

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

JOHN F.CARNES,
Appellant

v.

G2-18-223

TOWN OF NORWELL,
Respondent

Appearance for Appellant:

Gary Nolan, Esq.
Nolan Perroni PC
73 Princeton Street
N. Chelmsford, MA 01863

Appearance for Respondent:

Paul J. Hodnett, Esq.
Rubin and Rudman, LLP
53 State Street, 15th Floor
Boston, MA 02109

Commissioner:

Cynthia A. Ittleman

DECISION

On November 20, 2018, the Appellant, John Carnes, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Norwell (Town or Respondent) to bypass him for promotional appointment to the position of Police Sergeant in the Norwell Police Department. On December 5, 2018, a pre-hearing conference was held. I held a hearing at the Commission on January 30, 2019, February 26, 2019 and March 19, 2019.¹ The full hearing was digitally recorded and both parties received CDs of

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

the proceedings.² On April 30, 2019, the parties submitted post-hearing briefs in the form of proposed decisions. For the reasons stated below, the appeal is denied.

FINDINGS OF FACT:

The parties submitted thirty-four (34) joint exhibits (Ex. 1-34). Five of these exhibits are CD's. (Ex. 4, 14, 19, 24, 29). A recording of the Town of Norwell Board of Selectmen meeting on September 19, 2018 was also received into evidence (BOS CD). The Town submitted four (4) exhibits (AA 1-4) and the Appellant submitted three (3) exhibits (App. 1-3). Based on the documents submitted and the testimony of the following witnesses:

For the Town:

- Theodore Ross, Norwell Police Chief
- Peter Morin, Norwell Town Administrator
- Marc Duphily, Carver Police Chief
- Ellen Allen, Chairperson Norwell Board of Selectmen (BOS)

For the Appellant:

- John Carnes, Appellant

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

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

Norwell and Candidates for Sergeant

1. Norwell, Massachusetts is a town located in Plymouth County, twenty miles south of Boston, with a population of approximately 11,000 people. <https://www.townofnorwell.net/about-norwell>.
2. The Appellant has lived in Norwell for over fifty years and has been employed as a patrolman by the Norwell Police Department (Department) for nineteen years. (Appellant Testimony at CD 2, 4:11). He has a Master's Degree in Criminal Justice. (*Id.*)
3. The Appellant owns his own landscaping business for which he works an average of about 20-30 hours each week. This business does not impact his work as a patrolman. (Appellant Testimony at CD 2, 4:13).
4. The Appellant volunteers in the community through sports teams that his children participate in, such as coaching and being on the Board of Directors of the Town's Little League. (Appellant Testimony at CD 2, 4:09; Ex. 12).
5. Police Department staff include the Chief, Deputy Chief, 6 Sergeants, 16 patrolmen, and special part-time police officers. (Ross Testimony at CD1, at 1:17; App. Testimony at CD 2, 4:15). In 2018, it was a "young" department, with four (4) recent new hires (Morin Testimony at CD 1, 4:43-4). There are only patrol officers and Sergeants in the police hierarchy. (Ross Testimony).
6. Norwell Police Chief Ross (Ross or Chief Ross) has been the Chief of Police at the Norwell Police Department for thirteen years. (Ross Testimony)
7. Special positions within the Department include positions such as the Police Prosecutor, School Resource Officer, and others. Some of these positions are put into the normal bid cycle and others are positions filled by the Chief. (Ross Testimony at CD, 3:20 approx).

8. Specialty training opportunities exist within the Department, such as certified sexual assault investigator and training for motorcycle or mountain bike patrols. (Ex. 1; Ross Testimony at CD 1, 2:16).
9. There are several opportunities for members of the Police Department to participate in police-sponsored community events, such as the Town Memorial Day parade, a cancer fundraiser called Pick Patches Project and Cops for Kids (Ross Testimony at CD 1, 2:14; AA Ex. 1).
10. The Appellant served as President of the Norwell Police Association (union) for eight years, Vice President for two years, and Treasurer for six years. (Appellant Testimony at CD 2, at 4:14-15). The union is comprised of both patrolmen and Sergeants. (Appellant Testimony at CD 3, 6:16).
11. As a union leader, the Appellant did not apply for departmental special positions because those positions often came with extra benefits such as pay, certain time off, or other “perks” and he did not wish his union duties to be influenced by any benefits he would receive as part of those assignments. (Appellant Testimony at CD 3 at 2:00).
12. The Appellant takes part in Departmental mandatory testing and certain community events each year. (Appellant Testimony).
13. In early 2018, two Sergeant positions became available at the Department. (Ross Testimony, CD 1 at 1:41; Appellant Testimony at CD 3, 1:55 and 2:04; CD 3, 2:04).³
14. In August 2018, four candidates signed the Departmental Promotional Certification, Requisition Number 04614, the Appellant, Candidate 2, Candidate 3, and Candidate 4. The Appellant was listed first on Requisition #04614 for Departmental Promotional Certification.

³ Chief Ross later added one Administrative Sergeant position in the summer of 2018. (Ross Testimony, CD 1 at 1:41; Appellant Testimony at CD 3, 1:55 and 2:04; CD 3, 2:04).

Candidate 2 was second, Candidate 3, third, and Candidate 4, fourth. (Ex. 6; Ross Testimony at CD 1, 1:21).

15. Candidates 2, 3, and 4 have earned undergraduate degrees in criminal justice. (Ex. 17, 22, 27).

16. The candidates' resumes show that Candidates 2-4 had considerably more experience in specialty positions and more specialty training than the Appellant. For instance, Candidate 2 sought specialty positions and is certified in the following: motorcycle, mountain bike, RAD Instructor and Armorer. Additionally, he has been awarded certificates of commendation from the Norwell Police Department, participated in several courses such as the Glock Advance Armorer's course, basic SWAT school, and emergency vehicle specialty course, to name a few. (Ex. 17). Candidate 3 sought specialty positions and is certified in motorcycle, mountain bike and RAD Kids Instructor (which requires specialized training). He serves as a Field Training Officer for new recruits, for which he received specialized training, and is assigned as Detective. Additionally, Candidate 3 serves as a Municipal Police Training Committee Level III Instructor for CPR/First Aid, has an EMT Paramedic certification, and teaches recruits and Norwell Police staff, among other activities. (Ex. 32) Candidate 4 has served as Detective, the Computer Systems Administrator for the Department, and as Police Prosecutor, all of which required specialized training. Additionally, to name a few of his responsibilities, Candidate 4 has served as the CJIS Representative, the Safety Net Coordinator, and Elder Affairs Officer (currently serving as back-up) which also require training. He is currently serving as a Field Training Officer for new recruits and actively seeks training opportunities not only for himself but for the Department as well. (Ex. 32).

17. At the time of the promotion process at issue in this case, Candidate 4 was the union president and Candidate 3 was union vice president. (Ross Testimony; Appellant Testimony). Chief Ross found the Appellant to be a more “aggressive” union advocate than Candidate 4, whom Ross considered to be working collaboratively with police management. (Ross Testimony at CD 1, at 3:07-3:08).
18. The Appellant’s resume listed no extra certifications, experience, or commendations gained through his work as a police officer. (Ex. 12).

Departmental Hiring Processes

19. Prior to the promotional hiring at issue in this appeal, the Department had promoted police officers based on “certification and the HR list”. (Ross Testimony at CD 1, 1:26). Past procedures for promotion involved an interview with the Norwell Board of Selectmen (BOS), who would take into consideration the Chief’s recommendation when deciding whom to promote. (Ross, at Testimony CD 1, 1:17).
20. Not long before the promotional process at issue here, in March 2016, an officer was promoted to Sergeant based on a previous interview by the Town Board of Selectmen and because he was first on the civil service List. (Morin Testimony at CD 2, 6:00; Allen Testimony at CD 2, 3:32).
21. Prior to the bypass in this appeal, only two candidates have been bypassed for promotion since Chief Ross became Chief. The first bypass occurred because the candidate had a record of discipline and the second occurred because of a lack of experience. Specifically, the second bypass involved the Appellant, who was bypassed years earlier when he only had four years’ experience. (Ross Testimony; Appellant Testimony)

22. In January 2018, Chief Ross spoke to Peter Morin, the town administrator, about using an assessment center to fill the upcoming available sergeant positions. (Ross Testimony at CD1, 1:29; Morin Testimony at CD 2, 9:26). Mr. Morin and Chief Ross discussed using an assessment center, which meant an outside entity would administer examinations to candidates. (Ross Testimony at CD 1, 1:24). At a regularly scheduled meeting with union officials, Chief Ross and the Deputy Chief brought up this possibility. The union officials expressed concerns with the proposed assessment center. Another regularly scheduled meeting with the union president and vice president took place on May 10, 2018. At that meeting, Chief Ross further discussed the possibility of using an assessment for the promotional positions. The candidates complained that they had already paid money for exam preparation and the civil service exam itself. (Appellant Testimony at CD 3:4:26; Ross Testimony).
23. A union meeting was held on May 11, 2018 with Candidates 3 and 4 (in their union positions) and Sergeant A (who was not a candidate for promotion). On direct examination at the Commission hearing, Chief Ross testified at the Commission hearing that he did not tell those present at the May meetings that he would “kill the list”, meaning that he would end the promotion process because, he asserted, there were not enough candidates on the list. However, on cross-examination Chief Ross admitted that he did threaten to “kill the list” at the May 2018 meeting. Specifically, Chief Ross told those at the meeting that under civil service law (the “2 [N] plus 1 Rule”), he did not have 5 candidates for the open two positions.⁴ (Ross Testimony at CD 1, AA Ex. 1). Chief Ross next proposed that the

⁴ “In general, positions must be filled by selecting one of the three most highly ranked candidates willing to accept the appointment, known as the “2n+1” formula. G.L. c. 31, §27; PAR.09. In order to deviate from that formula, an appointing authority must provide written reasons - positive or negative, or both - consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L.

promotional process includes an interview panel instead of an assessment center. In considering the Chief's amended proposal, the union asked the Chief to ensure that certain named individuals not be allowed to participate on the proposed interview panel. The Chief agreed not to include the named individuals to which the union objected. (Ross Testimony at CD 1; AA Ex 1).

24. In mid-June, 2018, after the Appellant and others requested an informational meeting with Chief Ross to explain what the proposed promotional process would involve, Chief Ross and Mr. Morin met with the four candidates and informed them that an interview panel, not an assessment center, would be utilized. (Ross Testimony). The Appellant asked that the process be provided to the candidates in writing so that the union could bring that proposal to the union lawyer for review. (Appellant Testimony, CD 2, 4:11). After that mid-June meeting, Chief Ross believed that the promotional process had been finalized. (Ross Testimony, Morin Testimony).⁵

25. On July 30, 2018, Chief Ross emailed the union president, Candidate 4, about the hiring process. The email stated that a three-member panel would receive the candidates' cover letters and resumes and would be informed about the candidates' civil service exam rankings. The interviews would be conducted in the order of standing on the civil service certification and would be audio- and/or video-taped. The questions to be asked by the interview panel would relate to a Sergeant's responsibilities, such as policy, management and supervision of

c.31, §1, §27; PAR.08. The statement of reasons must 'indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before the . . . Civil Service Commission.' PAR.08(4)." Pilling v. City of Taunton, 32 MCSR 69, 71 (2019).

⁵ The Appellant requested that the union leadership (Candidates 3 and 4) recuse themselves from participating in decisions about changing the promotions process. They did not. (Appellant Testimony at CD 3, 1:19).

personnel, scenarios and “other questions as deemed appropriate.” The interviews would be scored to produce a ranking of the candidates but the panel’s recommendation would not be binding because the BOS has the final hiring authority. (Ex. 4).

26. On August 21, 2018, Chief Ross informed the candidates via email of the time and place of their interviews. (Stipulated Facts).

27. Chief Ross did not tell the candidates the weight that the interview would be given in relation to the civil service exam score and any other criteria used to evaluate the candidates’ suitability for the position of Sergeant. (Appellant Testimony).

Candidate Interviews with the Three-Person Panel and Scoring

28. The three members of the panel were professional colleagues of Chief Ross, the Police Chiefs of Hull and Carver, and Mr. Morin. (Ross Testimony, CD 1 at 3:00). Two of the three panelists testified at hearing: Mr. Morin, Norwell Town Administrator, and Carter Chief of Police Duphily.⁶ (Hearing at CD 3 at end).

29. Chief Ross provided the panel with a list of twenty questions to be asked of all candidates, instructions to be read to each candidate at the start of each interview, scoring ranks of 1 (poor) to 5 (excellent), a grading sheet for each candidate, and other instructions about the candidates’ poise and communication scores being separate scores. Chief Ross also provided the panel with information about question #20 regarding the use of reasonable force and information about the Active Shooter Street Guide scenario and the responsibilities of a Patrol Supervisor to help the interviewers assess the candidates’ responses to related

⁶ The third member of the panel, Chief Dunn of the Hull Police Department, was available to testify but the Town did not call him.

questions. However, he did not provide model answers. (Ross Testimony, Morin Testimony, Ex. 9).

30. The panelists took notes during the interview and scored each candidate separately, without input from others on the panel. (Morin Testimony; Duphily Testimony). Chief Duphily scored the candidates on his notes and then placed his scores on the scoresheet. There were differences in these scores for the Appellant only.⁷ Morin changed some of his initial scores for the Appellant and one other candidate on his scoresheet. (Duphily testimony; Morin Testimony; Ex. 10, 15, 20, 25).
31. The scores were totaled and averaged at the end of the interview process. The Appellant scored 65.08, Candidate 2 scored 90.08, Candidate 3 scored 90.75, and Candidate 4 scored 84.66. (Ex. 13, 18, 23, 28). The three panelists indicated on their score sheets that they would not recommend the Appellant to be promoted to Sergeant. (Ex. 10, Ross Testimony, Morin Testimony).
32. Chief Ross and the Deputy Chief were present in the interview room for all four interviews. Chief Ross testified that he did not speak to the panelists during the interviews. However, Mr. Morin testified that Chief Ross said something once during the interviews. Specifically, Mr. Morin testified that Chief Ross informed panel members that one of the Appellant's answer was incorrect. To wit, after the Appellant had answered Question 5 (about what two new policies he would suggest), Chief Ross told the panelists that one of the policies suggested was an existing policy. (Morin Testimony). Chief Ross did not comment about any other candidate's answers to the interview questions. (Ross Testimony). In view of Chief

⁷ For candidates 2, 3 and 4, Duphily's contemporaneous scores match up exactly with his final scores entered into his rating sheet. For the Appellant's scores, however, several of Chief Duphily's contemporaneous scores were significantly lower than those on his scoresheet. There is no evidence that Duphily was influenced in any way nor that there was a bias towards the Appellant despite the modification of scores.

Ross's prior conflicting testimony about whether he had told the union he would "kill the list" and Mr. Morin's straightforward testimony about what the Chief said at the interviews, I find Mr. Morin's testimony in this regard credible and Chief Ross' testimony in this regard not credible.

33. There were discrepancies in scoring the candidate's answers. (Ex. 14, 19, 25, 29). Morin awarded different scores to the Appellant for similar or less accurate answers from other candidates. For instance, on Question 5, which asked the candidate to tell the panel two policies that currently do not exist that should be instituted (Ex. 9), Morin gave the Appellant a 3.5, Candidate 2, who provided only one policy, a 4.5, Candidate 3, who could not name any new policy, a 2.5, and Candidate 4, who named no new policies but described the policies as complete because they were up-to-date on the law, a 4. (Ex. 14, 19, 25, 29; Morin Testimony). On Question 15, which asked, "If you were not promoted to Sergeant name one candidate and why," Morin gave the Appellant 4.5 and Candidate 3 a 5 for virtually the same answer. (Ex. 9, 13, 14, 23, 25, 29; Morin Testimony). On Question 20, which asked about the standard for use of force, the Appellant listed the correct standard of reasonableness and factors he would consider in evaluating whether the force used was excessive. (Ex. 9, Ex. 14, 19, 25, 29). Candidate 3 referred to the correct standard but did not name any factors, instead referring to the policies and procedures manual. (Ex. 14, 19, 25, 29). Morin gave the Appellant a 4 and Candidate 3 a 4, despite Candidate 3 not fully answering the question and the Appellant providing a full answer. (Ex. 13, 23). Morin stated that he may have given the Appellant lower scores because he was the first to be interviewed but had no reasons for the difference in scoring of many other questions. (Morin Testimony).

34. At times, the Appellant's answers were similar to answers given by the other candidates. (Ex. 14, 19, 25, 29). However, in some of those answers, such as Question 6, 13, 14, and 15, the other candidates provided more information or a more thorough answer than did the Appellant, or the Appellant assessed the question in a slightly different way that did not fully comport with policy. For example, Candidate 4 had long and thorough answers for Question 13, which asked about what steps a shift supervisor would take to ensure a domestic incident is handled thoroughly and in accordance with department policy. (Ex. 9). The Appellant answered the question fully based on his assumption that the initial officers would have already called EMS for medical treatment; the policy states that the shift supervisor must call EMS and was scored lower than other candidates for not including the step of calling EMS. (Ex. 14, 19, 25, 29; Appellant Testimony).

35. At least one question resulted in a discussion of proper police procedure amongst the panelists. Question 6 asked,

“You are the day shift Sergeant. There are confirmed reports of an active shooter at the High School. You must assume command as both the Chief and the Deputy are out of town. Please explain what steps you would take to effectively handle this incident. Please be as thorough as you can.” (Ex. 9).

Morin scored the Appellant by comparing his answer to the policy in place. Chief Duphily, however, understood the Appellant's answer to reflect current police response to an active shooter, which had changed on a national level after a recent school shooting. The panelists discussed the answer to that question and scored according to their own opinions, with Morin scoring the Appellant very low because he did not follow policy and Chief Duphily scoring higher because the Appellant's answered in accordance with current police practice. (Morin Testimony, Duphily Testimony). Chief Dunn scored the Appellant's answer as “2,” or “fair.” Regardless of the difference in opinion about the correct answer to this question, other

candidates responded in a more thorough way, incorporating other steps such as which agencies to communicate with and where to set up particular stations near the school. (Exs. 10, 13, 18, 23 and 28)

36. Each panelist's scores varied; in other words, no scoresheet looked exactly like another one. This was true for all candidates. (Ex. 10). Morin and Captain Duphily testified that they scored each candidate independently, without input from the others, and that changes made to their scoresheets were made contemporaneously. (Morin Testimony; Duphily Testimony).
37. The Appellant stated at the hearing that his answers to the questions at hearing were different than the answers he gave during the panel interview. (Appellant Testimony).

BOS Process of Promotional Appointment.

38. As the Appointing Authority for the Town, the BOS received the candidates' resumes and cover letters. (Allen Testimony)
39. The Chairperson for the BOS (Allen or Chair) has chaired the BOS for eight years. (Allen Testimony). It is her practice to seek out the Chief of Police or the Town Administrator prior to interviewing candidates to learn what she can in advance of the meeting. (Allen Testimony).
40. At some point prior to the BOS meeting on September 19, 2018, Morin told the Chair about the candidates' interviews with the three-person panel. Morin stated the panel did not recommend the Appellant because in a question about active shooter, the Appellant had answered in a way that did not follow policy. Morin also stated that the Appellant, when asked to suggest a new policy, provided an answer that was already in policy. The Chair did not know any questions asked of the candidates except these two. Morin did not tell the Chair that the Appellant's answer was considered to be the correct answer by one of the panelists or

that the panel had differing opinions about the answer to that question. (Allen Testimony). The Chair was “convinced” by this information and made up her mind about the Appellant before interviewing the candidates at the September 12, 2018 meeting. At hearing, she did not remember if she told this information to any other board member. (Allen Testimony at CD 2 at 3:07, 3:38).

41. The BOS members interviewed the four candidates by asking five questions of each candidate. Each candidate was asked the same five questions in the same order. Among the questions were questions about community policing efforts and community involvement and a question about supervisory experience. (BOS CD; Allen Testimony)
42. At the BOS meeting, several members stated that the BOS has in the past always taken the recommendation of the Chief of Police and that they hold the entire police department in high regard. The members expressed gratitude to the Department for being a part of the community. They stated that all candidates were qualified and thanked them for their service to the Town. (BOS CD; Allen Testimony).
43. At the end of the interviews, Chief Ross explained to the BOS members the factors he used to make his recommendation. He stated that he considered the candidates’ scores from the interview panel, a review of specialized training, the jobs they did within the Department, and the amount of community interaction the candidates had signed up for. (BOS meeting at 1:46; Ross Testimony at CD 1, 2:01).
44. The BOS voted to bypass the Appellant for Candidate 2, bypass the Appellant for Candidate 3, and bypass the Appellant for Candidate 4. (BOS CD: Allen Testimony)

Appointing Authority's Determination

45. On September 24, 2018, the Appellant received the Town's decision to bypass him for promotional appointment to Sergeant in a letter from the Town. (Ex. 1). The letter included another lengthy letter signed by the Chief Ross that stated the reasons for the bypass and listed the qualifications of the other three candidates that led to their promotions. Chief Ross's letter stated that the Appellant was not promoted for the following reasons:

1. "The Appellant's interview did not compare favorably to other applicants, he did not demonstrate forethought regarding situations that a Police Sergeant might reasonably be able to handle, and displayed undesirable Sergeant qualities. Specifically, the Appellant
 - a. Displayed average communication skills.
 - b. Displayed lack of knowledge of Departmental Policies and procedures, specifically the procedures for juveniles (interview question 5) and the Department of HR, Essential Functions of a Police Sergeant in the Rules and Regulations.
 - c. Was not familiar with the Active Shooter Plans or Incident Command and did not answer interview question 6 thoroughly as requested. In the answer, the Appellant stated that he "would ignore the Active Shooter Plans and enter the school."
 - d. Did not state that he would contact EMS to provide medical attention in question 13 regarding a domestic disturbance.

Additionally, the Interview Panel did not recommend the Appellant for promotion and rated him the lowest of the four candidates."

2. "The Appellant's training history consisted of predominantly mandatory training, whereas the other candidates demonstrated 'far superior initiative in seeking specialized training.'
3. The Appellant demonstrated less initiative than the other candidates to engage in Community Policing efforts or participate in Department sponsored events.
4. The Appellant has taken significantly less initiative to contribute to the Department by serving in or expressing an interest in the Specialty positions." (Ex. 32).

This letter also contained detailed information about the other candidates' positive attributes and experiences in specialty training, police-sponsored community events, and special positions, with specific references to those types of activities, as well as other supervisory experience.

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

A person who is bypassed may appeal that decision under G.L. c. 31, §2(b) for *de novo* review by the Commission. When a candidate appeals from a bypass, the Commission's role is not to determine if the candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of evidence, the bypass decision was made after an "impartial and reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and that there was "reasonable justification" for the decision. Police Dep't. of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012) citing Massachusetts Ass'n.

of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006) and cases cited; Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). *See also* Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (appointing authority must prove, by a preponderance of evidence, that the reasons assigned to justify the bypass were “more probably than not sound and sufficient”); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)(same).

The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited. “It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington, 60 Mass.App.Ct. 914, 915 (2004).

Analysis

The preponderance of the evidence established that the Town’s decision to bypass the Appellant was made utilizing an impartial and reasonably thorough review and is reasonably justified. As part of my assessment regarding whether political considerations, favoritism, or bias played a role in this promotional appointment, I listened carefully to all of the witnesses, including the two witnesses who served on the initial interview panel. Additionally, I paid close attention to the video recordings of the panel’s interviews with the candidates and compared the candidates’ answers and assigned scores, and the candidates’ interviews with the Board of Selectmen.

Bypass Reason 1 – The Panel Interview

In this case, the promotional process of forming recommendations using the information gained by an interview panel, *once the process was decided upon*, was transparent and thorough.

“Public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one.” *See, e.g., Dorney v. Wakefield Police Dep’t*, 29 MCSR 405 (2016); *Cardona v. City of Holyoke*, 28 MCSR 365 (2015). Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers”, which is the lynch-pin to the basic merit principles of civil service law. *See e.g., Malloch v. Town of Hanover*, 472 Mass. 783, 796-800 (2015); *Flynn v. Civil Service Comm’n*, 15 Mass.App.Ct. 206, 208, *rev. den.*, 388 Mass. 1105 (1983).” *Pilling v. City of Taunton*, 32 MCSR 69, 72 (2019).

Further, performance during candidate interviews, especially for interviews for promotion to a senior level position in the department’s command staff, “is a relevant factor an appointing authority can use to judge an applicant.” *Sheehan v. City of Somerville*, G2-19-178 (2020). *See Frost v. Town of Amesbury*, 7 MCSR 137 (1994)(Commission upholds bypass where applicant's answers to situational questions were unsatisfactory); *LaRoche v. Department of Correction*, 13 MCSR 159 (2000)(Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead); *McMahon v. Town of Brookline*, 20 MCSR 24 (2007)(poor interview performance can stand alone as the sole basis for bypass where there is no evidence of any inappropriate motivations on the part of the Appointing Authority).

There is little information about if or how the change in promotional hiring in September 2018 was decided in conjunction with the union's decision-making process. Chief Ross's decision to impose a new type of promotional process marked a significant change from past policy, where the previously hired sergeant was promoted without an interview and based on the Chief's recommendation. Both Candidates 2 and 3 benefitted from the change in procedure, as they were ranked third and fourth on the Civil Service list. At a meeting on May 11, 2018 with Candidate 3 and Candidate 4 and Sergeant A (who was not a candidate for promotion), the Police Chief stated that he would "kill the list," meaning he would not fill the two open Sergeant positions; however, the record does not reflect that this statement was intended to prejudice the Appellant. The union had asked for a written description of the change in process so that the union could bring that information to its attorney. Ultimately, if the change in interview process did not adhere to the requirements negotiated as part of the collective bargaining agreement, a potential violation of the collective bargaining agreement should be pursued through the grievance process, not the Commission.

There is a flaw in the promotional hiring process of September 2018. Town Administrator Morin, in his informal conversation with the BOS Chair prior to the BOS interviews, supplied information about the Appellant's participation in the interview panel that was not fully accurate. Specifically, Mr. Morin stated that the panel agreed on not promoting the Appellant because in a question about an active shooter scenario, the Appellant had answered in a way that did not follow policy and that the Appellant, when asked to suggest a new policy on another matter, provided an answer that was already established policy. Because of this information, the Chair "was convinced" and made up her mind about the Appellant prior to his interview with the BOS, in effect tainting her participation in the BOS interview process.

However, this aspect of the Town's promotional hiring process in September 2018, while important, is just one aspect of the Town's decision to bypass the Appellant. In all, that process was fair and impartial. When compiling the panel, Chief Ross included two other Chiefs of Police whom he knew professionally. The panelists treated the candidates equally and all questions were asked of all candidates. The twenty questions asked involved the exact types of questions Chief Ross indicated would be asked in his email to union leadership: policy, management and supervision of personnel, and scenarios. While some of the scores reflected differences in opinion, the scores of all panelists were not wholly arbitrary, even though a model answer or method of scoring would have helped to eliminate some subjectivity in scoring.

One of the Appellant's responses, specifically to Question 5, was overtly scored lower and more subjectively by Mr. Morin, in all likelihood because Chief Ross told the panel that the Appellant's answer about a policy was incorrect.⁸ That single question, on which the Appellant scored differently than candidates 2, 3, and 4 in Mr. Morin's scoresheet, did not impact his overall score given the number of other questions, the slight variations in scores from all panelists, and the inherent subjective nature of an interview. In other questions, the difference in scores do not justify the differences in answers; however, in Mr. Morin's case, the differences were primarily in scoring a half point. This was the single occurrence of Chief Ross's intervention in the scoring process for any candidate.

In other scoring, the Appellant's answer was not the most thorough answer of all the candidates' responses, and the scores accordingly reflect that difference. For instance, the Appellant generally had shorter and less thorough answers to Question 6, 13, 14, and 15 when compared to the other candidates. Moreover, the scoring of the candidates' answers during the

⁸ Mr. Morin's scoring of the Appellant compared with other candidates could have been the result of the Appellant having interviewed first, as he credibly testified.

three-person interview, though inherently subjective, demonstrated a difference in each candidate's skills and knowledge to function in the role of a police sergeant. To give an example, Candidate 4 answered Question 6 in a more thorough way, incorporating taking other steps in an active shooter situation, such as contacting sister agencies and setting up particular stations for specific priorities near the school.

The evaluation of the Appellant under Bypass Reason 1 was reasonable and justifiable based on the record of the interviews, testimony of two panelists, and policies the panelists had when scoring. In its entirety, the record concerning the panel interview demonstrates a thorough process and justification to bypass the Appellant.

Bypass Reasons 2 Through 4

Even if the first reason for bypassing the Appellant was not justified, the other bypass reasons detailed in the Town's letter to the Appellant indicate that the Appellant did not possess the qualifications possessed by the successful candidates, which qualifications the Town deemed necessary for the promotion. The successful candidates engaged in specialized training, community policing efforts and Department-sponsored events and they applied for specialty positions, which were emphasized in this hiring process. The Appellant certainly possesses supervisory skills gained while being a union leader in positions of president, vice, president, and treasurer, as well as during the many years he has employed others at his own business. Unlike the other candidates, however, the Appellant lacked the breadth of specialized police training and specialty police position experiences that the Town wanted and which it had the discretion to pursue in filling the sergeant positions. In addition to bypassing a candidate for appropriate negative reasons, an appointing authority may bypass a candidate for positive reasons, as when one police candidate obtains specialty training and assumes specialty responsibilities that another

candidate has not. Here, the Town identified the specific skills and diversity of police work that it sought in the sergeant candidates. The Town promoted the two candidates it found had the training and work experience and bypassed the Appellant for not having the training and experience it sought. The Appellant's lack of training and experience that the Town sought provided the Town with reasonable justification for bypassing the Appellant for the Sergeant promotion.

As a final matter, the Appellant requests that I draw a negative inference from the fact that Chief Dunn, the third panelist on the interview panel, was available and was not called to testify at hearing. I decline to do so as the record provides adequate evidence on which to render a decision and the Appellant has not established a legal basis for requiring the appointing authority to call a particular witness.

Conclusion

For these reasons, the City's decision to bypass the Appellant for promotion to Sergeant is affirmed and the Appellants appeal under Docket No. G2-18-223 is **denied**.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on April 8, 2021.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Gary Nolan, Esq. (for Appellant)

Paul Hodnett, Esq. (for Respondent)