

# The Commonwealth of Massachusetts

Decision mailed: 12/18/09  
Civil Service Commission

ACM

SUFFOLK, ss.

CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108  
(617) 727-2293

**MICHAEL J. CLARK,**  
*Appellant*

v.

**BARNSTABLE  
POLICE  
DEPARTMENT,**  
*Respondent*

Docket No. G2-08-60

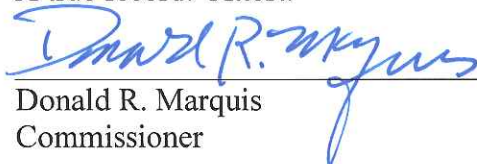
## DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on December 17, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 17, 2009, in which the Magistrate recommended dismissing the appeal. The Commission also acknowledged the comments from the Appellant which were received on September 11, 2009, and comments from the Respondent which were received on October 5, 2009. After careful review and consideration of the Magistrate's recommended decision and the comments of the parties, the Commission vote to adopt the findings of fact and the recommended decision of the Magistrate was a 2-2 tie vote with one Commissioner not participating. As a result, the Appellant's appeal is hereby *dismissed*.

A copy of the Magistrate's report is enclosed herewith.

By vote of the Civil Service Commission (Henderson - NO, Marquis - YES, Stein - YES and Taylor - NO, [Bowman, Chairman, not participating] Commissioners) on December 17, 2009.

A true record. Attest.

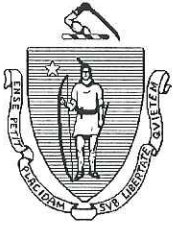
  
Donald R. Marquis  
Commissioner

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:

Brian E. Simoneau, Esq. (for Appellant)  
T. David Houghton, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR  
Boston, MA 02114

Tel: 617-727-7060  
Fax: 617-727-7248

August 17, 2009

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


**Re: Michael Clark v. Barnstable Police Department**  
**DALA Docket No. CS-08-493**

RECEIVED  
2009 AUG 18 A 10:08  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

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

Sincerely,

  
Richard C. Heidlage  
Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Brian E. Simoneau, Esq.  
T. David Houghton, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Michael Clark,  
Appellant

Docket No. G2-08-60  
DALA No. CS-08-493

v.

Barnstable Police Department,  
Appointing Authority

Appearance for Appellant:

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

Appearance for Appointing  
Authority:

T. David Houghton, Esq.  
Town of Barnstable,  
Office of the Town Attorney  
367 Main Street  
Hyannis, MA 02601

Administrative Magistrate:

Joan Freiman Fink, Esq.

COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

2009 AUG 18 A 10:08

RECEIVED

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31 §2(b), the Appellant, Michael Clark, is appealing the January 7, 2008 decision to bypass him for appointment as a Lieutenant with the Barnstable Police Department. On March 3, 2008, the Human Resources Division accepted the reasons proffered by the Barnstable Police Department for this bypass (Exhibit 15). The Appellant filed a timely appeal of this decision with the Civil Service Commission in accordance with the provisions of G.L. c. 31 §2(b) (Exhibit 14).

A hearing on the merits of the appeal was held on July 30, 2008 at the offices of the Division of Administrative Law Appeals, 98 N. Washington Street, Boston, MA. A second day of hearing was held on August 8, 2008. Various documents were entered into evidence at the hearing (Exhibits 1 – 19). Paul B. MacDonald, Police Chief of the Barnstable Police Department, testified on behalf of the Appointing Authority. The Appellant testified in his own behalf as did Sergeant Andrew McKenna, Lieutenant JoEllen Jason, and Lieutenant David Cameron, all of the Barnstable Police Department. A stenographic record was made of the proceeding.

The record in this matter was left open until October 3, 2008 for the filing of written closing memoranda.

### **FINDINGS OF FACT**

Based on the documents entered into evidence (Exhibits 1 –19) and the testimony of Paul MacDonald, Andrew McKenna, JoEllen Jason, David Cameron and Michael Clark, I make the following findings of fact:

1. The Appellant, Michael Clark, d.o.b. 11/3/69, is a graduate of UMass Amherst and has a Masters degree from Western New England College. He commenced employment with the Barnstable Police Department in 1995 as a police officer (testimony of the Appellant).
2. He served as a patrol officer for five years at which time he was promoted to the position of detective. He subsequently was promoted to the position of Sergeant in or about 2003 (testimony of the Appellant).

3. During the course of his tenure with the Barnstable Police Department, the Appellant received numerous commendations including a letter of commendation from the Attorney General's Office relative to his coordination of a police task force in the highly publicized investigation of a physician involved in a drug operation in the Barnstable area in 2005 (testimony of the Appellant, Exhibit 19).
4. The Appellant has not taken a single sick day during the course of his thirteen year tenure with the Barnstable Police Department (testimony of the Petitioner).
5. The entire complement of the Barnstable Police Department consists of 114 sworn officers, comprised of one Chief, two Deputy Chiefs, four Lieutenants, fifteen Sergeants, and ninety-two Patrol Officers (testimony of Chief MacDonald).
6. In November of 2006, a vacancy occurred for the position of Lieutenant in the Barnstable Police Department as a result of the appointment of then Lieutenant Paul MacDonald to the position of interim Chief. Paul MacDonald was subsequently appointed to the position of permanent Chief on August 16, 2007 (testimony of Chief MacDonald).
7. On November 8, 2007, the Town of Barnstable filed a request for a certification of eligible candidates from an existing department promotional eligibility list to fill the vacancy for one permanent full-time Lieutenant (Exhibit 14).

8. On or about November 20, 2007, the Town received the Certification List from the Human Resources Division (Exhibit 2).
9. This Certification List contained the names of three Sergeants in the Barnstable Police Department in order of score: the Appellant, Michael Clark, 90; Sean E. Balcom, 88; and Sean Sonnabend, 86 (Exhibit 2).
10. Prior to establishing the process for selecting the individual for appointment to the position of Lieutenant, Chief MacDonald met with the Superior Officers' Union to discuss the matter (testimony of Chief MacDonald, testimony of Sergeant McKenna).
11. Chief MacDonald, with input from the union, decided that the selection process would consist of four separate components: (1) profiles of the candidates that they individually prepared; (2) interviews to be held before a three member board consisting of the Chief of the Rochester, MA Police Department, a Lieutenant in the MBTA Police Department, and a Deputy Chief of the Barnstable Police Department; (3) interviews with Chief MacDonald; and (4) reviews of the personnel records by Chief MacDonald (testimony of Chief MacDonald).
12. The candidates for the Lieutenant position all completed and submitted personal profiles to the Chief (Exhibits 3 & 4).
13. Interviews by the three member board were held on December 12, 2007. The candidates were judged on a scale of 1 - 100 on the following categories: attitude affecting law enforcement, general character traits, perception and

consequent judgment, leadership traits/potential for growth, education and experience, and general fitness for the position (Exhibits 5 & 6).

14. Sean Balcom received scores of 98.5, 100, and 91 from the individual members of the board for a composite score of 289.5, while the Appellant received scores of 98, 91, and 94.5 for a composite score of 283.5 (Exhibits 5 & 6).
15. Chief MacDonald subsequently reviewed the analyses of those interviews prepared by the board members (testimony of Chief MacDonald, Exhibits 5 & 6).
16. On December 13, 2007, Chief MacDonald gave each candidate for the Lieutenant position a written request that they submit in writing no later than December 19, 2007, a community policing plan including a mission statement and a list of the resources needed, including personnel to accomplish their stated objectives (Exhibit 7).
17. All three candidates including the Appellant submitted their written community policing plans within the required time period (Exhibits 8 & 9).
18. Sergeant Balcom's community policing plan addressed several key issues that the Appellant failed to address including funding and organizational changes (testimony of Chief MacDonald).
19. Chief MacDonald then scheduled and held interviews with all three candidates in or about the last week of December (testimony of Chief MacDonald).

20. Prior to making his decision, Chief MacDonald spoke to his command staff and supervisors, requesting their input as to the various candidates for the Lieutenant position (testimony of Chief MacDonald).
21. At the time of the interviews, Sergeant Balcom had eighteen years' experience with the Barnstable Police Department. The Appellant had twelve years of experience and was several years younger than Balcom (testimony of Chief MacDonald).
22. Both Sergeant Balcom and the Appellant supervised numerous complex and sensitive investigations (testimony of Chief MacDonald).
23. In 2004, Sergeant Balcom was selected by the Town Manager of the Town of Barnstable as the outstanding employee of the year (testimony of Chief MacDonald).
24. Neither Sergeant Balcom nor the Appellant had any prior disciplinary record (testimony of Chief MacDonald).
25. On or about January 7, 2008, Chief MacDonald promoted Sergeant Sean Balcom to the permanent full-time position of Lieutenant in the Barnstable Police Department (Exhibit 2).
26. On January 8, 2008, Chief MacDonald notified the Human Resources Division of the Commonwealth of Massachusetts in writing that he had selected Sergeant Balcom for the position of Lieutenant in the Barnstable Police Department and that he was bypassing the Appellant for appointment to that position (Exhibit 2).



27. In his letter of January 8, 2008 to the Human Resources Division, Chief MacDonald outlined the selection process for the position as well as a detailed explanation for his decision to select Sergeant Balcom rather than the Appellant. Chief MacDonald stated that Sergeant Balcom “supervised the only full-time undercover police officer in department history during the six-month period that this officer operated.” The Chief noted that “Sergeant Balcom has been in charge of the Narcotics Unit for four years. In this role, he has gained a great amount of administrative experience in fiscal issues, budgeting, grants, scheduling, program development, preparing operational plans and policymaking” (Exhibit 2).
28. Chief MacDonald did not make any negative references to the Appellant in his letter of January 8, 2008 to the Human Resources Division. Rather, Chief MacDonald recited the reasons that he selected Sergeant Balcom for the Lieutenant’s position (Exhibit 2).
29. On March 3, 2008 the Human Resources Division sent the Appellant official notification that it accepted the reasons offered by the Barnstable Police Department for bypassing him for appointment as a Lieutenant (Exhibit 15).
30. On March 13, 2008, pursuant to G.L. c. 31 §2(b), the Petitioner filed a timely appeal of the decision of the Human Resources Division with the Civil Service Commission (Exhibit 13).

**CONCLUSION AND RECOMMENDATION**

After careful review of the testimony and evidence presented in this appeal, I recommend that the decision of the Human Resources Division accepting the reasons proffered by the Barnstable Police Department for bypassing the Appellant for appointment for the position to Lieutenant be affirmed.

In a bypass case, the Civil Service Commission must determine “whether the appointing authority has sustained its burden or proving that there was reasonable justification for the action taken by the appointing authority.” See *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). “Justified” in this context means “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.* at 304.

Appointing Authorities are to be accorded wide discretion in selecting individuals from a certified civil service list of eligible candidates for a specific position. The issue before the Civil Service Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). See *Commissioners of Civil Service v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

In this case, the Appointing Authority, the Barnstable Police Department, selected Sean Balcom and bypassed the Appellant for appointment to the position of Lieutenant.

Chief MacDonald offered multiple reasons for his selection of Balcom, all of which I found to be sound, sufficient, and reasonable.

In the first instance, Chief MacDonald offered that Balcom had more experience than the Appellant. He noted that both Balcom and the Appellant were seasoned professionals who had received numerous commendations for their police work. At the time of his selection, Balcom had eighteen years of experience as a police officer versus the Appellant's twelve years of experience.

Chief MacDonald testified that Balcom had been in charge of the Narcotics Unit for four years and had supervised the only full-time undercover police officer in the history of the Barnstable Police Department. Chief MacDonald further testified that Balcom had gained administrative experience in fiscal issues, budgeting, and preparing operational plans as part of his oversight of the Narcotics Unit as well as his supervision of the undercover officer. In addition, the Chief stated that Balcom has been responsible for designing accounting procedures and preparing monthly reports for various federal and state grants. While Chief MacDonald acknowledged that the Appellant had been involved in many investigations, sometimes as the lead investigator, the Chief emphasized that Sergeant Clark had not been in charge of the Narcotics Unit nor had he (Clark) handled the complex financial issues that Balcom had faced.

As part of the selection process, Chief MacDonald assembled a three member board to interview the candidates and to assess their abilities. The board consisted of the Chief of the Rochester, MA Police Department, a Lieutenant in the MBTA Police Department, and a Deputy Chief of the Barnstable Police Department. After conducting

interviews of the candidates, the board awarded Balcom a higher composite score of 289.5 (of a possible 300) than the Appellant who received a composite score of 283.

Chief MacDonald also requested that the candidates submit a written presentation on community policing. At the hearing, Chief MacDonald testified that Balcom's presentation addressed several issues not discussed in the Appellant's plan including funding and necessary organizational changes. According to Chief MacDonald, in his written presentation, Balcom demonstrated a far greater overall grasp of law enforcement issues and problems than the Appellant did in his presentation.

Chief MacDonald conducted personal interviews of Balcom and Clark. According to Chief MacDonald, during the interviews, Balcom displayed a more comprehensive understanding of the workings of the Barnstable Police Department than the Appellant.

Finally, the Chief opined that his selection of Balcom for the position of Lieutenant and the bypass of the Appellant for that position was based on the fact that Balcom had more experience and demonstrated a better overall performance on the various selection component parts than the Appellant.

The Appellant argued that since he had achieved a two point higher score on the promotional examination than Balcom, he (Clark) should be appointed to the position of Lieutenant, not Balcom. Notwithstanding the above, in the recent case of *Sellon v. Mansfield Police Department*, G2-05-172 (dec. 2/21/08), the Civil Service Commission, in affirming the bypass of an officer to the position of sergeant despite the fact that the officer had scored higher on the promotional examination than the candidate selected, addressed the very same issue. In *Sellon*, supra, the Civil Service Commission held that

“paper and pencil civil service examinations should not be used as the sole determinant when making hiring and promotional decisions, particularly when it concerns appointments as important and sensitive as a police sergeant.” In the present case, the conclusion of the three member interview board was consistent with the conclusion reached by Chief MacDonald to the effect that Balcom had more experience and demonstrated a higher level of understanding of police work than the Appellant.

The Appellant further argued that Balcom’s selection constituted a retaliatory action by Chief MacDonald as a result of his (Clark’s) statement at a union meeting favoring the retaining of the Chief’s position in Civil Service. The Appellant noted that the position of Chief of the Barnstable Police Department is no longer a civil service position and that Chief MacDonald was not pleased with the Appellant’s vocal opposition to the removal of his position from civil service.

Despite the Appellant’s assertion, I found no evidence of inappropriate motivation or bias on the part of Chief MacDonald in his decision to bypass the Appellant and select Balcom for the position of Lieutenant. The interview component of the selection process by the three member board, two of whom were not affiliated with the Barnstable Police Department, was completely neutral. The findings of this three member board were fully consistent with the findings of Chief MacDonald to the effect that Balcom was the better candidate for the position of Lieutenant.

Moreover, Chief MacDonald praised the Appellant’s accomplishments with the department and stressed that the Appellant was not only an excellent police sergeant but that at some point in the future, he (Clark) could even be selected for the position of Chief of Police. Chief MacDonald stressed that he was faced with a very difficult

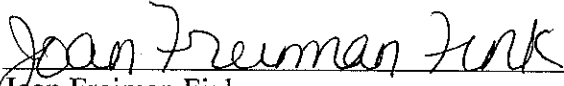
decision and that the selection of Balcom was not a reflection on Clark's dedication and professionalism but rather on Balcom's greater experience and comprehension of police work.

I found Chief MacDonald to be a sincere and persuasive witness and fully credited his testimony to the effect that the decision to bypass the Appellant was based on fair and impartial criteria.

Based on the above, I conclude that the Appointing Authority has met its burden of proof to demonstrate that its reasons for bypassing the Appellant were sound, sufficient, and fully justified.

Accordingly, I recommend to the Civil Service Commission that the Appellant's appeal be denied and that the decision of the Human Resources Division upholding the Barnstable Police Department's bypass of Michael Clark to the position of Police Lieutenant be affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

  
Joan Freiman Fink  
Administrative Magistrate

Dated: **AUG 17 2009**