

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Decision mailed: 12/30/11
Civil Service Commission

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

ROBERT BINNALL,
Appellant

v.

CITY OF NEWTON,
Respondent

Case No.: G2-10-83

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on December 29, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 18, 2011. The Respondent submitted comments to the Commission on December 16, 2011. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *allowed*.

ORDER

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 Civil Service Commission directs the Human Resources Division or the City of Newton in its delegated capacity to place the Appellant's name at the top of the next certification for the position of full time permanent Fire Captain until such time as the Appellant receives at least one consideration for the position of Fire Captain.

If promoted, the Appellant shall receive additional relief consisting of a civil service seniority date in the position of Fire Captain retroactive to the date of the improper bypass. This retroactive seniority date is not intended to provide the Appellant with any additional and/or retroactive compensation.

By vote of the Civil Service Commission (Henderson, McDowell and Stein [Bowman, Chairman, absent; Maquis, absent], Commissioners) on December 29, 2011.

A true record. Attest.

Paul M. Stein
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Brian Simoneau, Esq. (for Appellant)

Donalyn B. Lynch Kahn, Esq. (for Appointing Authority)

Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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November 18, 2011

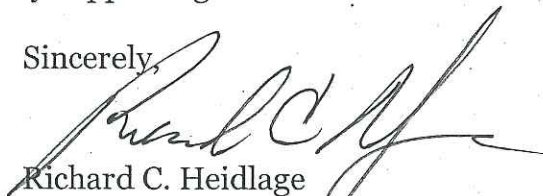
Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Robert Birmall v. City of Newton
DALA Docket No. CS-11-4
CSC Docket No. G2-10-83

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Donalyn B. Lynch Kahn, Esq.
Brian Simoneau, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Robert J. Binnall,
Petitioner

v.

Docket No. G2-10-83
DALA No. CS-11-4

City of Newton,
Respondent

Appearance for Petitioner:

Brian E. Simoneau, Esq.
161 Worcester Road, Suite 200
Framingham, MA 01701

Appearance for Respondent:

Donnalyn B. Lynch Kahn, Esq.
City of Newton
100 Commonwealth Avenue
Newton Centre, MA 02459

Administrative Magistrate:

Kenneth J. Forton, Esq.

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CIVIL SERVICE COMMISSION

SUMMARY OF RECOMMENDED DECISION

The appeal of a bypassed candidate for promotion to Captain at the City of Newton Fire Department should be allowed because the Appointing Authority cited no negative reasons for the bypass, and the positive reasons for choosing the appointee are either unsubstantiated or apply equally to the bypassed candidate. In addition, the Department's Interview Committee failed to use any objective criteria in evaluating the candidates' interviews and failed to use a numerical or other similar objective system for ranking the candidates.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Robert J. Binnall, appeals the decision of the Respondent, City of Newton, to bypass him for a promotion to the position of Captain in the Newton Fire Department. The appeal was timely filed. A hearing was held on December 13, 2010 at the Division of Administrative Law Appeals, 98 North Washington Street, Boston.

I admitted 15 documents into evidence. (Exs. 1-15.) I also marked two exhibits for identification: "A" is the witness list and "B" is the parties' agreed upon facts. At the conclusion of the hearing, I left the record open for the Appellant to submit an affidavit from the Human Resources Division (HRD) for the purpose of explaining the bypass process and HRD's ranking system. I marked the affidavit and accompanying exhibits, which were submitted on January 13, 2011, as Exhibit 16.

The Appellant testified on his own behalf. Two members of the Newton Fire Department also testified on the Appellant's behalf: Captain William Bianco and Lieutenant Richard Toli. The Appointing Authority called four witnesses: Deputy Chief Paul Chagnon; Assistant Chief Bruce Proia; Karen Kinnealey of the City of Newton Human Resources Department; and Chief Joseph F. LaCroix.

At the conclusion of the hearing, I agreed to keep the record open to accept post-hearing briefs from the parties. Upon receipt of the City's proposed decision on March 14, 2011, the administrative record closed.

FINDINGS OF FACT

Based upon the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. At all relevant times, the Appellant, Lt. Robert J. Binnall, and the appointed candidate, Lt. Mark Heitman, have been employed by the Newton Fire Department. (Ex. 1.)

2. On November 17, 2007, Lt. Binnall, Lt. Heitman, and a third candidate, Lt. Brian Merrill, all took a civil service promotional examination for the position of Permanent Full-Time Captain for the Newton Fire Department. (Ex. 1.)

3. On April 19, 2008, the Civil Service Commission issued Certification List #290855 to the City of Newton. The top three slots on the list, in order of appearance, were Robert Binnall, Brian Merrill, and Mark Heitman. (Ex. 2.)

4. On March 8, 2010, a vacancy arose for the position of Permanent Full-Time Captain for the Newton Fire Department. (Ex. 1.)

City of Newton Fire Captain Hiring Process

5. When a promotional vacancy occurs within a department, the Appointing Authority must generate a list of candidates. This list is called a certification. Next, HRD will determine the eligible list for the position of Fire Captain, and send it to the Appointing Authority. (Ex. 16.)

6. Names on the eligible list appear in rank order, based on their civil service exam scores. Candidates with tie scores are identified by printed words "Tie" and "Tie End" to the right of the affected candidates' names on the eligible list. (Ex. 16.)

7. Pursuant to Personnel Administrator Rules .02, a bypass results if the Appointing Authority selects a person whose name appears lower on a certification list than a person who is not appointed and whose name appears higher on the certification. (Ex. 16.)

8. The Appointing Authority must provide bypassed candidates with the reasons that any lower ranked candidate was chosen for promotion. The Appointing Authority must also clearly communicate in writing to the bypassed candidate that he or she has the right to appeal with the Civil Service Commission. (Ex. 16.)

9. Chief LaCroix is the Appointing Authority for the City of Newton's Fire Department. Chief LaCroix requires an interview as part of the hiring process. However, he does not personally conduct the interviews and instead relies on an Interview Committee. (Testimony of LaCroix.)

10. The purpose of the Interview Committee is to evaluate the candidates and make recommendations to the Chief. The Interview Committee is expected to consider additional aspects of the candidates, other than interview performance, including letters of commendation and/or recommendation, disciplinary issues, and sick time. After the interviews are concluded, Chief LaCroix sits down with the Interview Committee to discuss their findings. (Testimony of LaCroix.)

11. Chief LaCroix gives great weight to the conclusions that the Interview Committee draws from the interviews. Chief LaCroix uses the discussions he has with the members of the Committee to make his final determination. The Chief expects that the Committee will extensively review the candidates' records and backgrounds; the Chief, himself, does not review the candidates' records. The only time the Chief will rely on information, outside of what is presented to him by the Committee, is when "there is something extraordinary that the individual accomplished that is well known." In this case, Chief LaCroix did not consider additional information and based his decision solely on the information presented by the Committee. (Testimony of LaCroix.)

12. HRD's Certification Handbook provides that the interview process may be a sufficient reason for non-selection if the Appointing Authority is specific as to the issue that arose during the course of the interview. (Ex. 16.)

Hiring Process for Certification List # 290855

13. For Certification List #290855, the Appointing Authority followed the City's standard hiring process. The Interview Committee interviewed all three candidates and ultimately recommended Lt. Heitman for the position of Permanent Full-Time Captain. Chief LaCroix chose Lt. Heitman based on the Interview Committee's recommendation. (Testimony of LaCroix.)

14. The Interview Committee was experienced; its members had interviewed several candidates in earlier original appointments and promotions. The Committee consisted of Karen Kinnealey, Assistant Chief Bruce Proia, and Deputy Chief Paul Chagnon. Karen Kinnealey has been on the Newton Fire Department Interview Committee for 4 years. (Testimony of Kinnealey.) Assistant Chief Proia has been on the Interview Committee for 7 years. (Testimony of Proia.) And, Deputy Chief Chagnon has been on the Interview Committee on and off for several years. (Testimony of Chagnon.)

15. On March 10, 2010, the Interview Committee interviewed each of the candidates, who were asked the same 17 questions. Each committee member took notes on the questions asked during each interview; however, the answers were not scored or weighted. (Testimony of Kinnealey; Exs. 9, 10, 11.)

16. During the course of their assessment, the Interview Committee also viewed letters of recommendation and commendation, attendance records, and the

personnel and disciplinary files of each candidate. (Testimony of Kinnealey, Proia, Chagnon.)

17. At the conclusion of each of the three interviews, the Committee discussed each candidate's interview performance. At the conclusion of all of the interviews, the Committee members each individually ranked the candidates and then discussed their individual rankings to make a collective recommendation to Chief LaCroix. (Testimony of Kinnealey.)

Disciplinary Files

18. Nothing in the candidates' disciplinary files influenced the Committee's recommendation to Chief LaCroix, and the Chief did not cite discipline as a reason for bypassing Lt. Binnall. (Testimony of Proia, Kinnealey, Chagnon.)

19. Lt. Binnall had two "Dear Chief" letters in his personnel file. These letters are not considered disciplinary and are used by firefighters to explain certain incidents to the Chief. The first "Dear Chief" letter explained how Lt. Binnall had backed a fire truck into something, and the second letter explained why a certain task was not completed at the end of a crew's shift when Lt. Binnall had been the crew's officer. (Testimony of Proia.)

20. Lt. Binnall had also received a verbal reprimand from Assistant Chief Proia for failure to perform a function he was assigned to do. Proia documented this reprimand in his own personal file where he kept track of firefighters, lieutenants and captains. No record of the verbal reprimand was placed in Lt. Binnall's personnel file. (Testimony of Proia.)

21. Proia was impressed with Lt. Binnall after the reprimand because Binnall apologized and corrected the situation. (Testimony of Proia.)

Candidates' Attendance

22. None of the candidates exhibited any abuse of sick time. (Testimony of Proia.)

23. Lt. Heitman had perfect attendance. (Testimony of Kinnealey; Exs. 4, 8.)

24. Lt. Binnall used 24 of his 60 accumulated available sick days, all of which were approved. He used 14 of those days after he broke his wrist in an off-duty accident. (Testimony of Binnall; Ex. 8.)

25. In a letter of recommendation, Deputy Chief James Thorne stated that Lt. Binnall "showed excellent attendance." (Ex. 6.)

Candidates' Training Records

26. Between May 1, 2006 and June 30, 2006, Lt. Heitman assisted Captain William Bianco in teaching three of 53 classes for a class of recruits in the Training Division. Lt. Heitman was listed as an instructor in the Massachusetts Fire Academy Manual three times. This manual was made by Acting Provisional Chief Castro. The May 8, 2006 Class that lists Lt. Heitman as an instructor was a building construction class where Lt. Heitman's participation was limited to changing the slides on the projector. (Testimony of Bianco.)

27. At the request of Captain Bianco, Lt. Binnall assisted in teaching the recruits about jet fires. Lt. Binnall was not granted permission to aid Captain Bianco while he was on duty, so Lt. Binnall assisted during his days off. Lt. Binnall went to Drager Maze, a training facility by Quincy Shipyard, to aid in the recruits' training.

Additionally, Lt. Binnall helped a recruit class at the Worcester Burn Building.

(Testimony of Bianco, Binnall.)

28. Lt. Binnall took several specialized training classes. On December 7, 2010 the Commonwealth Office of Public Safety and Security Department of Fire Services wrote to Lt. Binnall, providing him with a list of classes he had successfully completed. The classes Lt. Binnall completed were: an eight-hour course entitled Structural Firefighting Practices in September 2002; a 48-hour Basic Fire Investigation Course in September 2007; a 60-hour Fire Officer Supervisory Training Course in January 2008; a three-hour Lightweight Construction Course in March 2008; a three-hour Roadway Safety for Emergency Service Personnel course in February 2009; and a three-hour Fire Emergency Operation course in January 2010. (Testimony of Binnall; Ex. 15.)

29. Chief LaCroix considered Lt. Heitman's experience in the Training Division as an important factor because a new recruit class would be beginning soon after the Captain promotion, and the Chief wanted an experienced teacher to teach the recruits. (Testimony of LaCroix; Exs. 4, 8.)

30. When he chose Lt. Heitman for the promotion, Chief LaCroix was unaware of Lt. Binnall's experience training recruits. (Testimony of LaCroix.)

Letters of Commendation and Letters of Recognition

31. Lt. Heitman had a letter of recognition on file. It was issued by Acting Chief Mike Castro for Heitman's work in the Training Division with a recruit training class. Heitman received no letters of commendation. (Testimony of LaCroix, Proia; Ex. 5.)

32. In their recommendation to the Chief, the Committee members erroneously reported that Lt. Heitman had received a letter of commendation.

(Testimony of LaCroix; Ex. 8.)

33. Although, there is a technical difference between the two titles, and commendation tends to signify more prestige, Chief LaCroix maintained that the title does not impact the impression the letter made. A letter of recognition is often awarded when the recipient has dedicated more personal time and labor than a recipient of a group commendation has. (Testimony of LaCroix.)

34. Regardless of whether the letter was one of recognition or of commendation, Chief LaCroix was impressed with the work Lt. Heitman did.

(Testimony of LaCroix.)

35. Lt. Binnall had received a group commendation for his work when he responded to an extensive MBTA accident. (Testimony of Binnall; Ex. 14.)

36. The Interview Committee was unaware of Lt. Binnall's group commendation. (Testimony of Proia.)

37. At the time that he selected Lt. Heitman for the promotion, Chief LaCroix was also unaware that Lt. Binnall had received a group commendation. (Testimony of LaCroix.)

Lt. Heitman's Maps and Spreadsheets

38. During the course of the interview each candidate was asked: "What changes or improvements have you made to your station or group and in what way did the change make an improvement?" (Exs. 9, 10.)

39. In response to this question, Lt. Heitman stated that he created a street book, a map of the Boston College Campus, and a hydrant testing spreadsheet. (Exs. 9, 13.)

40. The Interview Committee was impressed by these accomplishments because they demonstrated Lt. Heitman's initiative. Deputy Chief Chagnon was familiar with Lt. Heitman's hydrant testing spreadsheet because he asked other men to use it in preparing their reports. The Committee did not scrutinize the street book's contents or its accuracy. (Testimony of Proia, Chagnon.)

41. Lt. Heitman's street book had a significant number of errors in it. On one occasion, Lt. Richard Toli was dispatched to an emergency at 41 Edge Road in Newton; Toli relied on Lt. Heitman's street book to get him to the location. The street book directed Lt. Toli down the wrong street, forcing him to call the station to find the correct address and get the correct directions. (Testimony of Toli, Chagnon, Proia.)

42. Lt. Binnall found 16 one-way streets listed as going in the wrong direction and over 170 streets missing from one district alone. (Testimony of Binnall.)

43. In the interview, Lt. Binnall responded that he had not made any changes because he had previously attempted to keep the department clean, but was told by Chief LaCroix not to, so he "backed off doing things on his own." (Testimony of Binnall.)

44. Lt. Binnall also made a spreadsheet for the department, to assist the Department's Clothing Officer; however, Lt. Binnall failed to bring the spreadsheet to the Committee's attention. (Testimony of Binnall; Ex. 10.)

Interviews

45. During the interview, each candidate was asked the same 17 questions. The questions fell into two general categories: the first examined how the candidate would deal with various hypothetical situations, and the other probed the candidates' substantive knowledge that a Captain would require. The consistent testimony from each of the interview committee members was that all of the interviewed candidates answered fully each of the standard questions. The committee members took personal, contemporaneous notes of the responses. (Testimony of Proia, Binnall; Ex. 9.)

46. The Committee members did not use any objective standards or criteria to grade each interviewee's performance. None of the Committee members used a scoring matrix or a numerical grading system, nor did they give each question any particular weight in assessing the interviewees' performance. (Testimony of Proia, Chagnon, Kinnealey.)

47. After the interviews were complete, the Committee members met to discuss their individual rankings of the candidates. Ms. Kinnealey had ranked the third candidate, Brian Merrill, first. The other two members of the Committee, Proia and Chagnon, who had ranked Heitman first, then convinced Kinnealey to change her ranking and agree with them that Heitman should be the top-ranked candidate. (Testimony of Kinnealey.)

48. The Committee believed each candidate would have made a good Captain. The Committee chose to recommend Lt. Heitman as their top choice because of his interview performance. The additional factors that were listed in Proia's and Chagnon's letter to the Chief were only intended to be a list of pertinent factors that the Chief would

potentially want to review. Mrs. Kinnealey looked at the other listed considerations, but the interview was the major factor in her ultimate decision. Proia made his decision solely on conclusions he drew from the interview; the other reasons cited in his letter to Chief LaCroix were only generated for the Chief's review. Chagnon was not swayed by any of the additional cited factors and based his recommendation solely on the interview. Chagnon cited additional factors in his letter to the Chief because he considered those factors to be pertinent, and something the Chief should consider. However, those factors did not contribute to his evaluation and ultimate selection of Lt. Heitman as the best candidate. (Testimony of Proia, Chagnon, Kinnealey.)

49. At the conclusion of the interview, the Committee members told Chief LaCroix that all of the candidates were excellent. The Committee concluded that Lt. Heitman's "maturity" and "presence" in the interview set him apart from the other two candidates. Proia stated: "Chief, you have got a tough decision to make, but no matter which way you go, you can't go wrong." (Testimony of Proia, LaCroix.)

50. Assistant Chief Proia believed that all three candidates had the requisite knowledge, skills, and ability to be promoted to Captain. (Testimony of Proia.)

51. The Committee presented selection reasons to the Chief; those reasons were the only factors the Chief relied on in selecting Lt. Heitman. Chief LaCroix did not review any documentation that supported the Committee's cited reasons because he assumed that the Committee had fully researched the candidates and made a recommendation based on a full review of each candidate's qualifications. (Testimony of LaCroix.)

52. Following the interview, Chief LaCroix discussed the candidates with the members of the Committee. Chief LaCroix did not consider any information outside of the factors cited by the Committee members. (Testimony of LaCroix.)

53. Finally, the Committee and Chief LaCroix were under the erroneous impression that their non-selection of Robert Binnall would not constitute a bypass. They claim they drew this conclusion because this Certification List was the first one that the Committee had seen which did not list the candidates' scores next to their names. Therefore, the Committee did not give any weight to the order in which the names appeared on the Certification List. (Testimony of Proia, Kinnealey, Chagnon, LaCroix.)

The Appointment List and Mr. Binnall's Bypass

54. At the conclusion of the hiring process, the City of Newton, by its Appointing Authority, Chief LaCroix, selected Lt. Heitman from Certification List #290855 for promotion to Permanent Captain in the Newton Fire Department. The other two candidates, Lt. Binnall and Lt. Merrill, were thus bypassed. (Exs. 2, 4, 8.)

55. On March 18, 2010, Chief LaCroix submitted to the Human Resources Division the six reasons that he selected Lt. Heitman for promotion to Permanent Captain: perfect attendance, his interview, prior experience in the training division, letter of commendation, clean discipline record, and the initiative he showed by developing maps and spreadsheets for the department's use. (Testimony of LaCroix; Ex. 2.)

56. On March 18, 2010, Chief LaCroix wrote to Lt. Binnall to indicate why he did not select Lt. Binnall for the Permanent Captain position and also that Binnall had a right to appeal the bypass. As the only reason for the bypass, the Chief cited the positive reasons that he had selected Lt. Heitman for the promotion. (Ex. 2.)

57. On April 27, 2010, Lt. Binnall filed a timely notice of appeal of the City's March 18, 2010 decision to bypass him. (Ex. 3.)

CONCLUSION AND RECOMMENDATION

The governing statute, G.L. c. 31, § 2(b), requires the Civil Service Commission 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 Serv. Comm’n*, 43 Mass. App. Ct. 300, 303 (1997); *Mayor of Revere v. Civil Serv. Comm’n*, 31 Mass. App. Ct. 315, 320 n.10, 321 n.11, 322 n.12 (1991). Reasonable justification, in the context of review, 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.” *Selectmen of Wakefield v. Judge of the First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928); *Comm’rs of Civil Serv. v. Mun. Court 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *Murray v. Second Dist. Court of East. Middlesex*, 389 Mass. 508, 514 (1983); *Kelleher v. Personnel Adm’r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm’r of Boston v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 370 (1986). “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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing

School Comm. of Salem v. Civil Serv. Comm'n, 348 Mass. 696, 698-99 (1965); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 413 (1987).

G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. The 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*, 31 Mass. App. Ct. at 320 n.10.

"In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." *City of Cambridge*, 43 Mass. App. Ct. at 304-05, citing *Callanan v. Personnel Adm'r for the Commonwealth*, 400 Mass. 597, 601 (1987), *Mayor of Revere*, 31 Mass. App. Ct. at 320-321. In cases involving the bypass of a candidate on the civil service list in favor of another candidate ranked lower on the list it is appropriate to consider the comparative qualifications of each candidate in determining whether the appointing authority has demonstrated reasonable justification. The Commission, however, may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations as weighed by the appointing authority. *City of Cambridge*, 43 Mass. App. Ct. at 304.

In this case, the Appointing Authority, Chief LaCroix, bypassed the Appellant, Lt. Binnall, for a combination of six reasons: review of sick time, interview performance, prior experience in the training division, letters of commendation, discipline received, and initiative. Lt. Binnall challenges these stated reasons, arguing that they do not amount to a reasonable justification to bypass him.

Attendance

In his letter to the Human Resources Division providing the reasons he bypassed Lt. Binnall, Chief LaCroix cited Lt. Heitman's perfect attendance. The members of the Interview Committee testified that they had reviewed the candidates' personnel files, including their use of sick time. Lt. Binnall had used 24 days of sick time out of 60 days that he had accumulated; he missed all but 10 of those days as a result of an off-duty injury. Lt. Heitman had not used any sick or personal days.

Both Assistant Chief Proia and Deputy Chief Chagnon, of the Interview Committee, testified that they were not swayed by this factor. Proia stated that the Committee concluded none of the candidates had any attendance issues, and Chagnon could not recall the candidates' attendance records.

Although it is obvious that the City of Newton wants to promote a policy of good attendance, the Appellant's use of sick time was within the normal range. And, most of the sick time he used was as a result of an injury that he received while he was not on duty. No misuse of sick time is evident. Lt. Binnall's use of authorized sick time, where he had not been disciplined for its use, cannot be a reasonable justification for bypassing him and choosing Lt. Heitman, who had a perfect attendance record. The Civil Service Commission has held that an Appellant's attendance record, where it does not amount to an abuse of sick time, is not a reasonable justification for bypass. *Piersiak v. Town of Needham*, 21 MCSR 605 (2008) (no reasonable justification where Appellant never disciplined for alleged sick time abuse and where there was no violation of departmental policy regarding attendance); *Tolland v. Boston Police Dept.*, 11 MCSR 32 (1998) (no reasonable justification for bypass where Appellant did not abuse sick time and had an

overall good assessment in all job performance categories, which would have been apparent to the Appointing Authority, had he “made a minimal attempt to obtain and accept additional information on this matter”); *Walker v. Boston Police Dept.*, 22 MCSR 622, 631 (2009) (no reasonable justification where no evidence of alleged pattern of taking sick days before or after Appellant’s regularly scheduled days off or on the weekends).

Letter of Commendation

Another reason that Chief LaCroix cited for bypassing Lt. Binnall was that Lt. Heitman had received a letter of commendation, with the implication that Binnall had not received any letters of commendation. This supposed “commendation” was brought to Chief LaCroix’s attention by the Committee. Upon examining the letter during the hearing, Chief LaCroix testified that the letter was in fact, a letter of recognition and not a letter of commendation. Although, there is a technical difference between the two titles, and commendation tends to signify more prestige, Chief LaCroix maintained that the title does not impact the impression the letter made. Chief LaCroix testified that a letter of recognition is often awarded when the recipient has dedicated more personal time and labor than a recipient of a group commendation has.

The Committee members were unaware that Lt. Binnall had received a group letter of commendation for his response to an extensive MBTA accident. This lapse resulted in the Committee’s failure to report this consideration, which would have been in Lt. Binnall’s favor, in their recommendation to Chief LaCroix. During the hearing, when Chief LaCroix was first made aware of Binnall’s group commendation, he testified that the group commendation was impressive because of the severity of the MBTA accident

and the amount of manpower it required. Chief LaCroix's testimony demonstrated that both letters were impressive and neither one outweighed the other.

Upon review of Lt. Binnall's and Lt. Heitman's letters of recognition and of commendation, I conclude that neither candidate had an advantage in the category of commendations or recognition. Had the Committee not erred in their description of Lt. Heitman's letter or failed to acknowledge Lt. Binnall's Group Commendation, the Chief testified that he would have been equally impressed with both candidates. Therefore, Lt. Heitman's letter of recognition is not a reasonable justification to promote him instead of Lt. Binnall. *See Tuohey v. MBTA Police Dept.*, 19 MCSR 53, 54 (2006) (no reasonable justification for bypass where the Appellant and the chosen candidates received a similar amount of commendations).

Disciplinary Files

Another reason that Chief LaCroix cited for bypassing Lt. Binnall was the fact that Lt. Heitman had never been disciplined. Neither Binnall nor Heitman had any discipline documented in his personnel file. Accordingly, based on the testimony of the Interview Committee members, the Committee did not consider discipline an important factor in making its recommendations. Neither did Chief LaCroix, who principally relied on the information presented to him by the Committee.

Lt. Binnall's personnel file did contain two "Dear Chief" letters, which are meant to explain things and are not disciplinary. The two letters were written by Binnall to explain a truck accident and to explain why a task was not completed by Binnall's crew at the end of a shift. Had the letters required disciplinary action, these letters would have

been followed by additional documentation or some formal discipline in Lt. Binnall's personnel file. Here, no discipline was imposed.

Based on his testimony, apparently Assistant Chief Proia keeps his own personal files on some of the Fire Department staff. In his personal files, he found documentation of a verbal reprimand that he had given Lt. Binnall; this reprimand was not in Binnall's personnel file. Proia testified that he did not use the verbal reprimand in his ranking of the candidates. In fact, Proia testified that Binnall's response to the reprimand was positive and constructive.

Because both Heitman and Binnall have not been formally disciplined, Heitman's clean discipline record is not a reasonable justification for bypassing Lt. Binnall. *See, e.g., Nicoletti v. Methuen Police Dep't*, 12 MCSR 12 (1999) (bypass appeal allowed where reasons for selection focused on educational background and achievements, and the bypassed candidate and several selected candidates had similar academic background and performance).

Experience in the Training Division

Another reason Chief LaCroix cited for bypassing Lt. Binnall is Lt. Heitman's experience in the Department's training division. Between May 1, 2006 and June 30, 2006 Lt. Heitman assisted Captain William Bianco in teaching 3 of 53 classes for recruits in the Training Division. Lt. Heitman was listed as an instructor in the Massachusetts Fire Academy Manual three times. This manual was made by Acting Provisional Chief Castro. The May 8, 2006 Class that lists Lt. Heitman as an instructor was a building construction class where Lt. Heitman's participation was limited to changing the slides on the projector.

Chief LaCroix testified that he believed it was possible that Lt. Heitman aided in more classes because Deputy Chief Castro was consistently listed as an instructor, and he knew that Deputy Castro normally did not teach alone. Other than Chief LaCroix's conjecture, there is no evidence in the record that Lt. Heitman did in fact help teach additional classes or help the training division in any other way.

Lt. Binnall had assisted Captain Bianco in teaching recruits, as well. Lt. Binnall volunteered, at the request of Captain Bianco, to teach recruits about jet fires when he was off-duty. Additionally, Lt. Binnall took specialized training classes from September 2002 through January 2010, including courses in Structural Firefighting Practices, Basic Fire Investigation, Fire Officer Supervision.

The Committee brought Lt. Heitman's work in the training division to Chief LaCroix's attention, and it is apparent after the hearing that this experience impressed Chief LaCroix. The Committee and Chief LaCroix saw the work as an advantage and an added benefit because he planned on placing the newly promoted Captain into the Training Division. To LaCroix, Lt. Heitman's experience made him a "better fit." Chief LaCroix was unaware that Lt. Binnall also had similar experience in the Training Division.

After reviewing the evidence, I conclude that both Heitman and Binnall have similar experience in the training division. Therefore, Lt. Heitman's experience cannot be a reasonable justification for bypassing Lt. Binnall. *See Tuohey*, 19 MCSR at 54 (citing *Borelli v. MBTA*, 1 MCSR 6 (1988)) (Appointing Authority's reliance on reasons which apply equally to the chosen candidate and to the bypassed candidate impermissible in bypass decision).

Initiative

A particularly important consideration cited by Chief LaCroix for his selection of Lt. Heitman was his demonstration of initiative by creating a street book and maps for the Department's drivers to use. Heitman also created a hydrant testing spreadsheet. During the course of the candidate interviews, the Committee asked each candidate what they had done to improve the fire station. Lt. Heitman responded by stating he had created a street book, an updated map of the Boston College Campus, and a hydrant testing spreadsheet. The Committee was impressed by these items and included this information in their recommendation to Chief LaCroix.

The street book was created to provide drivers with turn-by-turn directions from the firehouses to local addresses in the City of Newton. The street book, however, has a significant number of errors. Both Deputy Chief Chagnon and Assistant Chief Proia identified errors in the book during the hearing. In addition, Lt. Richard Toli testified that he had attempted to use the book when responding to a call and that the directions to that location were incorrect, which meant that he could not respond timely to an emergency. Lt. Binnall also testified that he personally found 16 one-way streets listed as going in the wrong direction and over 170 streets missing from one district alone.

As for the spreadsheets, both Heitman and Binnall created useful spreadsheets for the Department's use. Binnall's kept track of Department-issued clothing. Therefore, Heitman's creation of the spreadsheets is not a reasonable justification for bypassing Binnall. *See Tuohey and Nicoletti, supra.*

It was permissible for Chief LaCroix to give some weight to the initiative that Lt. Heitman showed by creating the street book, but the number of errors in the street book

very strongly detracts from the weight that can be accorded it in assessing whether or not Chief LaCroix was reasonably justified in bypassing Lt. Binnall. The Committee did not scrutinize the accuracy of the street book. And, although LaCroix may not have been aware of the multiple errors in the street book, after the hearing it would make little sense for me to give much weight to it. The book is not worth much if it has so many errors in it.

Against this background, I conclude that Lt. Heitman's perceived initiative is not a reasonable justification. The case of *Selectmen of Wakefield v. Judge of First District Court of Eastern Middlesex*, 262 Mass. 477 (1928), is instructive. The court explained that "justified" when reviewing a reason for removal of an officer 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." *Id.* at 482. The judge must make an affirmative finding that the greater amount of credible evidence definitively supported that the action was justified. *Id.* If the judge cannot make this affirmative finding because he considers the collective evidence to be "in an even balance or inclines to the view that such an action was not justified," the decision to bypass must be reversed. *Id.*

Applying the standard in *Selectmen of Wakefield* to the present case, I do not affirmatively find that the greater amount of credible evidence supports the conclusion that Lt. Heitman showed more initiative than Lt. Binnall. The amount of errors in the street book reduces the weight of the evidence to the point that I cannot conclude that Lt. Heitman's initiative was a reasonable justification.

The Interviews

As none of the aforementioned reasons amounts to a reasonable justification to bypass Lt. Binnall, this leaves the candidates' interviews as the final reason that Chief LaCroix bypassed Binnall and chose Lt. Heitman. The Committee members reiterated in their testimony that they made their recommendation based solely on the interview, and Chief LaCroix testified that he relied heavily on the Committee in making his final decision, so it is clear that the interview was of utmost importance to the persons involved in the promotion selection process.

The Appointing Authority may use an interview in the civil service hiring process, *see Brown v. Town of Duxbury*, 19 MCSR 407, 410 (2006), and some subjectivity is an inherent part of any interview and its assessment. *See id.*; *Spicuzza v. Dep't of Corrections*, 12 MCSR 187 (1999). Thus, Chief LaCroix's use of an interview to help him make the ultimate promotion decision was permissible. To minimize the influence of personal and subjective opinions in the interview process, however, the Civil Service Commission and the Courts have expressed a preference for numerical ranking or rating systems. *See, e.g., Flynn v. Civil Service Comm'n*, 15 Mass. App. Ct. 206, 209 (1983); *Moses v. Town of Winthrop*, 21 MCSR 420 (as relief to improperly bypassed candidate Commission ordered interview committee members to prepare written numerical and narrative evaluations of each candidate's performance, without consultation with any of the other interviewers).

The Committee members were all in-house, made up of an assistant chief, a deputy chief, and the City's head of Human Resources. Although the interview

committee wasn't quite the blue-ribbon panel assembled in *Brown v. Town of Duxbury*, supra, there is nothing objectionable in the committee's make-up.

Together, the Committee asked a set of established questions to each candidate. The questions fell into two general categories: the first examined how the candidate would deal with various hypothetical situations, and the other probed the candidates' substantive knowledge that a Captain would require. The consistent testimony from each of the interview committee members was that all of the interviewed candidates answered fully each of the standard questions. The committee members took personal, contemporaneous notes of the responses. However, they failed to use any sort of numerical or objective evaluation system in ranking the candidates.

Also, the interviewers did not make independent assessments and pass those on to the Chief. Instead, they met together, and Proia and Chagnon attempted to persuade Kinnealey that Heitman was the best candidate. The Committee then relayed their impressions of the interview to Chief LaCroix. Although the Committee did not think that any of the candidates performed badly, the Committee preferred Lt. Heitman. The Committee concluded that Lt. Heitman's "maturity" and "presence" in the interview set him apart from the other two candidates.

The Civil Service Commission has affirmed an appointing authority's refusal to select a candidate based on interview performance. These subjective determinations have been upheld when they are sufficiently related to the job. *Fairbanks v. Town of Oxford*, 18 MCSR 167 (2005); see also *Snow v. City of Salem*, 7 MCSR 177 (1994) (appellant appeared for interview poorly dressed and demonstrated poor communication skills); *LaRoche v. Dep't of Correction*, 13 MCSR 159 (2000) (appellant appeared for interview

out of compliance with the dress code); *Mazur v. Dep't of Transitional Assistance*, 17 MCSR 91 (2004) (appellant's answers suggested an insensitive and inappropriate attitude for the position). Reliance on purely subjective impressions gathered from the interview, however, can be problematic where the persons who interviewed the candidates cannot explain with any specificity how they came to their conclusions. See *Tuohey v. MBTA Police Dep't*, 19 MCSR 53 (2006) (fact that bypassed candidate's responses to interview questions "lacked enthusiasm" was not a sufficient reason for bypass and instead amounted to nothing more than rationalization).

A subjective impression can still be a reasonable justification to bypass a candidate, as long as the reason is specifically job-related and the interviewers can describe how they came to their conclusions. In *Horte v. Hingham Police Dep't*, 20 MCSR 185 (2007), for example, the appointing authority cited the candidate's lackluster performance during the interview in its bypass decision. The Commission upheld the bypass because the candidate's lackluster performance related to his lack of career planning and motivation and his failure to pursue continued job training, factors which are directly job-related.

Here, Chief LaCroix's selection letter stated that Lt. Heitman's "interview showed a maturity and presence that sets him apart." There is nothing in the evidentiary record beyond the interviewers' subjective impressions, however, that proves that Lt. Heitman is more mature and has a better presence than Lt. Binnall. To the contrary, when Chief LaCroix was specifically asked if he recalled anything from his conversations with the interview committee members that led him to make those conclusion regarding maturity and presence, he was unable to identify anything specific. Nor could the Committee

members explain how they concluded that Heitman exhibited more maturity and presence in the interview. What's more, Lt. Binnall's interview performance was also very good, according to the interviewers.

After hearing all of the evidence on the interviews, which were supposedly at the center of the City's promotion selection process, I am unable to understand how Chief LaCroix came to the conclusion that Lt. Heitman's interview performance was better than Lt. Binnall's. The City has failed to prove by a preponderance of the evidence that Lt. Heitman exhibits more maturity and has a better or more effective presence than Lt. Binnall; therefore, interview performance cannot be a reasonable justification for bypass.

Potential Bias

Lt. Binnall alleges that his personal side business installing home entertainment systems may have prejudiced him because Chief LaCroix considered it in making his decision. Mr. Binnall testified that, during a conversation with Chief LaCroix, the Chief told him that he did not really want the promotion to Captain because the additional duties would interfere with the side business. Chief LaCroix testified that he could not remember that conversation, and I have no reason not to believe him. This uncorroborated claim is not enough for me to conclude that Chief LaCroix was biased against Lt. Binnall.

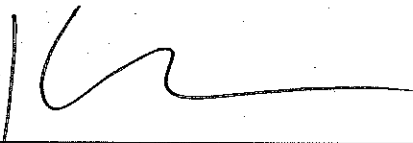
Conclusion

An examination of the credible and reliable evidence establishes that Lt. Binnall is a highly qualified candidate for promotion to the rank of Captain in the Newton Fire Department and that he was at least as well qualified as the selected candidate, Lt. Heitman. The City cited no negative reasons for not selecting Binnall. The positive

reasons cited by the appointing authority for selecting Heitman either apply equally to Binnall or have not been substantiated by the evidence.

For the above-stated reasons, I recommend that the Commission allow the Appellant's appeal and fashion an appropriate remedy.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

DATED:

NOV 18 2011