lead and asbestos licenses, could fairly be considered the type of "statewide" program management that the ISHI-III might be expected to perform. Similarly, although less certain, the administrative duties that Mr. Wong occasionally delegated to him, arguably, might fit within the duties of the higher title of ISHI-III. Nevertheless, these additional functions have been sporadic and, from the evidence presented, I cannot fairly conclude that he has continued to perform such work for any significant, quantifiable part of his time on and after the date (March 30, 2016) that he seeks to be reclassified to an ISHI-III.

In sum, Mr. Saunders did not meet his burden to establish that he performs the duties of an ISHI-III more than half of his time. Therefore, the Commission is not authorized to find that his position should be reclassified to an ISHI-III

Accordingly, for the reasons stated above, the appeal of the Appellant, Jared Saunders, under Docket No. C-17-123, is ***denied.***

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By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on December 19, 2019.

Notice to:

David J. Fried, Esq.
David J. Fried & Associates
400 Trade Center, Suite 5900
Woburn, MA 01801

Patrick G. Butler, Esq.
Labor Counsel, Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

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