

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

STEPHEN CAWLEY,
Appellant

v.

G2-07-423

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Stephen Cawley (hereinafter "Appellant"), filed this appeal on December 13, 2007 with the Civil Service Commission (hereinafter "Commission") claiming that the Respondent, Boston Police Department (hereinafter "BPD") as Appointing Authority, lacked reasonable justification to bypass him from promotion to the position of Lieutenant. The Appellant was notified on

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

December 5, 2007 that the BPD's reasons for his bypass were approved by the Personnel Administrator. The appeal was timely filed. A full hearing on this matter was held in the Commission's offices on April 2, 2008. Two (2) audiotapes were made of the hearing. The witnesses were not sequestered. The parties submitted proposed decisions.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 – 12 and Appellant Exhibits 1 – 3) and the testimony of BPD Director of Human Resources Robin Hunt (hereinafter "Ms. Hunt"), BPD Deputy Superintendent Norman Hill (hereinafter "Dep. Supt. Hill"), BPD Superintendent-in-Chief Robert Dunford (hereinafter "Supt. Dunford"), BPD Captain John P. Greland (hereinafter "Capt. Greland"), BPD Sergeant Keith Dalrymple (hereinafter "Sgt. Dalrymple"), and the Appellant, I make the following findings of fact:

1. The Appellant has been permanently employed with the BPD since 1983. He was promoted to police sergeant in 1996 and holds this rank today. The Appellant served as a Boston Police Cadet ² for two years before becoming a permanent employee of the Department. (Testimony of Appellant)
2. The Appellant served in the United States Air Force from 1978 to 1982. He received military commendations for good conduct, marksmanship, and for participating in a long tour overseas. He also received a unit citation. He was never disciplined while in the military and was honorably discharged. (Id.)

² The Boston Police Cadet Program is an on-the-job training program for Boston's youth seeking a career in law enforcement. The Program is a minimum of two-year commitment. Cadets rotate throughout the Department in various assignments and shifts, including Headquarters, District Stations, and other specialized units throughout the City. Primary responsibilities include: routine clerical and administrative duties, answering phones, data entry, traffic duty, utilizing Department vehicles, and related duties as required.

3. The Appellant received his Bachelors of Arts degree from UMASS Boston and a Masters of Science in Criminal Justice Administration from Western New England College. (Testimony of Appellant, Joint Exhibit 7)
4. The Appellant received several commendations from the BPD during his 23 years of permanent employment, including a letter of commendation for his actions in supervising the apprehension of armed and dangerous felons. In 2000 Supt. Dunford appointed him to the Department's Critical Incident Negotiation Team, a unit which specializes in hostage negotiations. (Testimony of Appellant, Joint Exhibits 8a – 8f)
5. In November of 2000, the Appellant was investigated by the BPD's Internal Affairs Division ("IAD"), IAD Case No. 217-00, for violations of Department Rule 102, §3 (Conduct) and Rule 102, §4 (Neglect of Duty). On September 22, 2000, while assigned to perform a paid detail for the Department of Public Works, the Appellant who was the detail supervisor, left the detail to conduct personal business. On October 19, 2000, the Appellant acting as the Patrol Supervisor, again conducted personal business while assigned to a tour of duty. The Appellant admitted to this misconduct, and to a settlement agreement to a thirty (30) day suspension via a settlement agreement. The Appellant was only required to serve ten (10) days of the suspension: twenty (20) days were held in abeyance for one year - to be imposed only if he engaged in further misconduct. (Joint Exhibits 5 and 6)
6. Though the settlement agreement does not detail the Appellant's misconduct, the Appellant conceded that such business involved having sexual intercourse with a female companion. (Joint Exhibit 3)

7. The Complaint giving rise to IAD Case No. 217-00 was initiated following an investigation into the Appellant's behavior on two separate occasions. The investigation determined that on September 22, 2000, while assigned to perform a paid detail as the detail supervisor, the Appellant left the detail site to engage in sexual conduct with a female. At the time, the Appellant was responsible for the supervision of five (5) subordinate officers, was on duty, in uniform and in a Department vehicle. The Appellant received pay for a full shift. (Testimony of Dep. Supt. Hill and Joint Exhibits 3 and 5)
8. The investigation also determined that on October 19, 2000 the Appellant left his assignment to engage in sexual conduct with a female. At that time, the Appellant was on duty as the Patrol Supervisor, in uniform and in a Department vehicle. (Testimony of Dep. Supt. Hill)
9. The Appellant served his ten (10) day suspension in April of 2001. Since he did not engage in further misconduct, the twenty (20) days of his suspension held in abeyance for one year never had to be imposed. IAD Case No. 217-00 is the only blemish on the Appellant's record. (Testimony of Appellant)
10. In September of 2005, the BPD bypassed the Appellant for promotion to the position of police lieutenant based on IAD Case No. 217-00, and its ensuing suspension. The Appellant filed a timely appeal of that bypass with the Commission, Docket No. G2-05-351. The BPD and the Appellant then entered into a settlement agreement resolving that matter and another case also filed with the Commission, Docket No. G2-05-377. This Commission granted the Appellant Chapter 310 Relief, and the Appellant withdrew his bypass appeal. (Stipulated Fact)

11. As a result of the Chapter 310 relief, the Appellant's name appeared at the top of civil service certification no. 271025 for lieutenant in the BPD in November 2007. He was again bypassed due to IAD Case No. 217-00. (Joint Exhibits 2 and 3)
12. Lieutenants are responsible for overseeing all officers on duty during each shift, ranging from thirty (30) to forty (40) people, and ensuring compliance with Department Rules and Procedures. A lieutenant is also responsible for the processing of prisoners, the assignment of details, and reporting to the Captain, among other responsibilities. The lieutenant often serves as the duty supervisor when working in a District. (Testimony of Supt. Dunford, Joint Exhibit 1)
13. Lieutenants have a heightened responsibility since they are responsible for supervising subordinates in the performance of their duties and insuring their compliance with law, department policy, procedures, rules and regulations and accepted police practices. When a lieutenant is in command of an Area, he or she is held fully accountable for the conduct of affairs within the Area and is responsible for the guidance and supervision of sergeants and patrol officers under his/her command. (Id.)
14. The Appellant has been assigned to District C-11 since 2001. There are approximately 10 sergeants and 4 lieutenants assigned to C-11. In a given tour of duty there is one lieutenant and a minimum of 3 sergeants. The Appellant currently works the first-half tour of duty, 4:00 PM to 11:45 PM. The Appellant has also worked the day tour of duty, 7:30 AM to 4:00 PM, and the last-half tour of duty, 11:45 PM to 7:30 AM the following day. (Testimony of Appellant)

15. Each tour of duty must have one patrol supervisor responsible for the oversight of officers working the streets during that shift. Sergeants serve as patrol supervisors, however, but in their temporary absence a lieutenant may serve as a patrol supervisor on an overtime basis.³ (Testimony of Appellant and Supt Dunford)
16. Each tour of duty must have one duty supervisor who is responsible for the following: administrating roll call and ensuring that all officers have the information that they need to carry out their assignments for that shift; filling unanticipated vacancies in the shift; monitoring all 9-11 calls coming in for the district; monitoring all incidents going on in the district by radio; providing radio and/or telephone assistance to all officers working in the district; reading and editing all reports written by officers related to incidents responded to in the community. (Testimony of Appellant and Joint Exhibit 2)
17. The only difference between a sergeant and a lieutenant serving as the duty supervisor is “personal relations” in that a sergeant has to give orders out to other sergeants without having the permanent higher rank of lieutenant to provide higher authority behind such orders. Capt. Greland testified that sergeants must be “diplomatic” in these matters since, at the end of the shift, “they are still sergeants” and continue to be peers of those to whom they had issued directives. (Testimony of Capt. Greland)

³ Article XIII of the collective bargaining agreement between the Boston Police Superior Officers Federation and the City of Boston provides that when an employee performs temporary service in a rank higher than that rank in which s/he performs regular service s/he is compensated for such service at the rate to which s/he would have been entitled had he been promoted to such rank. Thus, when a sergeant serves out of rank as a lieutenant s/he is paid at the rate of a lieutenant. (Joint Exhibits 10 and 11)

18. The Police Commissioner retains the sole discretion to make personnel assignments.

The Police Commissioner has delegated part of that discretion to his commanding officers (or captains) in each of his police districts. Captains are responsible for assigning patrol and duty supervisors to each tour of duty. Thus, captains are responsible for assigning sergeants, in the absence of lieutenants, to serve out-of-rank as the duty supervisor. (Testimony of Supt. Dunford, Capt. Greland and the Appellant)

19. Since at least 2001, it has been the practice in C-11 for captains to let the sergeants decide amongst themselves who will be acting as the duty supervisor. The captain only gets involved if there is a dispute.⁴ (Id.)

20. Since 2000, the Appellant has acted as the duty supervisor on numerous occasions acted as the duty supervisor. Currently, the Appellant is one of five (5) sergeants – the others being McMaster, Burns, Dalrymple, and Taxter - assigned to the first-half tour of duty. The Appellant, Dalrymple, Burns and Taxter (on overtime) are available to act out of grade as a duty supervisor during the first-half tour of duty. Dalrymple and Burns dislike the duty supervisor assignment and have frequently declined it. The Appellant always volunteers and takes every available opportunity to act as the duty supervisor. (Testimony of Appellant, Capt. Greland and Sgt. Dalrymple and Appellant Exhibits 1, 2 and 3)

⁴ In 2004, the Boston Police Superior Officers Federation filed a grievance contesting this practice and arguing that temporary lieutenant vacancies should be filled in accordance with the civil service list for sergeant, *i.e.*, the first sergeant on the list and in the district where the vacancy occurred got to serve as the acting lieutenant and duty supervisor. The City argued that the assignment of personnel was within the sole purview of the Commissioner and the Commissioner's delegation of such assignment power to his commanding officers in each of the districts and the city-wide practice of letting sergeants work out amongst themselves who should serve as acting lieutenant must prevail. The Arbitrator ruled in favor of the City and thus the practice continues today. (Joint Exhibit 12)

21. The Appellant provided statistics to show he acted as a duty supervisor 57 out of the 193 days that he was regularly scheduled to work in 2001. He testified that he served in such capacity without issue. In 2002, the Appellant acted as a duty supervisor 86 out of the 216 days that he was regularly scheduled to work, again with no problems. (Appellant Exhibit 1)
22. Supt. Dunford was the commanding officer of C-11 in 2001 and 2002. He was aware of the Appellant's conduct in 2000 and the resulting suspension. Supt. Dunford was aware that the Appellant frequently acted as the duty supervisor in 2001 and 2002. Supt. Dunford never denied the Appellant the opportunity to act as the duty supervisor. (Testimony of Supt. Dunford)
23. Capt. Greland is the captain assigned to Area C-11 and is responsible for its day-to-day operation and police services for approximately 70, 000 citizens. He further stated that a permanent lieutenant has been absent on injury leave since the summer of 2007. He stated that the Appellant frequently acts as the duty supervisor and that he has never denied the Appellant this opportunity. (Testimony of Capt. Greland)
24. The Appellant often volunteered or was sometimes the only available candidate. As a Sergeant was assigned to the first-half tour of duty, the Appellant worked on four (4) different days and was one of at least three (3) Sergeants assigned to the district. On the first two days, the Appellant would work with Sergeants Dalrymple and McMasters. On those two days, the Appellant was the only officer available to act as the duty supervisor. Specifically, Sgt. Dalrymple was the Anti-Crime Sergeant or the Patrol Supervisor and worked on the street and Sergeant McMasters was assigned to the Safe Street team and also worked on the street. On the second two nights of the

tour of duty, the Appellant worked with Sergeants Dalrymple, Burns, and Taxter. Similar to the first two nights of the tour of duty, Sgt. Dalrymple either served as the Anti-Crime Sergeant or the Patrol Supervisor, Sergeant Burns preferred to work on the street, and Sergeant Taxter was assigned to the Safe Street team. Based on the assignments of the other eligible Sergeants, the Appellant was the only one available to act as the duty supervisor and ultimately received the assignment by default. (Testimony of Appellant and Sgt. Dalrymple)

25. Supt. Dunford and Capt. Greland both testified that an acting duty supervisor is only responsible for the individuals working on that particular tour, or shift. In contrast, a permanent lieutenant is responsible for overseeing three (3) different shifts and the officers assigned to those shifts. Supt. Dunford emphasized that a permanent lieutenant “is much different and has greater responsibility” than an acting duty supervisor. (Testimony of Supt. Dunford and Capt. Greland)

26. Supt. Dunford testified that he convenes meetings of other superintendents to review candidates for promotion, including the candidates’ IAD histories, if any. He then makes recommendations for promotion to the Commissioner, to whom he directly reports. He stated that he and the other superintendents who reviewed the Appellant’s candidacy in the instant matter unanimously recommended that the Appellant be bypassed based on his previous discipline. (Testimony of Supt. Dunford)

27. Supt. Dunford testified that it was the consensus of the reviewing superintendents that leaving his post and his subordinate officers without supervision reflected poorly on the Appellant’s “judgment, character and command ability.” (Id.)

28. On November 14, 2007, Ms. Hunt notified the Personnel Administrator of the BPD's recommendation to bypass the Appellant for promotion and the reasons for the recommendation pursuant to G.L. c. 31, § 27. (Testimony of Ms. Hunt and Joint Exhibit 3)
29. On December 5, 2007, the Human Resources Division notified the Appellant that the reasons for the Department's recommendation to bypass him for promotion were acceptable. The Appellant subsequently filed a timely appeal with the Commission. (Testimony of Ms. Hunt and Joint Exhibit 4)
30. I find that there were no issues regarding the veracity of any individual's testimony in this matter, and therefore I make no adverse credibility assessments. The issue before the Commission is the Appellant's argument that he cannot be denied promotion to a position for which he has performed the relevant job duties, for a significant period of time without incident.

CONCLUSION

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided

by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, 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.” 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. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds 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.” Borelli v. MBTA, 1 MCSR 6 (1988).

The Respondent did show, by a preponderance of the credible evidence presented at hearing, that the Appellant’s rights have not been abridged by the BPD in that the BPD

sustained its burden of proving reasonable justification to bypass the Appellant for promotion to the rank of lieutenant.

At the hearing on this matter, the BPD presented substantial evidence, through both oral testimony and corroborating documentation, that on two separate occasions, the Appellant's behavior evidenced a total lack of judgment and inability to supervise. In addition to the BPD's evidence, the Appellant did not refute that the incidents happened as described and that he ultimately accepted responsibility for his actions through a settlement agreement. The BPD appropriately considered the Appellant's previous behavior, and due to the egregious nature of the violations and their direct correlation to his actions as a supervisor, determined that he was not a suitable candidate for promotion to the rank of lieutenant.

The Appellant's assertion that successfully acting as duty supervisor on his usual shift fails to make a convincing comparison between those duties and the duties and responsibilities required of a permanent lieutenant. Acting as duty supervisor requires an individual to ensure that the shift runs smoothly in the absence of a superior officer. Serving as a permanent lieutenant, as Supt. Dunford emphasized (and the position description documents), "is much different and has greater responsibility" than a duty supervisor. The Appellant has benefited from the fact that he is often the only individual willing to work out-of-grade as duty supervisor and make the higher pay that accompanies that duty. It is clear, however, that the BPD fills the acting duty supervisor slot by necessity and not by merit considerations. That is not the case when making a decision as to who is suitable for a permanent command position and the BPD was

reasonably justified in considering the Appellant's serious breach of his command responsibilities in 2000.

Therefore, for all the reasons stated herein, the appeal filed under Docket No. G2-07-423 is hereby *dismissed*.

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on July 24, 2008.

A true record. Attest:

Commissioner

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

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

Notice to:

Leah M. Barrault, Esq. (for Appellant)

Nicole I. Taub, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)