

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

DAVID BOUSQUET,
Appellant
Vs.
Town of Leicester,
Respondent

Docket No. G1-07-111

Respondent's Attorney

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Appellant's Attorney

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, §2(b), the Appellant, David J. Bousquet ("Appellant" or "Bousquet"), appealed the Commonwealth's Human Resources Division's ("HRD") approval of the Town of Leicester's ("Respondent", "Appointing Authority" or "Town") decision to bypass him for original appointment as a permanent intermittent police officer in the Leicester Police Department, ("Department"). A full hearing with sworn testimony was held at the Civil Service Commission ("Commission") on January 15, 2008 and January 25,

2008. Chief of Police James J. Hurley (“Chief Hurley”), West Boylston Chief of Police Dennis W. Minnich (“Chief Minnich”) and Massachusetts State Trooper Brian C. Shanks (“Trooper Shanks”) testified on behalf of the Appointing Authority. The Appellant testified on his own behalf. In addition, the parties introduced a total of thirty-one (31) exhibits. The Respondent filed a *Motion to Reopen* the record, which was allowed after a telephone-conference on June 19, 2008, pursuant to which Exhibits 30 & 31 were added to the record. A stenographer appeared as requested by the Respondent and produced a stenographic transcript of the Hearing. The stenographic transcript is the official record of the hearing and the original is provided to the Commission, at no cost to the Commission. Proposed Decisions were submitted by both parties as directed after extensions.

FINDINGS OF FACT

Based on the testimony, exhibits and reasonable inferences there from; I make the following findings of fact:

1. On March 19, 2006, Chief Hurley formally requested authorization from Town of Leicester Board of Selectmen (“Board”) to hire five (5) additional permanent intermittent (“part-time”) police officers. (Exhibit 3)
2. The Appointing Authority for the Leicester Police Department (“Department”), including the position of permanent intermittent police officer, is the Board (Hurley, Tr., p. 16)
3. In accordance with Chapter 31, the Town requested a certification list (#260372), for the position of permanent intermittent police officer, (part-time), from the Human Resources Division. The Appellant was at the top of that certified list received by the Town, dated May 1, 2006. (Exhibit 4)

4. The Appellant had been placed at the top of that certified list pursuant to a Commission decision on a prior bypass appeal filed by the Appellant. On or about July 31, 2001, the Town bypassed the Appellant, and, instead, appointed two (2) other candidates to part-time police officer positions. A full hearing was held before then-Commissioner Daniel O'Neil on November 12, 2002 (Docket No. G-01-1361). Commissioner O'Neil's tenure as a Commissioner lapsed before he could render a final decision in said appeal. The Commission ordered a rehearing of the matter. The Appointing Authority refused to participate in a second hearing. As a result, the Appointing Authority was defaulted and the Appellant was placed at the top of the next certified list. (Exhibit 2)
5. The Town contacted the individuals on the May 1, 2006 roster certification list, provided those interested with an application, arranged for interviews by an interview panel and conducted a background check of those candidates who indicated their willingness to accept appointment by signing the certification list. (Hurley, Tr., pp. 16, 23; Exhibits 4, 5, 6, 9A-9D).
6. Eight (8) of the sixteen (16) background investigations, including the Appellant's, were performed by the Massachusetts State Police – Certification Unit. (Id. at pp. 24-25; Exhibit 10A, 10B and 22)
7. On or about September 15, 2006, the Appointing Authority, based on Chief Hurley's recommendations, appointed four (4) individuals to the position of permanent intermittent police officer; these four appointees had been lower on the certification than the Appellant. (Exhibits 7 and 8)

8. The Appellant had received a conditional offer of employment from the Town, on or about August 23, 2006. At the time of the above-described appointments, the Appellant's candidacy was still under consideration pending completion of the Appellant's background investigation, including the Massachusetts Ethics Commission Advisory Opinion addressing potential conflict-of-interest concerns identified by Chief Hurley. (Hurley, Tr., 28; Exhibits 6 & 7)
9. On February 16, 2007, HRD sent the Appellant a letter, pursuant to G.L. c 31 § 27, notifying him that he had been bypassed and the reasons stated by the Town for bypass, had been approved by HRD. A seven page list of reasons marked "Confidential" and dated December 7, 2006, was attached to that letter. The Appointing Authority informed the Appellant that he was bypassed for the reasons, in summary, as follows: (1) conflict of interest based on his employment at Becker College as Campus Police Chief; (2) prior disciplinary action; (3) poor relationship with co-workers; (4) Provided false information on prior License to Carry Firearms application; and (5) negative issues during interview with Trooper Shanks. (Exhibit 18)
10. Becker College ("College") is a private four (4) year college with several campuses in Massachusetts, including one in the Town of Leicester ("Town"). (Bousquet, Tr., pp. 256, 303)
11. The Leicester campus of Becker College is comprised of several academic and administrative buildings, dormitories and athletic fields. (Hurley, Tr., p. 70)
12. Becker's Campus Police Officers are special police officers, and, as a result, do not have police powers beyond the College's campus. (Hurley, Tr., pp. 65, 393)

13. The Leicester Department's police officers, however, retain full police powers whenever responding to incidents and crimes on the College's campus. (Id., Tr., p. 394)
14. As a result, there is overlapping law enforcement jurisdiction between the Department and the Campus Police. (Id., Tr., p. 53)
15. Members of the Department respond to various public safety calls from the College including: medical calls, public disturbances and physical altercations. (Id., Tr., p. 65)
16. The Campus Police does not have a booking facility or holding cells; as a result, all student arrests are brought to the Department and are processed and held at the station by the Department's police officers. (Id., Tr., p. 66; Bousquet, Tr. p. 366)
17. The Appellant, since on or about 1997, has been employed by Becker College as its Campus Police Chief. Prior to that, he had been employed as a Sergeant in the Becker College Police Department since 1993. (Bousquet, Tr., 256-257)
18. From 1987 to 1993, the Appellant was employed as a law enforcement officer with the State of Florida Department of Environmental Protection. (TR 257).
19. His duties as a law enforcement officer for the State of Florida Department of Environmental Protection included enforcing rules, regulations, and state laws as well as drug interdiction and immigration. (TR. 257)

20. The Appellant served six years as a Reserve in the United States Marine Corps and one year active duty. Appellant received an Honorable Discharge from the United States Marine Corps. (Exhibit 22, TR.258 & 302).
21. Appellant has an Associate in Science Degree from Becker College. (Exhibit 22, TR 302).
22. Appellant is a certified Defensive Tactics instructor, Massachusetts Sheriffs Association. Appellant is authorized to train other persons in Weapon Defensive Tactics. Appellant is a certified instructor in the use of aerosol. Appellant has completed a specialized school in rape investigation by the Massachusetts Criminal Justice Training Council. Appellant has completed the instructor evaluation test for the use of straight police baton. Appellant is certified as a physical defense instructor. Appellant has completed the Attorney General's campus law enforcement course. Appellant has completed the Emergency Medical Service First Responder course, Florida Criminal Justice Standards and Training. Appellant has completed the National Association for Search and Rescue course, Braintree, Massachusetts. The National Rifle Association of America has certified appellant to be a Police Marksman. Appellant has completed the Broward County Florida Police Academy course for Standards and Pistol Range Requirements. Appellant has successfully completed a course in Criminal Law at the Broward County Florida Community College. (Ex 22 and testimony of Appellant)
23. Appellant has successfully a 40-hour course in case preparation and court presentation offered by the Florida Criminal Justice Standards and Training Commission. Appellant has successfully completed a course at the Massachusetts State Police Academy

(24 hours) in evidence search and Seizure. Appellant has successfully completed a course at the Massachusetts State Police Academy (8 hours) in Specialized Training in Verbal Judo. Appellant has successfully completed a course at the Massachusetts State Police Academy (4 hours) in Suicide Prevention. Appellant has successfully completed a course at the Massachusetts State Police Academy (16 hours) in Officer Safety. Appellant has successfully completed a course at the Massachusetts State Police Academy (16 hours) in Standardized Field Sobriety Testing. Appellant has successfully completed a course at the Massachusetts State Police Academy (8 hours) in Specialized Training in Community Policing. Appellant has successfully completed a course at the Massachusetts State Police Academy (8 hours) in Specialized Training in Explosives Recognition and Bomb Threat Procedures. (Ex 22 and testimony of Appellant)

24. Appellant has completed a course in Internal Affairs, Creating and Maintaining an Ethical Organization, New England Institute of Law Enforcement Management. Appellant has completed a specialized course re-certifying him as a Defensive Tactics Instructor, Massachusetts Criminal Justice Training Council. Appellant has completed a specialized school in “In Custody Deaths Training”, Massachusetts Criminal Justice Training Council. Appellant has completed 8 hours of training in Civil Liability for Special State Police, Massachusetts State Police Academy. Appellant has successfully in training in Public Safety Human Resource Management, International Association of Campus Law Enforcement Administrators. Appellant has been a Special State Police Officer, by appointment by the Department of State Police, Commonwealth of Massachusetts, since 1997. (Ex 22 and testimony of Appellant)

25. Appellant is a graduate of the State of Florida Basic Police Academy (698 hours). Appellant has completed the basic course of training for Reserve Intermittent Police Officers, Massachusetts Criminal Justice Training Council. Appellant has completed the Florida Department of Natural Resources Ranger Academy. Appellant has completed the Defensive Driving course of the National Safety Council. Appellant has successfully completed the College Sexual Assault Protocol and Investigation Seminar, Office of the District Attorney, Worcester County, Massachusetts. Appellant was recognized by the Broward County Florida Police Academy for “Highest Physical Proficiency”. Appellant received a letter of appreciation from the Chief of Police, Worcester, Massachusetts, for Appellant’s efforts in assisting the Worcester Police in a fire which resulted in the death of six firefighters. (Ex 22 and testimony of Appellant)
26. Appellant was employed as a part-time police officer in the Police Department of the Town of West Boylston, Massachusetts from 1995 to 2004. (TR. 259)
27. During the period of 1995-2004, the Appellant would also perform police work for the Town of Leicester, and for that work he would be paid by the Town of Leicester. However, the Appellant would perform these details in a Becker College uniform (TR. 260).
28. In the past, the Town has appointed at least two (2) Becker Campus Police officers to the Department. However, in both instances, the Campus Police officers were patrol officers. Chief Hurley believes that the higher the level of rank, the higher the level of potential conflict of interest exists. In any event Chief Hurley testified that he would not

higher anyone from Becker College without first getting an (Ethics Commission) opinion first. (Hurley, Tr., 67)

29. At the time of the Appellant's investigation, and eventual bypass, Chief Hurley had been the Chief of the Department for only a short time; he was hired as Chief in February, 2006. (Hurley, Tr., 15)

30. Chief Hurley testified that he believes the Department should more closely scrutinize the hiring of Becker Campus police officers as Department part-time officers, because of the "tentacles" that could create various conflict of interest issues between the Town and the College. (Hurley, Tr., pp. 67, 68)

31. Chief Hurley believes that the position of Campus Police Chief is a high level administrative position. He testified that in addition to potential law enforcement conflicts between the two (2) departments, potential conflicts of interest may extend administratively, to the various financial arrangements between the Town and the College such as mutual aid and CBA issues and, including, but not limited to: paid staffing details performed by the Department's officers on campus; the temporary issuance of liquor licenses for the College by the Town; leasing and maintenance of Town properties by the College; paid road details performed by Campus Police officers; and the Department's review and processing of Campus Police Officers' licenses to carry a firearm application and annual audits; College-sponsored law enforcement training for Department officers; and use of the College's facilities by the Department's officers. (Hurley, Tr., pp., 67-73; Appellant testimony)

32. Prior to making a recommendation to the Board regarding the Appellant's candidacy, Chief Hurley requested a confidential advisory opinion from the Legal Division of the Mass. State Ethics Commission, in which he outlined areas of potential concern related to his own public employment if the Appellant was appointed to the Department. Chief Hurley was concerned about his own potential conflict of interest generally due to the hiring of the Appellant. (Hurley, Tr., pp. 55, 67; Exhibit 11B)
33. Based on the facts presented in his letter, the Ethics Commission opined that the hiring of the Appellant could create conflict-of-interest situations for Chief Hurley, pursuant to G.L. c. 268A, §§ 19 and 23, because a reasonable person may conclude that Becker College could improperly influence him or unduly enjoy the performance of his official duties because one of his employees is also an employee of the College. (Exhibit 11A)
34. Chief Hurley included this potential conflict of interest determination as one of his stated reasons in his recommendation for bypassing the Appellant. The recommendation of Chief Hurley refers to an advisory opinion from the Massachusetts State Ethics Commission. That advisory opinion, dated June 5, 2006, is six (6) pages and marked as "Exhibit #11-A" It suggests that Chief Hurley consult with Town Counsel for advice and guidance on such questions that he asked. It also recommended that the Appellant call or write the Commission directly for advice on his own behalf. It addresses generally the issues of interest or benefit received and disclosure, restriction or abstention as remedies. It does not prohibit the appellant from working as a part-time police officer for the Town of Leicester while he is employed as the Chief of Becker College Campus Police. Specifically, the Massachusetts Ethics Commission, in its advisory opinion,

specifically states that if certain restrictions are satisfied, the Town of Leicester may employ the appellant as a part-time police officer. The first restriction, according to the Ethics Commission, would be that all part-time police officers employed by the Town of Leicester be designated as “special municipal employees”. The second restriction, according to the Ethics Commission, would be that the appellant work as a part-time police officer for the Town of Leicester, and if that employment involves matters that involve Becker College, such employment must be approved in writing by the Town of Leicester. With regard to the second restriction, as stated by Chief Hurley in his recommendation, “the Town of Leicester cannot be reasonably be expected to hire a police officer who is legally prohibited from responding to calls, especially where the community has limited shift staffing (generally only two officers per shift) and the location of concern is a college campus which is a regular recipient of Leicester Police Department services. The Ethics Commission, in its opinion to the Appellant however, specifically points out that “the law provides an exemption, for such circumstances, under Section 19(b) (1). Under this exemption, you must first advise your appointing official of the nature and circumstances of the particular matter and make full disclosure of the financial interest. Then you must receive, in advance of your participation, a written determination made by your Town appointing official that the interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town”. (Exhibit #13, page 6, paragraph 4).

35. The Ethics Commission goes on to state that “as you may appreciate, exigent circumstances do not usually allow one to obtain written permission, in advance, from one’s appoint official, as those circumstances unfold. However, should the Town’s Police Chief deem it necessary to have you available to respond to a crisis on the campus, he has

the discretion to provide a §19(b) (1) determination to you to cover such a possibility.”

(Exhibit #13, page 6, paragraph 5). In a footnote, the Ethics Commission states “please note that under G.L. Chapter 268A, Section 23(d), ‘any activity specifically exempted from any of the prohibition in any other section of [c268A] shall also be exempt from the provisions of [Section 23]. The state ethics commission ... shall not enforce the provision of this section with respect to any such exempted activity.” (Exhibit #13, Footnote 16).

Thus, it is not accurate to state that the Massachusetts Ethics Commission has advised the Town of Leicester that under no circumstances may the appellant be hired as a part-time police officer. It is accurate to state that under certain restrictions, the Town of Leicester may hire the appellant. In the final analysis, it is the respondent Town of Leicester asserting that notwithstanding the fact that appellant is first on the eligibility list for appointment as a part-time police officer, the Town will not accommodate the appellant within the framework of the opinion of the State Ethics Commission. (Exhibit 11(A))

36. On or about July 31, 2006, by letter, Chief Hurley instructed the Appellant to seek an Advisory Opinion from the State Ethics Commission. (Hurley, Tr., p. 59; Exhibit 12)

37. The Appellant initially balked at Chief Hurley’s request for an advisory opinion and, in any event, although the Appellant tried to premise his request for an advisory opinion if only the advisory opinion were not used against his candidacy, he did eventually request that opinion. (Hurley, Tr., 388-389)

38. The Commission did not consider the existence of a conflict of interest in the previous bypass case, and, as a result, the Appellant was instructed to seek his own advisory opinion by Chief Hurley. (Hurley, Tr., pp. 388-389; Exhibit 2)

39. On or about September 21, 2006, the Ethics Commission responded to the Appellant's request for advice. (Exhibit 13)
40. The Ethics Commission opined that the conflict of interest law would not prohibit the Appellant from serving in both capacities, provided that certain restrictions are met. (Hurley, Tr., p. 61; Exhibit 13)
41. The Ethics Commission's first restriction would require the Board of Selectmen to designate all of its existing part-time police officers as "special municipal" employees under the conflict of interest law. (Hurley, Tr., pp. 61-62; Exhibit 13) (emphasis added)
42. The second restriction mandated by the Ethics Commission would bar the Appellant from working on matters that might involve the College. (Hurley, Tr., p 65; Exhibit 13) (emphasis added)
43. Chief Hurley suggested that the Appellant resign from his position at the College in order to avoid the above-described conflicts of interest – the Appellant declined. (Hurley, Tr., pp. 73-74; Exhibit 15)
44. "Special municipal employees," pursuant to G.L. c. 268A, §1(n), may not earn compensation for an aggregate of more than 800 hours during the preceding 365 days. (Exhibit 13, Footnote 7)
45. Chief Hurley testified that designating the Department's current part time police officers as "special municipal employees," in order to comply with the Ethics Commission's restriction placed on the Appellant, effectively downsizes the size of the Department's part-time police force. (Hurley, Tr., 62)

46. The Department's part-time police officers regularly work in excess of the number of shifts allowed under M.G. c.268A, §1(n). (Hurley, Tr., p. 62; Exhibit 30)
47. Part-time officers are heavily relied upon to fill vacant "off-shifts" that are frequently staffed with only two (2) officers. (Id., pp. 42, 44-45, 69-70)
48. The part-time officer would always be the "junior" officer on the shift, regardless of overall years of law enforcement experience. (Id., Tr., p. 43)
49. Chief Hurley believes that limiting the number of shifts that part-time officers can cover would have a severe impact on the Department's operating budget because the Department will have to fill the eight (8) hour shifts at the higher full-time officer pay rate (\$29-\$40/hr) instead of the lower part-time rate of compensation (\$16-\$20/hr) once a part-time officers hits the ceiling for hours worked in a year. (Hurley, Tr., pp. 63, 64)
50. Moreover, even if the Board, in its discretion, designated its part-time officers as "special municipal" employees, the Appellant would be limited to working sixty (60) days during any 365-day period pursuant to §17 of G.L. c. 268A. As a result, limitations on the number of shifts the Appellant can work further adversely impacts the Department's operational budget because of the Department's increased dependency on highly paid full-time officers to cover open shifts. (Id., pp. 70-71; Exhibit 13, p. 4)
51. Additionally, limiting the number of shifts part-time officers can work would violate (a) the collective bargaining agreement between the Town and the Massachusetts Coalition of Police, Local 168A and (b) G.L. c. 150E since it would adversely impact

terms and conditions of employment – namely hours of work and wages. (Id., pp. 62, 72; Exhibit 31 (Article IX, Section 2))

52. Limiting the Appellant's ability to get involved "on matters that might involve the college in any way" severely limits the Department's ability to deliver public safety services to the College and the Town. "...seeking police support for an incident on the Leicester Campus would very likely involve a particular matter...of direct and substantial interest to the Town because of the Town's resources devoted to the call." (Id., p. 65; Exhibit 13, page 3)
53. The Appellant's inability to respond to any calls related to the College because of his Ethics Commission restrictions, poses at the least an inconvenience and scheduling obstacle for the Department and a potential public safety risk for the community and the College because the Appellant will not be able to respond to emergency calls involving the College, its students, faculty or facilities. (Id., p. 70)
54. As a result, the Department's ability to respond to medicals calls or violent crimes will be delayed, particularly if the other officer working with the Appellant on a particular shift is involved with another police matter when a call for police services involving the College is dispatched and the Appellant is barred from responding pursuant to the advisory opinion. The obvious complexity and confusion arising from the Appellant responding to a situation, then after arriving and a limited investigation, he determines that the College is somehow involved, places an untenable burden on the Department. (Id. and reasonable inference)

55. Appellant served as a reserve officer with the West Boylston Police Department between 1995 and 2004. (Bousquet, Tr., pp. 258-259)
56. Chief Minnich testified that in 2001 the West Boylston Police Department had a long-standing practice that cruiser assignments are set forth in writing and posted weekly or biweekly in advance of an officer's shift. (Minnich, Tr., p. 372)
57. On December 8, 2001, in direct violation of Chief Minnich's November 26, 2001 written, cruiser assignment and also as Chief Minnich believed in defiance of a direct verbal order from the shift officer, Richard Petit, the Appellant took another cruiser out for his patrol. (Id., Tr., pp. 205, 374-375; Exhibit 21.)
58. Minnich described Officer Petit as the "*senior guy*", "*the senior officer*", "*the superior officer*" or the "*officer in charge of the shift*" for that December 8, 2001 shift, only because he was a full-time officer and the Appellant was a part-time officer. Minnich admitted that Petit "was new to the—fairly new to the Department." They were the only two officers on that shift. Yet the Appellant had been in the West Boylston Police Department since 1995. Officer Petit was actually a probationary officer, being in the Department only a matter of months at that time and was actually younger in age than the Appellant. The Appellant denied in testimony, that he had received a verbal order from Petit to take the other cruiser. The Appellant testified that he was merely following his usual practice since starting in the WBPD, of taking one of the two cruisers left in front of the station for the shift. Petit was not called as a witness, at this hearing. (Administrative notice, Minnich/ Bousquet Tr. pp 211, 214-215, 240-241, 259, 346, 351-352 & Ex. 10A)

59. Chief Minnich telephoned Petit after driving by the station during that shift on December 8th and sought an explanation on the Appellant's use of an unassigned cruiser for the shift. He then ordered Officer Petit by telephone, to write him a memo regarding the incident without first even attempting to get an explanation from the Appellant. Minnich believed Petit's explanation and assumed that there was no reasonable excuse for the Appellant to take the unassigned cruiser. Minnich also chose to allow the Appellant to drive the entire shift, in an unassigned cruiser. Minnich chose not to discipline Petit, a probationary officer, for his failure to report the Appellant for these two alleged acts of insubordination, prior to Minnich calling him on the telephone. (Minnich Tr. pp 213-215, 239-244, Ex 21)

60. Chief Minnich testified that there was not a Department rule or regulation that specifically subjected one patrol officer to the orders of another patrol officer under the consequence of discipline for failure to follow. Minnich testified that the applicable rule referred to "insubordination" resulting in discipline for failure to follow. (Minnich Tr p. 228-231)

61. Chief Minnich testified that he subscribes to the principles of "progressive discipline": which calls for the escalation of the amount of discipline imposed in a situation in direct relationship and in proportion to the employee's prior record of discipline. Minnich admitted that the Appellant had no prior discipline. However, Minnich chose not to begin the Appellant's discipline with counseling, a verbal or written reprimand or warning or something less than a suspension because he believed that it was a serious incident. Minnich emphasized that the WBPD was a non-civil service department

and that he was appointed Police Chief “under the strong chief act” (Minnich Tr. pp. 211-213, 221, 228)

62. Chief Minnich first met with the Appellant on December 11, 2008 to discuss his failure to follow the written cruiser assignment and Petit’s verbal order to take a specific cruiser as described above. Minnich had already made up his mind on this alleged insubordination, based on what Petit had told him and before even speaking with the Appellant. Minnich already had the discipline letter typed-up and ready before the Appellant walked into his office, for this meeting. The Appellant did not dissuade Chief Minnich during this December 11th meeting and he was suspended without pay for the equivalent of three (3) shifts which ended up being two (2) shifts for two (2) counts of insubordination. The Appellant, a union member, chose not to grieve or contest this discipline and he could not appeal the discipline pursuant to Chapter 31, since the WBPd is a non-civil service Department. The Department was in the process at that time of eliminating the reserves and going to full time officers. The Appellant’s appointment as a reserve officer ended on June 30, 2004 and his appointment was not renewed. Minnich had just become interim Police Chief in 2001. (Id., Tr. pp 215- 217, 219, 221, 351, 382-383; Exhibits 21)

63. Chief Minnich testified favorably for the Appellant in the first bypass appeal, prior to the alleged insubordination incident on December 8, 2001. Chief Minnich apparently changed his opinion and evaluation of the Appellant thereafter. Minnich also pointed to the Appellant’s alleged “abrasive relationship” with some members of the Department as a reason for his subsequent change in opinion about the Appellant. Yet he offered no specific example of this abrasiveness. However, Minnich did concede that the

Appellant had been a good employee; "...he did an excellent job" except for that one incident, (December 8, 2001). (Id., Tr., pp. 217-218, 225, 380)

64. Chief Minnich testified that he chose to believe officer Petit without first giving the Appellant the opportunity to respond to Petit's version. He did this despite believing then: that the Appellant was a good officer with no prior discipline; had been in the Department for six (6) years to Petit's few months and probationary status and the Appellant being older than Petit. Minnich continually described Petit as: the senior guy, the senior officer, the superior officer, the officer in charge of the shift and similar superlatives to justify a charge of insubordination, despite Petit and the Appellant holding the same rank of patrol officer. The only difference was that the Appellant was part-time and Petit full-time. Minnich intentionally chose not to begin discipline with a suspension and not with the lesser: counseling, reprimand or warning; in keeping with the principles of progressive discipline. Minnich also chose to drive by the station and not stop in to confront the Appellant and Petit together, to address the issue. Minnich offered no convincing excuse for not addressing the issue immediately with both officers together. Despite getting Petit's version immediately by telephone, he chose to confront the Appellant three days later by the formal discipline of three shift suspension. He failed to discipline Petit, a probationary officer, for failing to report the Appellant's use of an unassigned cruiser and refusal to follow his verbal order. Petit only wrote a report on the alleged incident because he was ordered to by Minnich. Minnich allowed the Appellant to use the unassigned cruiser for the entire shift. He continued to hold a strong negative opinion against the Appellant five years later, and conveyed this strong negative opinion to Trooper Shanks and Chief Hurley to diminish the Appellant's chances of getting the

Leicester appointment. The acts, omissions and testimony of Minnich indicate a strong bias or personal animus that he held against the Appellant. The strength of this bias or animus is disproportionate in nature and degree to that single cruiser incident, which he asserts as the basis for his opinion of the Appellant. (Exhibits and testimony, testimony and demeanor of Minnich)

65. Chief Minnich makes a good professional appearance and does not appear to try to slant his testimony on issues except as they relate to the Appellant's personality or character and therefore his qualification to be a part-time Leicester police officer. Minnich offered no other specific or factual basis for his strong negative opinion of the Appellant, other than the single 2001 use of an unassigned cruiser. His dramatization, emphasis and focus on this single incident seem to be out of proportion to its facts. His handling of the initial situation indicates a lack of good faith, bias or prejudice and not even-handedness under the circumstances. His continued desire to affect the Appellant's employability, five years later, based allegedly on that single incident, is an indication of the depth of bias he held. I do not find that Minnich's testimony relating to the Appellant's personality or character or the 2001 cruiser incident to be credible or reliable. (Exhibits and testimony, testimony and demeanor of Minnich)

66. One of the reasons (#3), which Chief Hurley considered for bypassing the Appellant, was his poor relationship with co-workers. However, no co-workers from the Leicester Police Department testified at this hearing. The two officers (Dyson and Dolay), interviewed by Shanks for his report were not co-workers of the Appellant but listed their relationship as "Acquaintance" and "Years known: N/A". However they coincidentally had similar opinions of him; he had "domestic issues" and "I would not want to work with

him”. The two Sergeants, (Tebo and Antarivica), interviewed by Shanks for his report, expressed hard feelings toward the Appellant of a personal nature. Tebo had once been a friend of the Appellant but had a subsequent falling-out with him. Antarivica felt that he had been ignored or unacknowledged by the Appellant early in Antarivica’s career. They each openly acknowledge their own bias against the Appellant. Their opinions were innuendo, vague allegations of irrelevant, personal matters and expressions of personal animus. If Trooper Shanks’ report is only generally accurate; each of these four members of the Leicester Police Department made gratuitous statements and expressed themselves in an incautious and unprofessional manner, which should cause the Department some concern. In contrast, Auburn Police Chief Sluckis gave Trooper Shanks a specific detailed incident as a basis for his opinion that the Appellant was “arrogant”. Auburn police officer Eric Dyson gave an exemplary recommendation for the Appellant, whom he had known for ten years as a friend and co-worker. (Hurley, Tr., pp. 36-37 & Ex 10A)

67. As part of his background investigation, State Trooper Shanks interviewed references provided by the Appellant as well as former colleagues or contacts based on answers he provided the Department on his job application. However, none of those prior co-workers testified at this hearing, except Chief Minnich. Chief Minnich’s change of opinion on the Appellant is stated elsewhere in these findings. Officer Petit’s alleged opinion of the Appellant, like Chief Minnich’s opinion, is primarily based on that single disciplinary incident of December 8, 2001. This incident is described in detail, elsewhere in these findings. (Shanks, Tr. pp. 157 - 161; Exhibits 5 and 10A)

68. The statements collected by Trooper Shanks in his report, from the prior co-workers of the Leicester and West Boylston Police Departments lack sufficient indicia of

reliability and were not subject to cross-examination to test their reliability. Those statements were in the main, summary opinions of the appellant's personality, such as: "arrogant" or "selfish". If these statements had been factually specific, relevant, written and attested to, they would have carried more weight and probative value. I find very little weight or value in these statements collected by Trooper Shanks; except for Chief Minnich's statement. Chief Minnich appeared as a witness and was subjected to cross-examination and rebuttal and addressed elsewhere in these findings. (Testimony and Exhibits, Exs. 5, 18 and 10A)

69. The Appellant's references were recognized by Chief Hurley as "very, very good". The interviews conducted by Trooper Shanks, as part of the greater background investigation, with former co-workers and professional acquaintances were very positive except for a few each from the Leicester and West Boylston Police Departments, which were negative. (Ex 10A, Id., Tr., p. 37)

70. Trooper Shanks generated an 18 page background investigation report on the Appellant, dated July 6, 2006. He interviewed 17 employment related people in the process. Shanks did not number the pages of his report nor did he identify any of the interviews: by date, place or means of communication. Most of the people who had a long term, (5-10 yrs.) employment related relationships with the Appellant gave him exemplary evaluations and recommendations, including: Tyler Kelsch, Vice President of Finance & CFO at Becker College; Steven Dale, Officer for the State of Florida Dept. of Environ. Protection; Eric Dyson Auburn and former Leicester Police Officer; Kevin Woods, Professor Becker College, Steve Goulet, Police Chief Clarke University and John Carter,

Police Chief Amherst College. It is also noted that the personal references provided by the Appellant gave exemplary evaluations, recommendations or opinions. (Exhibit 10A)

71. However, there were some interviewed from the Leicester and West Boylston Police Departments who stated negative opinions of the Appellant. Trooper Shanks admitted that he initiated his investigation by first going to the Leicester Police Department and speaking with Chief Hurley. He also admitted that he spoke with and interviewed Chief Minnich and other officers at the West Boylston Police Department in the process. Trooper Shanks admitted in testimony that he received two opposing views of the Appellant in the process. Some felt that he was “an excellent officer” and others in the LPD and the WBPD held “negative views” of him. (Shanks Tr. pp. 153, 161, 167)
72. Trooper Shanks’ report indicated the summary negative view of the Appellant allegedly held by some prior co-workers in the LPD or WBPD was that the Appellant was “arrogant” or “selfish” and that they wouldn’t want to work with him. However, even some of the negative viewers (e.g. D. Richardson of WBPD), conceded that the Appellant “... had plenty of courage and plenty of knowledge of police work.”(Exhibit 10A)
73. Trooper Shanks interview of Chief Minnich’s as contained in the report summary opinion of the Appellant, is very negative. However, Minnich in that summary as in his testimony could only point to that one disciplinary incident, regarding the cruiser assignment violation of December 8, 2001, as the factual basis of his negative opinion. Yet Minnich testified that the Appellant “..did a good job while he was working there, (WBPD). This incident obviously bothered Minnich and he refused to let it go, even five years later. (Ex 10A and Minnich Tr. pp.381, 386)

74. The command and influence of Chief Minnich and Chief Hurley over the officers in their respective departments is inferred, as it is a paramilitary organization and they hold the highest rank of office. The Chief's influence over their personnel might only be subtle or nuanced. Chiefs Minnich and Hurley initiated or introduced Shanks for interviews in their own department. These are small Department and information of this kind is generally available and discussed. In a small department it is likely that at least some of the officers in each department were generally aware of their respective Chief's attitude toward or opinion of the Appellant. Some of the officers, as stated elsewhere, held negative opinions or bias against the Appellant, (Petit and Richardson in West Boylston, Dyson, Dolay, Tebo and Antarivca in Leicester). The Appellant believes that Dolay and Tebo held bias against him, since they had been on the interview panel which bypassed him the first time, which bypass he then appealed. He believes that those two officers were spoken to regarding this present bypass, due to their participation in the first bypass. It would be normal and expected for these officers and others in the departments, to discuss Shanks prospective interview and their opinions with other officers in their department. The Department members were and are concerned about their own careers and opportunity for appointment, assignment and promotion. (Exs. 10A, 18, Appellant Tr. pp.292-298 Reasonable inference and administrative notice)

75. As part of the application process here, all of the candidates, including the Appellant, were required to compile a lengthy packet of information in order to assist with the background investigation and application review. (Hurley, Tr., 73; Exhibit 5)

76. All of the candidates on the certified eligibility list, including the Appellant possessed all of the necessary qualifications for this position, that were established by

HRD as prerequisites for taking this competitive 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 or otherwise by application of the law, was placed at the top of the certified list. (Administrative notice of G.L. c. 31§ 21 and §22, PAR.06 (1) (b)and Exhibit 1)

77. The Appellant was well known to the members of both the WBPD and the LPD. He had a past training and working relationship with the personnel in the LPD. He was a well known commodity. Chief Hurley's protracted and detailed evaluation of the Appellant's application for this part-time position conveyed the impression to department personnel that he was against or resistant to the Appellant's application. This circumstance also adversely affected the Appellant's interview-evaluation results. (Testimony, exhibits, testimony and demeanor of Hurley, reasonable inference, Appellant Tr. pp 289-301)
78. 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 and eligibility lists. 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 or placement on the eligibility list.

(Administrative notice of G.L. c. 31§ 21, §22, § 25, §26 and §27 and PAR.06 (1) (b))

79. 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 were 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. (administrative notice)
80. “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). (administrative notice)
81. The Civil Service Commission recognizes that there are applicable laws that govern the: access to , compilation and use by state and municipal appointing authorities in making civil service appointments and promotions such as: (1) M.G.L. c.6, § 167-178 and

related laws and regulations pertaining to CORI (Criminal Offender Record Information), CJIS (Criminal Justice Information System), NCIC (National Crime Information Center) and other records containing information about the criminal history of an applicant for civil service appointment or promotion; (2) various laws governing the “sealing” and “expungement” of criminal records; (3) the obligations imposed under Mass.G.L.c.151B, §4(9) that limit the extent to which appointing authorities, as employers, are permitted to inquire about or use an applicant’s criminal history in making employment decisions;(4) and the specific provisions within the Civil Service Law itself that are applicable. The use of “sealed records” is covered under the Sealed Records Law, M.G.L. c. 276, §§ 100A-C. Mass.G.L.c.31, §50 prohibits the employment of any person in a civil service position who is “habitually using intoxicating liquors to excess” or who has been “convicted of any crime” within one year (except for certain misdemeanors or other offenses where the fine imposes is not more than \$100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). Mass. G.L.c.41, §96A provides that “No person who has been convicted of any felony shall be appointed as a police officer of a city town or district.” Applicants for civil service and/or government employment are controlled by Mass. G.L.c.31, §20, concerning “Applications for examination or registration; fees; requests for information,” provides:

Each application for examination or registration pursuant to the civil service law and rules shall be made under the penalties of perjury and shall contain requests for such information as the administrator deems necessary. Each such application for a non-promotional examination shall include a fee, not exceeding ten dollars, which may be waived by the administrator, subject to the rules adopted pursuant to [section four](#).

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

or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application.

Notwithstanding the foregoing provisions, an application for examination or registration shall contain the following question:

“Have you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace?”

<u>Yes.</u>	
<u>No.</u>	

- a. If yes, please indicate the date, court, offense charged and the penalty imposed.” Each applicant shall answer such question, subject to the provisions of [sections one hundred A, one hundred B and one hundred C of chapter two hundred and seventy-six](#).

The Commission also recognizes that the foregoing is not a complete list or summary of the applicable laws, rules and regulations. (administrative notice).

82. An incident cited as a basis for one of the stated reasons for bypass: (#4) Provided False

Information on Prior License to Carry Firearms Application; states in part that on May 13, 2003 the Appellant filed an application, under the pains and penalties of perjury, to renew his license to carry firearms (LTC) with the West Boylston Police Department. (Exhibit 16) On that application, the Appellant answered “No” to the question: **“Are you now under any charge(s) for any offense against the Law?”** However, a Department inquiry through the Board of Probation indicated that there was an open case from 1982 for “Disturbing the Peace” out of Worcester District Court. The Appellant was unaware of this open case until he was notified sometime in 2004. He immediately went to court in 2004 and had this 22 year old case closed. The West Boylston Police Department did not notify the Appellant of this “open” case. The Appellant had applied and reapplied for a LTC numerous times at the WBPD and LPD and various Florida departments since 1982. Each application or renewal request required at the least, a subsequent criminal record update. None of these subsequent criminal record checks, since 1982 reported this “open” case. The Appellant also renewed his Mass. Driver’s license regularly since 1982, which calls

for updated criminal record checks, without being notified of this “open” case. The Department of State Police also did annual criminal record checks on the Appellant to issue and renew his various State Police certifications, without discovering this “open” case. (Hurley, Tr., pp. 78-79; Appellant Tr. pp. 268-272 Exhibits 16 & 18).

83. Another incident cited as a basis for the stated reasons for bypass: (#4) Provided False Information on Prior License to Carry Firearms Application; states in part that the appellant answered “No” to the Question- **“Has any license to carry firearms, permit to possess firearms, or firearms identification card ever been suspended, revoked or denied?”** The Department claims that this answer was erroneous, since the Appellant had civil, domestic relations, restraining order issued against him on August 28, 1995. Part of that pro forma, restraining order called for “You are also ordered to immediately surrender to the Leicester Police Department all guns, ammunition, gun licenses, and FID cards. Your license to carry a firearm, if any and your FID card are suspended immediately.” The Appellant testified that this was a domestic restraining order with his then wife, from whom he is now divorced. He did not interpret that as an actual suspension since it was obtained ex parte, was in effect for only a matter of a few days. He then filed the required court documentation to vacate that part of the order dealing with firearms and get a quick hearing. He then went to court with his wife and then Leicester Police Chief Rusty Drake. Chief Drake and his wife testified on his behalf and that the relevant part of the restraining order was vacated and his license, FID card and firearms were returned to him. Most of the Department personnel were and are now aware of the Appellant’s past domestic relations issues and court appearances and restraining orders with his ex-wife. This was not

secretive information that the Appellant was attempting to hide on these applications.

(Appellant Tr. pp. 287-289, Exhibits 1, 10A, 16 & 18)

84. Another incident cited as a basis for the stated reasons for bypass: (#4) Provided False Information on Prior License to Carry Firearms Application; states in part that the appellant answered “No” to a question on a June 6, 1998 application for a license to carry firearms(LTC) which he signed under the pains and penalties of perjury. The Question- **“Have you ever been convicted of any offense against the law, are you now under charges of any offense against the law?”** The Department claims that this answer is erroneous since the Appellant had an “open” case from 1982 in Worcester District Court for disturbing the peace, which was closed in 2004; and he had a conviction from 1985 for minor in possession of alcohol. The Department claimed he also gave an erroneous answer of “No” to the same question on an August 17, 1993 application for a LTC with the Leicester Police Department, when he had the 1985 conviction for minor in possession of alcohol. These erroneous answers or discrepancies between his application answers of “Yes or NO” and a technical and precise reading of his BOP report is not an incident of willfully or knowingly giving a false answer. If anything, under the circumstances here and the legal frame work described elsewhere in these finding, it appears to be sloppiness or presumptive thinking based on his many years of successfully applying for and renewing his numerous licenses, certifications and permits with the US Marines, the States of Mass. and Florida, the State Police, and the West Boylston and Leicester Police Departments. Despite all of these agencies and departments periodically doing criminal background checks on him, no “discrepancy” was found until Chief Hurley began his own review for

the purpose of this bypass. (Appellant Tr. pp. 287-289, Hurley Tr. pp. 141-149, Exhibits 1, 10A, 16 & 18)

85. If anything the LPD and the WBPD and the Worcester District Court were equally remiss in their past LTC application process and record checks on the Appellant. They processed his applications for LTC or renewal several times each over decades without finding the “open” case or any other discrepancies in his applications. The Appellant had the right to rely on those repeated apparent affirmations of his accurate completion of those applications. Chief Hurley admitted in testimony that the Appellant had actually attached his BOP record with the “open” case to his LTC application; an affirmation that he didn’t realize that it was still open. Chief Hurley also admitted that BOP records are difficult to read and that even judges sometime require the assistance of professionals like probation officers. to read them properly. Chief Hurley admitted in testimony that there were many people in the LPD, the WBPD, The Worcester Police Dept. and the court who were in error or remiss for leaving this case open for decades. Chief Hurley also testified that the erroneous answers on the applications or discrepancies were not an indication of the Appellant’s lack of credibility or attempt to deceive but mere sloppiness or paperwork inaccuracy. Hurley strongly believed that once the Appellant learned of these discrepancies, he had an affirmative duty to go back even decades, to correct the old applications. Hurley offered no legal authority for this strong belief. Chief Hurley also admitted that he knew that the 1995 restraining order was probably issued ex parte, in place for only 3 days and vacated at the Appellant’s first court appearance, with his then wife’s approval. (reasonable inference, Hurley TR. pp. 141-149, Appellant Tr. pp. 287-289, Exhibits 1, 10A, 16 & 18)

86. The Appellant testified that he did not list, on the application, the 1985 conviction for minor transporting alcohol because he was rushing the application or misinterpreted the question as relating to a felony conviction. He further answered that he couldn't quite recall why he answered it that way. When asked why he didn't list the 1982 "open" case on his 1993 LTC application; he answered that he didn't know he had an "open" case. It is noted that the alleged 24 year old record of an "open" case is simply an "O" after status, without any indication of an issued default, a warrant or any other effort by the court or the Worcester Police Department to notify the Appellant or procure his presence in court. This indicates that it is probably a mistake on the court's part and not due to the Appellant's inattention. Chief Hurley never offered a definition of or possible explanation for an "open" case. Therefore it is inferred here that under the circumstances here, it was a very minor matter and possibly due to a mistake on the court's part. (Appellant Tr. pp. 268-269, Hurley Tr. pp. 141-149, Exhibits 1, 10A, 16 & 18)

87. Trooper Shanks conducted the background investigation of the Appellant.
(Shanks, Tr., p. 154)

88. As part of his background investigation, Trooper Shanks interviewed the Appellant at his office and then again at the Leominster State Police barracks. (Id., Tr., pp. 163-167)

89. Trooper Shanks concluded his report by stating in part that; "I have two completely different views of Chief Bousquet: "During my interview with Chief Bousquet, I observed his arrogance and his inability to listen to a question. Several times he mentioned people in positions of authority he knew at the State Police (dropping names)

that were irrelevant to our conversation. He did not respect the interview process and attempted to turn it into a casual conversation to obtain information on my investigation. Several times throughout the interview he asked who I interviewed and if my conversations with them were positive or negative. Chief Bousquet states he applied for the position with Leicester PD because he enjoys police work and has always had a second job to supplement his income. This is a difficult investigation due to the fact the applicant is a knowledgeable and skilled police officer. But he does not have the confidence or respect of the people he will be working with. That fact could possibly disrupt the Leicester PD and possibly put the citizens of Leicester in a precarious position.” However, the prior co-workers did not say that they lacked respect for or confidence in the Appellant or his police abilities. Many stated that he had very good police knowledge, skills and performance. Yet, they also believed that he was arrogant and selfish. (Id.; Exhibits 1, 10A, 18).

90. The Appellant has a military look and bearing. He has short hair. He has the demeanor and comportment that reflects his long-term police and military background. He is relaxed, calm, controlled and unflappable as a witness. Without being hesitant; he does not spontaneously spout an answer but fully considers the question before answering. He did not display any of the arrogance or superiority that he is alleged to possess. He withstood sometime pressureful cross-examination with equanimity and ease. His answers and claimed state of mind descriptions rang true. He genuinely seemed to be perplexed and dismayed at Chief Minnich’s strongly held opinions on the December 8, 2001 cruiser incident. He thought that the incident was old and over with. I find him to be a credible witness. (testimony, demeanor and presentation of Appellant)

CONCLUSION:

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 vs. Civil Service Commission, 43 Mass.App.Ct.300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex 262 Mass, 477, 482 (1928). Commissioners of Civil Service vs. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, §2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probable than not sound and efficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civ. Serv. v. Municipal Ct. of

Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997).

The appointing authority is expected to exercise sound discretion under the particular circumstances of the matter when choosing among persons eligible for promotion or original appointment or may decline to make any appointment. See also the line of cases cited in .Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971) In addition to sound discretion, the appointing, public officer is expected to employ honesty and good faith in the selection process. A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272." Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971)

The Commission has the statutory authority to hear and decide bypass appeals See G. L. c. 31, §2(b). In making its determination, the Commission must consider the fundamental purpose of the Civil Service System, which is "to protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy." Hansen v. Department of Correction, 11 MSCR 47 (1998). See also Cambridge, 43 Mass App. Ct. at 304. If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then it should intervene. Cambridge, 43 Mass App. Ct. at 304. Otherwise, the Commission cannot substitute its judgment for the

judgment of the appointing authority. Cambridge, 43 Mass App. Ct. at 304. See also Doran v. Norwood Police Department, 11 MCSR 121 (1998).

An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations or personality preference for the selection of one candidate over the other. See Tuohey v. MBTA, Case No.: G2-04-394 (2006). The Appellant here was qualified for the position he sought and had excellent credentials and background experience. He had an excellent employment and disciplinary record except for that one incident in 2001, which was mitigated by the findings of fact here. The Appellant had the right to rely on his solid past performance record in the face of the insubstantive and uncorroborated hearsay attack by some past co-workers. The application-evaluation process here did not sufficiently, identify and substantiate a personality or character trait that might reasonably interfere with the Appellant's ability to perform the duties and responsibilities of the position he sought. Compare Radford v. Andover Police Department, 17 MCSR 93, (2004) and Barry v Town of Lexington, 21 MCSR 589, (2008). The Appellant was well-known in the local police community. He had been employed in the Department in the past. He possessed excellent experience and training credentials. He had a solid employment record except for a single disciplinary incident in a neighboring department, five years earlier. The Appellant in this present matter was subject to a suspect, detailed and protracted 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 selection process that should have been effectively remedied.

The Respondent did not have reasonable justification to bypass the Appellant based on his prior discipline, a single incident that was over emphasized and dramatized by both Chief

Minnich and Chief Hurley. This single incident was substantively mitigated by the Appellant, as shown in the findings of fact. It was also found to be isolated and inappropriately addressed by Chief Minnich, under the totality of circumstances.

The Respondent did not have reasonable justification to bypass the Appellant because of his alleged poor relationships with co-workers and his poor interview with Trooper Shanks. There is at least the appearance of bias or prejudice against the Appellant by Chief Minnich and at least a strong resistance to the Appellant on the part of Chief Hurley. These negative overtones pervaded the interview-evaluation process, influenced the interviewer, some of the interviewees and tainted the results.

Another of the five stated reasons for bypass; the alleged erroneous answers or discrepancies on the Appellant's various applications were not proven by a preponderance of the credible evidence in the record. The alleged errors or discrepancies were minor, unintentional and probably commonplace. The alleged errors or discrepancies were only discovered by Chief Hurley, after a microscopic examination of old records and a severe and tortuous rationale applied to the meager results of the examination. Chief Hurley admitted in testimony that this was not a matter of willfully or knowingly giving a false answer. If anything, under the circumstances here and the legal frame work described elsewhere in these finding, it appears to be sloppiness or presumptive thinking, based on the Appellant's many years of successfully applying for and renewing his numerous licenses, certifications and permits with the US Marines, the States of Mass. and Florida, the State Police, and the West Boylston and Leicester Police Departments.

If the appointing authority establishes that it had reasonable justification for its decision, the Commission must defer to the appointing authority. Cambridge v. Civil Service

Commission, 43 Mass. App. Ct. 300, 303 (1997). “Reasonable justification requires that the action taken be 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.” Basa v. Belmont Police Department, 12 MSCR 137. “In order to prevail in a bypass case, an appellant must demonstrate that the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation or are a pretext for other, impermissible reasons.” Sylvia v. New Bedford Fire Department, 9 MCSR 49 (1996). See, Borrelli v. MBTA, 1 MCSR 6 (1987).

Although the Respondent proffered a total of five reasons for the bypass of the Appellant, only one of those reasons, the conflict of interest matter, was sufficiently sound and established as a reasonable justification for the bypass.

As set forth in greater detail above, the stated reason #1, conflict of interest due to his employment, is the only stated reason of the five claimed which is supported by a preponderance of credible evidence in the record. However it is also concluded that this sole reason is of such a nature and substance as presented by the Respondent, that it independently justifies the bypass of the Appellant. This sole reason is a sound and sufficient reason for his bypass, especially considering that he desired this part-time position because he enjoys police work and always had a second job to supplement his income

Based on the findings of fact and the above conclusion; it is concluded here that the Respondent had reasonable justification to bypass the Appellant because his full-time employment as Police Chief for Becker College creates a continuing, conflict of interest situation that does not exist with any of the other appointees

The Respondent had reasonable justification to bypass the Appellant because, as the Chief of Police for Becker College's Campus Police Department, his candidacy creates unique barriers under G.L. 268A ("conflict of interest law"), not only for himself but also for the Town and Chief Hurley that do not exist with the other Appointees.

First, Chief Hurley is a "municipal employee" for purposes of the conflict of interest law. As a result, the potential hiring of the Appellant raises questions under §19 and §23 of the conflict of interest law. Pursuant to §23(b)(2), a municipal employee may not use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Accordingly, Section 23(b) (2) will prohibit Chief Hurley from using his position to obtain special benefits for himself, other members of the Department, the Town and the Appellant. Based on the testimony and evidence presented by the Respondent and the Appellant, it is clear to the Commission that the Town and the College are so interwoven that it will be impossible to avoid violations of the conflict of interest law. This is especially true when considering the following situations: the lease arrangements for athletic fields between the Town and College; the College's use of the Department's booking capabilities and holding facilities for their arrests; the fact that Campus Police Officers perform paid road details in Town and Department Police Officers perform paid details during College events; various police trainings occur between the two departments; and the Department's free use of campus facilities (gym.)

Moreover, Section 23(b)(3) prohibits a municipal employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can properly influence him or unduly enjoy his favor in the performance of his official duties. Issues may be raised under this section of the law if the Appellant is hired and Chief Hurley is dealing with a matter involving Becker. Under those circumstances, a reasonable person may conclude that

Becker College could improperly influence Chief Hurley. One such circumstance may involve law enforcement activities on campus. As a practical matter, the Town's Police Department responds to medical calls and complaints of criminal activity on the campus on a regular basis. If the Appellant is hired by the Department, and remains in his position as Chief of Campus Police, a reasonable person may infer that the decision to arrest a student - or not arrest, for that matter – was influenced by the Appellant's employment with the Department.

Finally, Section 19 encompasses any financial interest without regard to the size of that interest. The financial interest must be direct and immediate or reasonably foreseeable. As discussed above, the fact that both police departments perform paid details for each other raises significant conflict issues for Chief Hurley and the Town. Moreover, for example, simply deciding to halt the use of Department police officers at College events and Campus Police Officers on road details will have the unwanted consequence of creating a potential public safety issue and a potential conflict of interest situation.

In the present matter, the Appellant also sought, at the insistence of Chief Hurley, an advisory opinion from the Ethics Commission. In no uncertain terms, the Ethics Commission opined that the law will prohibit the Appellant from serving in both capacities, unless the following two restrictions are met: (1) the Town's Board of Selectmen must designate all of its part-time police officers as "special municipal" employees for purposes of the conflict of interest law; and (2) as a part-time police officer for the Town, the Appellant may not work on matters involving the College in any way. As discussed in greater detail below, the practical implications of these restrictions justify the Respondent's decision to bypass the Appellant.

First, the Town's part-time police officers play an important role with the Department by providing shift coverage in a cost effective manner. Because sick, vacation and holiday leaves

are taken by its full-time officers, the Department heavily relies on its part-time members to cover the otherwise open shifts. As a result, the Department's part-time officers regularly work in excess of one hundred (100) shifts annually. In addition to providing public safety, the part-time officers (even though they are unionized) are compensated at a much lower rate than their full-time counterparts. As a result, the Town realizes a financial benefit by using part-timers to fill open shifts and can forgo recalling full-timer police officers at overtime rates. If the Board of Selectmen, in their exclusive discretion, elected to designate the part-time officers as "special municipal employees", the decision would bankrupt the Department's budget. Because "special municipal" employees are limited in the number of shifts (and hours) they can work, the Department would be forced to decide whether to fill a shift or bring back a full-timer at a higher rate of compensation. Chief Hurley competently testified that the use of full-time officers to fill open shifts would gut his operating budget.

Second, the part-time officers are union members. Changing their designation to "special municipal" employees effectively limits the number of shifts they can work for the Department. Such a change would constitute a unilateral change in working conditions under M.G.L. c. 150E. It is reasonable to expect that any limitation placed on the number of shifts part-time officers can work will not be well received because, as a practical matter, designating them as "special municipal" employees will limit their annual earning capacity.

Third, in addition to the Town designating its part-time officers as "special municipal", the Ethics Commission recommended that the Appellant also comply with §17 of the conflict of interest law. If the Appellant followed this recommendation, his availability to work for the Department would be limited to less than 60 shifts per year. Obviously, such a limitation on the Appellant's availability further restricts the Town's ability to cover open shifts in a cost effective

manner. Stated differently, actually hiring the Appellant sets the Department back in terms of actual staffing levels.

Fourth, and perhaps more importantly, the Appellant cannot perform any work related to the College. This restriction from the Ethics Commission, in and of itself, justifies the Town's decision to bypass the Appellant. Based on the evidence present, none of which was rebutted by the Appellant, Department Police Officers regularly respond to police calls to the College's campus. Based on the second restriction mandated by the Ethics Commission, the Appellant would be precluded from responding to any College related calls. To further complicate matters, Chief Hurley testified that part-time officers typically work "off-shifts" that are staffed with only two (2) officers. The dilemma for the Town, should it appoint the Appellant, is obvious: if the officer working with the Appellant is at a call, and police presence is requested at the College, the Appellant cannot respond or could only respond in a limited manner. Based on this scenario, the Appellant would not be able to perform an essential function of his position – namely responding to public safety requests from the community, including the College.

The Appellant, in the high administrative position of Police Chief at Becker College creates a much higher potential for a conflict of interest situation arising. Neither the Town nor the Department should be placed in the above described precarious position. Neither the Town nor the Department should be saddled with the indefiniteness and the potential, consequential effects of this amorphous situation for the Appellant's benefit, of securing a second or part-time job. Based on the above, the Respondent was justified in bypassing the Appellant. Neither the Town nor the Department could be reasonably expected to accommodate the Appellant's part-time employment by the above enumerated commitments or adjustments.

The Respondent has shown reasonable justification to bypass the Appellant for appointment to the position of permanent intermittent police officer based upon: the Appellant/Town or Department's potential conflict of interest circumstances created by his full-time position at Becker College (Chief of Campus Police). For all of the above stated reasons; the Appellant's appeal, on Docket No. G1-07-111, is *dismissed*.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Taylor , Stein and Marquis Commissioners) [Bowman absent]on March 19, 2009.

A true record. Attest:

Commissioner
CIVIL SERVICE COMMISSION

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, 801CMR 1.01 (7) (1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Commission 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 M.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 section 14 of chapter 30A 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: John Marra, Atty. HRD
Frank J. McGee, Atty.
Nicholas Anastasopoulos, Atty.