

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place, Rm. 503
Boston, MA 02108

MICHAEL BARRY

Appellant

v.

G2-05-231

TOWN OF LEXINGTON

Respondent

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Commissioner:

Daniel M. Henderson,

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Michael Barry (hereafter "Appellant"), is appealing the decision of the state's Human Resources Division (HRD) to accept or approve the reasons of the Respondent, Town of Lexington (hereafter "Town" or "Appointing Authority"), to bypass him for promotion to the position of police sergeant. The appeal was timely filed. A full hearing was held on

October 4 and 25, 2007, at the offices of the Civil Service Commission. Four tapes were made of the hearing. The witnesses were sequestered.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Exhibits 1-19) and the testimony of the Appellant; Christopher Casey, Chief, Lexington Police Department; Mark Corr, Captain, Lexington Police Department; Joseph O’Leary, Lt. Det. Lexington Police Department; and Charles Sargent, Captain, Lexington Police Department, I find the following:

1. The Commonwealth’s Human Resources Division, (HRD) did not have a representative appear at this hearing nor did it directly submit testimony or documentary evidence at the hearing. An HRD document packet did not appear in the Commission’s case file. (Administrative notice)
2. The Lexington Town Manager is the Appointing Authority for the Lexington Police Department (hereafter “the Department”). (Ex. 2)
3. In the spring of 2005, the Town of Lexington sought a certified list of promotional candidates from HRD seeking to promote four Department patrol officers to the position of sergeant. (Ex. 1)
4. On or about April 6, 2005, the Town of Lexington received Certified List #250302 from HRD. The certification contained the names of nine Department patrol officers. (Ex. 1)
5. The Appellant’s name appeared in the first position with a score of 88. (Ex. 1)¹

¹ Although the certification in the record shows the Appellant in the first position, Officer Edward O’Brien had been placed at the top of the certification through prior litigation at the Civil Service Commission.

6. Officers John Mazerall, Kevin Veno, Paul Callahan, James Rettman, Christopher Barry, Susan McIntyre, Tamzin Duffy, and Colleen McLean appeared sequentially in positions below the Appellant on the same certification. Mazerall's score was 85, Callahan's 81, and Christopher Barry's 80. (Ex. 1)
7. Chief Christopher Casey, in consultation with Captain Mark Corr, created a selection process for the sergeants' positions using two interview panels. The "Chief's panel," consisted of the three highest ranking officers in the Department: Chief Casey, Captain Charles Sargent and Corr. The "staff panel," included three lieutenants, including Joseph O'Leary, a police dispatcher, Detective and a School Resource Officer and Detective Steve Garabedian. (Ex. 4 and testimony of Casey and Corr)
8. Chief Casey testified that four (4) Sergeant and Three (3) Lieutenant Promotions were made in 2005 due to retirements. The qualities he was looking for in selecting the Sergeants were: respect of their peers, leadership, ability to motivate and influence others, forward thinking philosophy of community policing, mature judgment, and problem solving capacity. (Casey Testimony).
9. Captain Mark Corr invited certain people to serve on Panel 2 He testified that he asked the members of the two panels to formulate questions to be asked of the applicants. The Chief's panel created eleven questions and the Staff panel created twelve questions. (Ex. 5)
10. The panel interviews were conducted on April 27 & 28, 2005. Corr asked the members of the two panels to formulate questions to be asked of the applicants. The interviews were not recorded. There was no scoring system. The evaluation

- was actually a “consensus” by majority opinion among the panel members. There was no prior discussion regarding what the correct answers were to the questions posed. It is unclear whether all of the questions were even asked of all of the candidates. (Casey, Corr, and O’Leary Testimony²; Ex.4 & 5).
11. Chief Casey testified that in the past, the Town had used evaluators from outside the police department in the selection process.
 12. Chief Casey testified that he believed that mature judgment and problem solving were critical qualities for a police sergeant. He believed that in making the selections among the competing candidates, an assessment of their relative or comparative interpersonal and communication skills had to be made. He also felt that self-awareness is the first step in improvement. He believed that the Appellant was unable to admit that he had a bad temper or that he could not handle stressful situations well and therefore could not improve in those two areas. (Testimony of Casey)
 13. After both panels concluded their interviews, they convened together to discuss the “strengths and growth areas” for each candidate and summarized such “strengths and growth areas” in a document. (Ex. 9 and testimony of Casey)
 14. The Appellant was criticized in this document for alleged discrepancies between his answers to the questions and panelists’ private assessments of his performance. (Ex. 9). According to Capt. Corr, the Staff panel was asked to accurately reflect on their personal experiences with each candidate in evaluating the candidates’ answers. (Corr Testimony). The Appellant was particularly

² Compare Casey and Corr’s doubts regarding whether all questions were posed to all applicants with O’Leary’s claims that they were.

criticized for supposedly having a propensity for losing his temper. (Corr Testimony; Ex. 9).

15. The Appellant testified that he and one of the members of the Staff panel, Detective Steve Garabedian, had engaged in heated discussions surrounding union issues prior to the interview process. Corr testified that one of the panel members, (Garabedian) stated to the Appellant; “you yelled at me two weeks ago”, in effect stating that the Appellant’s claim that he didn’t lose his temper was a lie. The Appellant testified that on dates prior to his interview, he had “some conflict”, “heated discussions” and “verbal sparring” with Garabedian. The Appellant also felt and publically acknowledged that Garabedian was an informant for Chief Casey, who would report any comments or statements he made to the Chief. (Ex. 9, Corr and Appellant’s testimony)
16. Chief Casey testified that as part of the evaluation process he also reviewed three years of annual performance evaluations, job history and assignments, feedback from the community, and disciplinary history. (Testimony of Casey)
17. Chief Casey, as Chief, had access to or was generally familiar with the candidates’ personnel files and/or background information prior to his decision on what information and for what period of time, would be considered for this promotional evaluation. (Testimony and Exhibits)
18. The Appellant’s performance evaluations, (EPRS) for the previous three-year period reflected that he exceeded or met expectations in all areas, except for “attendance and punctuality” in 2004, when he needed fourteen sick days due to his wife’s miscarriage and his own bronchitis. Chief Casey had approved of the

- time he took off for his wife's miscarriage, saying to him then "take the time off you need".(Ex. 13 and testimony of Appellant)
19. The Appellant's performance evaluations reflected that he had received a total of five "exceed expectations" over the previous three years. (Ex. 13)
20. No reference to Appellant's temper appear in the previous three performance evaluations reviewed, each of which included the statement, "He treats others with respect and courtesy" in the Teamwork and Cooperation category. (Ex. 13)
21. The Appellant's performance evaluation reflects that, in 2004, he testified in six court cases and his performance appeared in the "exceeds expectations" category. In 2003, he testified in three cases and his performance was in the "meets expectations" category. (Ex. 13). Officer Christopher Barry apparently did not go to court over the period of 2002-2004, since his performance evaluations show no court activity during the previous three years. Testimony as a witness in court is an important duty and responsibility of a police officer. (Administrative notice, Testimony, Ex. 14).
22. Christopher Barry, who was promoted over the Appellant, had an eight point lower score on the HRD list, had four "exceeds expectations" and one "below expectations", for traffic enforcement, over the same three-year period. (Ex. 14)
23. Christopher Barry had seven years of service, in comparison to the Appellant's nine, at the time of the bypass. (Ex. 6)
24. Both the Appellant and Christopher Barry had Master's degrees in Criminal Justice. (Ex. 2)

25. An employee in a promotional situation would reasonably expect his or her employer to review and incorporate past performance reviews (EPRS) in the process of evaluation for the promotion. Here, the Appellant actually had better performance reviews than appointee Christopher Barry. However, the Department failed to properly utilize and weigh these objective performance reviews in their evaluation process for “personnel determinations”; despite a statutory obligation to do so. See G.L. chapter 31, § 5, 6A, 6B & 6C. (Administrative notice, Testimony, Exhibit 14)
26. Lt. Detective Joseph O’Leary was a member of interview panel 2, the “Staff Panel”. O’Leary had 37 years of service on the Lexington Police Department. He testified and described the panels reaching a “consensus” opinion, as agreed upon by a “majority”. He described the incident of the Appellant’s alleged temper being a “heated discussion not an argument”. Regarding the Appellant’s union activity, he testified that “He (Appellant) had to be a bad guy at times”. He also testified that the Appellant’s union activities may have been part of the panel’s discussion. O’Leary appraised bypassing-appointee Christopher Barry as having: “strong community ties”, “good roots”, “institutional knowledge” and answered the interview questions “with confidence”, due to the fact that he was a “third-generation police officer”. (Testimony of O’Leary)
27. Lt. O’Leary testified in a straight-forward, unhesitant manner. He is loyal to the Department. His use of common descriptive expressions was spontaneous and rang true. His memory of some relevant specifics was missing but overall his

testimony is believable. He is a credible witness. (Testimony and demeanor of O'Leary)

28. Captain Charles Sargent testified at this hearing. He also was on one of the interview panels. He is a past vice president of the patrolman's union. He has known the Appellant for nine plus years and has been his supervisor. He testified that he did not tell the Appellant that he would have been promoted but for his union activities or that the Chief was "pissed off" at him for his union activities. He and Captain Corr divided up the candidates to speak with after the promotion interviews to explain what had happened. He spoke with the Appellant. He believed that his main purpose was to tell the Appellant how others in the Department viewed him and their relationship with him. He told the Appellant that he was viewed as "argumentative" and his biggest issue was "loss of his temper". He stated that the patrol staff was not happy at that time with the layoffs and were "irritated" at the delivery of the packets to the BOS members at home. He had discussed that issue with Chief Casey and suggested that BOS pick up the packets, although he was not in the "Chief's inner circle" and not in the "Chief's confidence". He was aware of the PSSCR final report and was positive that it had been discussed at the Department management meetings but could not remember the specific meetings. He read the report and discussed it with the Chief. However, he could not identify the other management people who discussed it at the meetings or the specific discussion. He assumed that the Appellant was the source of the information, viewed as criticism and cited in the report. He believes that the Appellant is not difficult to deal with but is "very reasonable" and

“responsible”. He believes that the Appellant did what was expected of him for the union membership and was a “vigorous advocate”. (Testimony of Sargent)

29. From September 2003 to September 2005, the Appellant served as the President of the patrol officers’ union in the Department. During that period, he filed five to six grievances, whereas his predecessor filed only one. One issue raised by the Appellant as Union President involved his protesting the delivery of document packages to the Selectmen. The Appellant believed that this was an improper use of limited police personnel. He heard that the command staff was upset about his protest. He was told by Lt. O’Connell and Capt. Sargent that his actions on this issue really “pissed off” the Chief. Chief Casey testified that he believed the packet delivery issue was too minor (“small potatoes”) to be protested and a protest should have been reserved for a more serious issue, and thereby “save political capital”. (Testimony of Appellant and Casey)

30. . The PSSRC was created by the Board of Selectmen to make recommendations to the Board of Selectmen to deal with the effects of the significant reductions in resources in public safety in Lexington. While also Union President, the Appellant volunteered to sit on the Public Safety Staffing Review Committee (“PSSRC”). He attended approximately 24 meetings, between January 6, 2004, and September 1, 2004 (Ex. 16 at 8-9). The PSSRC was chaired by Northeastern University Criminal Justice Professor Emeritus Edith E. Flynn, Ph.D. (Ex. 16). In the Acknowledgements to the PSSRC Final Report, “[s]pecial appreciation” was given to the Appellant and he was listed as “representing the Lexington Police Department.” (Ex. 16 at 2).

31. Also serving on the PSSRC with the Appellant, was then-Lt. Mark Corr, who was appointed by Chief Casey. (Testimony and Exs. 16 & 17)
32. During PSSRC meetings, Appellant offered a number of criticisms of the Department, including the inadequacy of the bulletproof vests issued to officers, defective radios, and the Department's outmoded computer system. These concerns were reflected in the PSSRC's Final Report, which was critical of Chief Casey's stewardship of the police department. . A survey by PSSRC was conducted of police officers, by a questionnaire with guaranteed anonymity. The survey results found that over 90% of the officers who responded, (68%) of total, blamed decisions by Department management for low morale in the Department. (Ex. 16 at 40). In this Final Report, the PSSRC "strongly recommends that serious efforts be expended on team (Department) building, managerial skills and leadership training." By contrast, the Fire Chief was highly praised in the Report based on a review of the Fire Department's performance, leadership and morale, by a similar survey of the Fire Department's personnel. (Ex. 16 at 42, 49 and testimony of Appellant and Corr)
33. No candidate for sergeant other than Appellant served on the PSSRC. (Ex. 16)
34. During the Appellant's interview, Corr commented to the Appellant that the Appellant's statements during the PSSRC meetings led him to question the Appellant's loyalty to the Department. Corr denied having made this particular statement directly to the Appellant but could not remember if there had been any discussion of the Appellant's participation in the PSSRC during the interview process. (Testimony of Appellant and Corr)

35. Mark Corr told the Appellant in an aside during a PSSRC meeting that because he, Corr, was up for promotion, he needed to “watch what he said during meetings.” (Appellant Testimony). Corr did not specifically deny having made this statement. On cross-examination, Corr testified that although he did not recall any specific conversation with the Appellant regarding this conversation, he could not say it did not occur. (Corr Testimony). Corr was promoted to Captain and was serving in that capacity by the time of the sergeant promotional process. (Corr Testimony)
36. The Department command staff, including Captain Corr, reacted defensively to the PSSRC Final Report, in its own written comments to that Final Report dated September 10, 2004. The Department specifically pointed out that the Appellant had not served the committee as a representative of the Department but as a union president representing the union membership. (Ex. 17 at 2) Chief Casey also complained in the written comments, about the anonymous survey questionnaire to the Department personnel regarding the Department morale and leadership. Chief Casey attempted by a robust and lengthy defense, to divert blame for the low morale and leadership opinion, on to the recent budget cuts. (Ex. 17 at 7-8)
37. The Appellant testified that he had a meeting with Chief Casey in end of October, 2004 at which Captain Raposa was present. Chief Casey was “kind of angry” then, regarding the perceived low morale in the Department. Casey blamed the low morale on the budget cuts and reduction of positions in the Department and specifically claimed that it was not due to “mismanagement”. (Testimony of Appellant)

38. By memorandum dated June 6, 2005, the Chief recommended as the four candidates for Sergeant O'Brien, Mazerall, Callahan, and Christopher Barry. O'Brien had served 24 years with the Department, Callahan: 20 years, Mazerall: 21 years and Christopher Barry: 7 years. Appellant had served 9 years. All but O'Brien had scores lower than the Appellant's, a gap ranging from three to eight points. (Exs. 1, 2 and 18)
39. All of the candidates including the bypassing candidate Christopher Barry and the Appellant possessed all of the necessary qualifications that were established by HRD as prerequisites for taking this competitive promotional civil service examination. Each of these competing candidates also received from HRD, the appropriate credit for their respective past relevant training and experience. HRD determines the appropriate credit, which is weighted, calculated and then added to the exam score so that the candidates did each receive an augmented final score which includes training and experience credit. The Appellant did receive a higher final civil service score than did all of the candidates except O'Brien and eight points higher than Christopher Barry. (Administrative notice of G.L. c. 31§ 21 and §22, PAR.06 (1) (b))
40. In the compendium of documents forming the basis for the appointment/bypass decisions, no mention was made of the Appellant's service on the PSSRC. (Ex. 9, 10). No other candidate for sergeant served on that committee. (Ex. 16).
41. By letter dated May 31, 2005 to HRD, Acting Town Manager Crew-Vine followed the Chief's recommendations in appointing O'Brien, Mazerall,

- Callahan, and Christopher Barry as sergeants. By letter dated June 3, 2005, HRD approved the reasons for the bypass. (Exs. 2 and 3)
42. The five (5) criterion chosen by Chief Casey, upon which evaluation of the competing candidates was made are: Experience, Interview, Supervisor's Role, Self-Awareness and Past Performance. (Testimony of Casey and Ex 2)
43. Both the Appellant and Christopher Barry served on bike patrol and the honor guard. Although the Honor Guard was listed on both of their submitted resumes (Ex. 6), only Christopher Barry's service in the Honor Guard is reflected in the bypass-reasons package submitted by the Town to HRD. (Ex. 2).
44. Christopher Barry served as a Field Training Officer. (Ex. 2). This position is appointed by the Chief. (Casey Testimony; Appellant Testimony). The Appellant applied twice, (2002 & 2004) to become a Field Training Officer, but was never even given an interview. Chief Casey testified that he could not remember if the Appellant had applied for the position of Field Training Officer, yet Chief Casey made the appointments with consideration to a Captain's recommendation. (Appellant and Chief Casey Testimony).
45. Chief Casey testified that he did not view the PSSCR final report as a criticism of him personally or his administration or leadership. He claimed to have taken it as constructive dialogue or input. He claimed to hold no animosity toward the Appellant, as the source or protagonist of some of the issues for which the Department was criticized. (Testimony of Chief Casey)
46. The Appellant was the only sergeant candidate who had served in the military. He received an honorable discharge following five years of service in the United

States Navy and six years in the United States Naval Reserve. Military experience was not weighed as a positive factor in the selection process.

(Testimony of Casey and Ex. 6)

47. Before joining the Department, Appellant worked as a computer operator and systems software analyst for approximately eight years in the private sector. During his employment in the Department, the Appellant put in service and maintained all of the laptops in the police cruisers, utilizing his private sector skills for trouble shooting, loading new equipment and for software selection from vendors. Chief Casey recognized this contribution to the Department in his testimony but did not give it any positive weight in the selection process for this promotion. (Ex. 6 and testimony of Appellant and Casey)

48. All of the successful sergeant candidates were originally from Lexington. Although not originally from Lexington, the Appellant has lived there for many years and has volunteered in the Lexington public schools in several different programs. (Testimony of Casey and Appellant)

49. The Appellant received a letter of reprimand in August, 2002, for driving his cruiser too fast through a construction site. Ironically, Captain Corr as Captain of Operations issued that reprimand letter. This prior discipline fell just within the three year window for review, as established by Chief Casey for this promotion. Chief Casey, without prompting or refreshing his memory, was intimately familiar with the details of this disciplinary incident during his testimony. He appeared to emphasize and dramatize the seriousness of the incident and its impact on the selection process. (Testimony of Corr and Casey, Ex. 3)

50. Verbal or written reprimands or warnings are not a type of discipline which may be appealed to the Civil Service Commission. There is no evidence presented here to indicate whether this type of discipline is reviewable by grievance and arbitration, pursuant to a collective bargaining agreement. (Administrative notice G.L. chap 31)

51. Chief Casey denied holding feelings of bias against the Appellant and further denied that any feelings of bias had any input or influence on this interview-evaluation process. I find however that Chief Casey held negative feelings toward the Appellant and those negative feelings did affect the interview-evaluation process to the Appellant's detriment. Chief Casey was professionally embarrassed by the PSSCR final report and he knew that the Appellant was the source of and agent for introducing the negative issues to the PSSCR. The Department personnel were generally aware of this situation. Chief Casey's influence over the other panel members is not discounted. The other panel members were and are concerned about their own careers and opportunity for appointment, assignment and promotion. They know that being on the Chief's bad side or in his "dog house" would not enhance their opportunities. The Chief's influence might be only subtle or nuanced but effective none the less. Chief Casey's bias against the Appellant did adversely affect the Appellant's interview-evaluation results.

(Testimony, exhibits, testimony and demeanor of Casey)

52. The Appellant testified in a forthright straight-forward manner on all matters. He testified in a professional and appropriate manner. He did not try to embellish or exaggerate his testimony. His memory of details of time, place, persons present

and statements made on the matters related to his activities on the PSSRC and his union activities was clearer than the other witnesses. I attribute this to the fact that the Appellant had a continuing sense of concern for the potential consequences he might suffer for those activities and he wanted to protect himself. Conversely there was no motive or advantage for the other witnesses to remember these details. Some of the statements made were off hand, scuttlebutt or office talk, made without the earmarks for memorializing. Failing to remember those statements or circumstances would not be unusual for most people. However, most of the Department personnel were generally aware of the PSSRC, the Appellant's contribution, its final report and the Chief's and command staff's negative reaction to it. I find the Appellant to be a credible and believable witness.

(Exhibits and testimony, testimony and demeanor of Appellant)

53. Corr's brother Steve is an officer in the Lexington Police Department and his father was a previous Police Chief of the Department. There was gossip or scuttlebutt in the Department and a general awareness that Chief Casey was angry about some of the Appellant's union, PSSRC and/or other activities or statements.

(Ex. 16 & 17, Testimony of Corr, Casey, O'Leary and Appellant)

54. Captain Corr was also called as a rebuttal witness regarding: 1.) the Appellant's claim that Corr stated to him during the panel interview, something about questioning the Appellant's loyalty to the Department and 2.) a discussion by the panel during the interview evaluation process about the Appellant's activities on the PSSRC and input to its final report. During his rebuttal testimony Corr offered into evidence (Ex 19), certain documents regarding the Appellant's evaluation-

recommendation for his application for the position of School Resource Office, dated March 26, 2002. These evaluation-recommendation documents were marked “X - Not at this time.” And contained comments by named Sergeants and Lieutenants. The evaluation comments were on the negative side. Captain Corr admitted that the Appellant had not seen these documents before and was not aware of their existence. Captain Corr also admitted that these documents were deliberately kept secret and unpublished due to their nature and the likelihood to create an “animus” in the Applicant toward the Evaluators. However, Corr overcame that policy consideration at this time for the sake of presenting some negative evidence against the Appellant.(Testimony of Corr, Ex. 19)

55. Corr, during his rebuttal cross-examination was asked: Q. “You never said in the first panel interview, anything about Michael Barry’s loyalty to the Police Department?” To which, Corr responded with a qualified rhetorical question. – A. “To his face?” However, this line was not pursued and Corr was allowed to answer in a qualified response. - Q. “In the interview, to Michael Barry?” – A. “No.” Corr was also asked if the interview panel discussed the Appellant’s activities with the PSSCR and Corr answered in a qualified, evasive manner by stating- A. “I don’t specifically remember...It would have been a reasonable topic to bring-up.” Corr was shown a copy of the Department’s written **Comments To: “Final Report of the Public Safety Staffing Review Committee”**, dated September 10, 2004. (Ex 17) Corr was asked –Q. “Recognize that?” he answered –A. “No”, “...I’m not familiar with it.” Then he furthered his answer “...I believe it was a consolidation...I gave him (Chief Casey) some responses, some issues. I

believe his response was a consolidation of some of the things I wrote and the other Captains wrote”. Corr repeated the “consolidation” answer two or three times. Corr also answered “I probably addressed some of the issues in here (Ex 17 Comments)” Corr also stated “I believe I either e-mailed or created a Word document. I believe that I may have brought down four or five points, and then I believe the Chief of Police may have consolidated the points. ...There may have been parallel issues that others raised.” Regarding the final draft of the written Comments he answered “I don’t remember if I did the drafting of some of it” many of Corr’s answers were qualified with “I don’t remember” or “I don’t remember specifically” or “I believe”. When this hearing officer asked Corr if he had made any general statement to others regarding the Appellant’s disloyalty to the Department, Corr answered with a lengthy, evasive statement. (Testimony and demeanor of Corr)

56. Captain Corr claimed to be unfamiliar with the Department’s written “**Comments to: Final Report of the Public Safety Staffing Review Committee**”, dated September 10, 2004. (Ex 17) and answered “No” when he was asked whether he had seen that document before. However, the introductory declaratory sentence of the “Comments” reads as follows; “Chief Christopher Casey, Captain Robert Raposa, Captain Charles Sargent, and Detective Lieutenant Mark Corr reviewed this report. We submit the following comments.” (Testimony of Corr, Ex. 17)
57. Corr, although a bright, well-dressed, professional and unflappable witness, was evasive by having an unclear memory regarding his participation in specific conversations set out by Appellant. Corr however, did not deny that the

conversations or events may have occurred. Corr seemed intent on avoiding awareness of any correlation between the Appellant's union activity or his participation on the PSSRC with the interview panel's evaluation process. Corr clearly viewed some of the Appellant's union activity and participatory contribution on the PSSRC, as critical of Chief Casey or the Department. He viewed this as the Appellant being disloyal to the Department yet he took pains to avoid testifying to it. Corr believed that the Appellant should have explored the issues factually and vetted them with the command staff prior to raising them with the PSSCR. I do not find that Corr is untruthful per se in his testimony but his answers were evasive, qualified and aimed at avoiding an answer that might support the Appellant's assertions regarding bias. Corr is very protective of his own state of mind regarding his recall of past feelings and beliefs associated with events. Corr is staunch in his loyalty and clever and precise in his recall and responses so as to avoid any misstep. An example is his rhetorical question as a qualification prior to answering a question on cross-examination: Q. "You never said in the first panel interview, anything about Michael Barry's loyalty to the Police Department?" To which, Corr responded with a qualified rhetorical question. – A. "To his face?" This evasion was somewhat effective yet it implies that he probably made a statement regarding the Appellant's loyalty other than directly to his face. I do not find Corr's testimony to be believable on the issues related to a predisposition of bias against the Appellant, by Chief Casey, himself and others on the interview panels or command staff. The bias being based on

their belief that he was disloyal and/or hot-tempered and/or abrasive and/or a non-townie. (Exhibits and testimony, Testimony and demeanor of Corr)

58. The interview-evaluation process here employs a nebulous, subjective evaluation scheme on concepts or the candidates' personal characteristics, which allowed the panel to incorporate their own bias or past experience with the Appellant. The Appellant's interview performance was evaluated as follows: "**Interview:** Articulate and intelligent but interview seemed contradictory and answers were described as "scattered" with "no end point." Spoke about importance of traffic enforcement but had difficulty explaining his own support for Department's traffic policy., Spoke about "never" losing temper and privately discussing issues of importance but this was inconsistent with interview panels' past experience with his tendency to react at times in an "explosive" and "defiant manner". Panels raised concerns about his handling stress, confidence in role, and indecisiveness. Job knowledge answers were weak and at times did not identify key concepts in lieu of a correct answer. For example, when asked about a group of residents who frequently draw police services, he was not able to identify the individuals nor could he give a constructive answer on how they would be properly handled."

(Testimony of Corr and Casey, Ex. 2)

59. The panel's subjective determination of concepts or personal characteristics identified regarding the other competing candidates were noticeably positive, included the following: "Interviewed well demonstrating emotional and professional maturity", "forward-thinking philosophy", "demonstrated self-awareness", "demonstrated self improvement", "interview performance",

“demonstrating emotional and professional maturity”, “portraying a friendly and outgoing image”, “Self-aware of growth areas answering with an honest and personable manner...”, “Understood supervisor’s role, the necessity of managing stress, and articulated the importance of working with officers with different needs”, “accepted responsibility”, “Demonstrated that he is self-aware of growth areas”, “open and honest manner”, “precise understanding of policy and its applicability day to day”, “Both interview panels cited very few growth areas” and “Where specific answers to interview questions were not known, he took responsibility for his position then gave intelligent and workable solutions identifying key concepts and expectations.” (Testimony of Corr and Casey, Ex. 2)

60. No correct answers to the interview questions were clearly identified or established, nor any authority cited or referenced for same. The Town did not produce sufficient evidence to objectively base a determination that the two candidates’ (addressed here) respective answers to interview question were right or wrong or better or worse, comparatively. The subjective evaluation process, the make-up of the interview panel and the prior negative experience of some of its members with the Appellant created an unfair disadvantage for him. The result is that the Appellant did not receive a fair opportunity for consideration. (Testimony and Exhibits)

CONCLUSION:

In reviewing hiring and promotional decisions, The Commission seeks to ensure that basic merit principles prevail in the selection process. Chapter 31 defines “basic merit principles” as requiring that employees be selected and advanced on the basis of their relative ability, knowledge and skills, that they are assured fair and equal treatment in all aspects of the personnel administration, and that they are protected from arbitrary and capricious actions. The main method by which the Commission and the Human Resources Division (HRD) ensure the application of basic merit principles in the hiring and promotional process is through the use of civil service exams and eligibility lists.

The eligibility lists are compiled, except for preferences, mainly on the basis of civil service examination scores. However, the competing candidates must first “pass” the exam before they receive consideration. The personnel administrator, prior to the exam, determines the entry requirements for qualification to take the exam and the passing requirement for the exam. The candidates also receive credit for their relevant training and experience. This credit is calculated by HRD and added on to the candidate’s exam score for a final civil service score.

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). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). 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." Id. at 304, quoting 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. 211, 214 (1971). "In making that analysis, the Commission must focus on the fundamental purposes 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. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997)

Civil Service law traditionally obligates the appointing authority to exercise sound discretion, within the particular circumstances of the case, in the selection of a candidate from a certified eligibility list. The Supreme Judicial Court stated succinctly and conclusively "The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select in the exercise of a ***sound discretion***, among persons eligible for promotion or may decline to make any appointment." (Emphasis added) Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660, 666 (1971). The Goldblatt decision then referenced Commissioner of the Metropolitan District Commission v. Director of Civil Service, 348 Mass. 184 (1964). This decision addressed the issue of appointing authority discretion in the face of the

apparent absolute preference for disabled veterans on an eligibility list, bestowed by the Legislature. The particular circumstances of this case presented a qualified candidate on the eligibility list for appointment as a police officer by virtue of having passed a civil service exam. This candidate also qualified for the statutory absolute preference as a disabled veteran and appeared at the top of the eligibility list. However the matter was complicated by the fact that the candidate (O’Handley) had previously plead guilty to, and been sentenced upon, an indictment for armed robbery, (a felony). O’Handley thereafter received a full pardon. The apparent statutory absolute preference for disabled veterans now had to be applied to a person who also seemed to qualify for the absolute statutory disqualification for appointment as a police officer due to the felony conviction, pursuant to G.L. c. 41, § 96A, although subsequently pardoned.

The Supreme Judicial Court resolved this statutory conflict as it affects the appointing authority’s selection discretion and the candidate’s eligibility rights. The court concluded as follows; “We hold that O'Handley's full pardon removed his ineligibility under Section 96A as an absolute bar to application and consideration for appointment, despite the strong legislative policy in Section 96A that persons once convicted of felony are not thereafter to be entrusted with police duties. Nevertheless, even if O'Handley has ceased to be ineligible under Section 96A to apply for appointment, it was open, and remains open, to the commissioner to refuse to appoint O'Handley because of the serious character of the criminal conduct underlying his conviction. The obvious inappropriateness of appointing as a police officer one previously convicted of felony, even though later pardoned (for grounds other than his innocence), was ample justification for the commissioner's refusal to appoint O'Handley. See State ex rel. Atty.

Gen. v. Hawkins, 44 Ohio St. 98, 102, 116-117.” *Idem.* Commissioner of Metropolitan District Commission at page 197. The court had further explained its rationale earlier in that decision, while citing several other decisions, *Idem* at page 193; “we adopt a construction of Section 23 which is within the constitutional limits set out in Brown v. Russell, 166 Mass. 14, 21-27, and Opinion of the Justices, 324 Mass. 736, 740. We hold that under Section 23 an appointing authority has the power and duty to protect the public interest in having only public officers and employees of good character and integrity and may refrain from appointing a disabled veteran in preference to others where there are reasonable grounds to regard that veteran's character or past conduct as rendering him unfit and unsuitable to perform the duties of office.”

The above cited Goldblatt line of decisions address serious and weighty factual and statutory considerations that affect the countervailing rights and responsibilities of the appointing authority versus the candidates.

However, in this present matter the interview-evaluation process employs a nebulous, subjective evaluation scheme on concepts or the candidates’ personal characteristics, which allowed the panel to incorporate their own bias or past experience with the Appellant. The Appellant’s interview performance was evaluated as follows: “**Interview:** Articulate and intelligent but interview seemed contradictory and answers were described as “scattered” with “no end point.” Spoke about importance of traffic enforcement but had difficulty explaining his own support for Department’s traffic policy., Spoke about “never” losing temper and privately discussing issues of importance but this was inconsistent with interview panels’ past experience with his tendency to react at times in an “explosive” and “defiant manner”. Panels raised concerns about his

handling stress, confidence in role, and indecisiveness. Job knowledge answers were weak and at times did not identify key concepts in lieu of a correct answer. For example, when asked about a group of residents who frequently draw police services, he was not able to identify the individuals nor could he give a constructive answer on how they would be properly handled.”

Chief Casey and some of the command staff who participated in the interview-evaluation process had some past negative experience with the Appellant and they were allowed to incorporate that experience in their subjective evaluation. The circumstances in this case regarding the interview panel staffing and evaluation process are similar to the circumstances in Kerrigan v. Hudson Police Department, 17 MCSR 54, (2004).

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).

“An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations for the selection of one candidate over the other.” *See* Tuohey v. MBTA, Case No.: G2-04-394 (2006). The interview-evaluation process did not identify a personality or character trait that might reasonably interfere with the Appellant’s ability to perform the duties and responsibilities of the sergeant’s position. Compare Radford v. Andover Police Department, 17 MCSR 93, (2004). The Appellant

in this present matter was caught in a trap, a “Catch-22” predicament. During the interviews he displayed a controlled, appropriate temper and denied that he had bad temper. Yet, he was penalized in the interview-evaluation process for failing to admit that he had a bad temper. Either way, admitting or denying a bad temper he was destined to lose. In this matter, the objective criteria of civil exam score, seniority and past performance evaluations weigh in the Appellant’s favor yet he succumbed to a suspect, subjective interview-evaluation process laden with overtones of bias or animosity. Here, at the very least, there was the appearance of or potential for bias in the promotional process and that should have been effectively remedied.

The use of an abstruse interview-evaluation process for promotions in a small or medium size department is of questionable value. The Police Chief and the command staff here should have been very familiar with the qualifications of each of the competing candidates. It’s their job to know that information. There are annual performance reviews and other records that document their performance in the normal course with due notice and opportunity to contest and review. This type of system is transparent, routinely monitored and traditionally relied upon by both the employees and management. All of the candidates here are long-term employees and there should not have been anything but a complete surprise learned from an interview. The abstruse interview-evaluation process employed here allows for the injection of impermissible factors in contradiction to basic merit principles, which are at the heart of Chapter 31.

In a bypass appeal, the question is “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 requires that the Appointing Authority's actions be based on adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). All applicants must be adequately and fairly considered.

In the present matter, the Town has not met its burden of proving that there was a reasonable justification for bypassing Appellant for the position of police sergeant.

"A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles." Sabourin v. Town of Natick, Docket No. G-01-1517 (2005). Here, Appellant's score on the civil service examination was higher than those of the other applicants and he appeared to be in line for the next promotion to Sergeant. However, rather than use Appellant's score and placement on the certification list, the Town opted to use a selection process that involved using two interview panels, with both panels staffed wholly by internal Departmental personnel. There were not adequate safeguards against the subjective, impartial determinations of the panel interviewers as there was no numerical or reasonably sound scoring system of the questions and testimony was unclear whether all of the questions were asked of all candidates. Further, the panel's assessment of the Appellant's "growth areas," particularly with respect to his temper, do not appear in the previous three performance evaluations he received from the Department, each of which included the statement, "He treats others with respect and courtesy" in the Teamwork and Cooperation category. The interview selection process was created and staffed primarily by Chief Casey and Captain Corr, two people who previously held low

opinions of the Appellant's temperament and loyalty to the Department. At least one person selected to be on one of the two panels, the "Staff panel", Detective Steve Garabedian had previously engaged in heated disagreements with the Appellant. During the interview, Garabedian accused the Appellant of effectively lying when he denied having a bad temper. People who held low opinions of or axes to grind with the Appellant participated in the interview evaluations and were encouraged to compare their past experience with the Appellant with his interview performance. In sum, the use of this type of interview process lacked the requisite structure to eliminate bias and ensure fairness.

Further, the failure of the appointing authority to utilize basic merit principles is also apparent when comparing the Appellant with Christopher Barry, the lowest scoring applicant, who was promoted to Sergeant with an examination score eight points lower than the Appellant's. The Appellant had more experience, nine years to Christopher Barry's seven, and better (EPRS) evaluations: Appellant had five ratings of "exceeds," as opposed to four for Christopher Barry. Based on testimony, there appeared to be a hometown bias for Christopher Barry that came into play in the bypass decision.

It is apparent that the Appellant's union presidency and role as a union representative to the PSSRC contributed to an impermissible bias against Appellant leading to Respondent's bypass decision. Appellant credibly testified that in his capacity as union president, the Appellant filed more grievances than his predecessors and that one issue in particular, involving the distribution of packets to the Selectmen, angered Chief Casey. Additionally, Appellant testified that in his interview, Corr commented in a way that questioned his loyalty to the Department for the manner in which he had participated

in the PSSRC. Although Corr denied making the comment directly to the Appellant, his denial was qualified, evasive and unconvincing.

The stated reason for the bypass, the low score resulting from a poor performance before the interview panels is unsubstantiated by reliable, credible evidence. The interview panel process, staffing and scoring was designed and influenced by Chief Casey to be subjective or a matter of opinion. This process was designed to obstruct the Appellant's opportunity for impartial consideration for this promotional appointment.

Chief Casey was biased against the Appellant, a matter the Chief took pains to deny. The Chief designed this subjective evaluation process to offset the areas of objective measure in which the Appellant had an advantage. The Chief was biased against the Appellant, who appeared next to the top of the civil service eligibility list with an eight point higher score, two more years' seniority and better performance reviews than the bypassing appointee, Christopher Barry. The entire interview-evaluation process was so thoroughly tainted that it not only negated its results but the taint also carried over to any other reasons alleged for the bypass. Although the Appellant had one incident of minor discipline, a reprimand for driving too fast, in a road construction area, three years earlier; there was not reliable or credible evidence presented to show that this constituted reasonable justification for the Appellant's bypass.

In sum, despite Appellant's having the highest civil service examination score, and being the only veteran on the certification list, he was bypassed by a candidate with less seniority and lower performance evaluations. Respondent proffered reasons for this bypass decision have been shown to have been based on impermissible biases and a flawed selection process.

For all of the above-stated reasons, it is found that the Respondent has not established by a preponderance of credible evidence that it had reasonable justification to bypass Appellant for the position of police sergeant. Therefore, this appeal on Docket No. G2-05-231 is *allowed*.

In light of the foregoing, the Commission, 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, hereby directs the Human Resources Division to place the name of Appellant, Michael Barry, at the top of the current and/or next certification for police sergeant with the Lexington Police Department, so that he receives at least one opportunity for consideration. Appellant's seniority date, should he be promoted to sergeant, shall be made retroactive to the date of the original bypass. Further; if the projected date for the next promotion to police sergeant is in the distant future, the Appellant may file a motion for further remedial relief. The filing time limit for such a motion shall be within ten days of the receipt of the Commission order or decision.

Civil Service Commission

Daniel M. Henderson, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Taylor and Henderson, Commissioners), [Stein absent, Marquis abstained] on October 9, 2008

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice To:

Alan H. Shapiro, Atty.

Laurie W. Engdahl, Atty.