

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL CONNOR,
Appellant

CASE NO. G2-16-159

v.

ANDOVER POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Rebecca C. E. Tatem, Esq.
Law Office of Joseph L. Sulman
391 Totton Pond Road, Suite 402
Waltham, MA 02451

Appearance for Respondent:

Wendy H. Chu, Esq.
Deutch Williams Brooks DeRensis & Holland, P.C.
One Design Center Place, Suite 600
Boston, MA 02210

Commissioner:

Paul M. Stein

DECISION

The Appellant, Michael Connor, appealed to the Civil Service Commission (Commission), acting pursuant to G.L.c.31,§2(b), to contest his bypass by the Town of Andover (Andover) for promotion to the position of full-time permanent Police Sergeant with Andover Police Department (APD).¹ The Commission held a pre-hearing conference on October 24, 2016 at the Armand P. Mercier Community Center in Lowell, followed by a full evidentiary hearing at the Commission's offices in Boston on February 28, 2017 and March 13, 2017. The full hearing was digitally recorded.² Eighteen exhibits (Exh.1 through Exh.18) were received in evidence. On April 12, 2017, each party submitted a Proposed Decision.

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.

² Copies of the CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the stenographic or other written transcript of the 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.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- APD Police Chief Patrick Keefe
- APD Police Lieutenant Edward Guy
- APD Police Lieutenant Frank Fitzpatrick
- Andover Deputy Town Manager, John Mangiaratti

Called by the Appellant:

- APD Patrolman, Michael Connor, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of the evidence establishes these facts:

The Appellant

1. The Appellant, Michael Connor, grew up and now lives in Andover MA. He holds the tenured civil service position of Patrolman with the APD to which he was appointed in 1998. He has an unblemished record, having received several awards and has never received professional discipline. (*Exh. 7; Testimony of Appellant*)

2. Since 2007, Officer Connor has served as the APD's sole K-9 officer, certified in patrol and narcotics detection. Officer Connor is one of the two APD officers³ who are members of the Northeastern Massachusetts Law Enforcement Council ("NEMLEC"), where he is part of a fifteen member K-9 Team on Platoon III. (*Exh. 7; Testimony of Appellant*)

3. In order to obtain his certification as a K-9 Patrol Officer, Officer Connor completed a sixteen-week academy with the Boston Police Department and an additional six-week academy to receive certification in Narcotics Detection. (*Exh.7; Testimony of Appellant*)

³ The other AFD officer is Lieutenant Frank Fitzpatrick who has been an NEMLEC member since 2008, also assigned to Platoon III, and has personal knowledge of Officer Connor's work with NEMLEC. (*Exh. 18; Testimony of Appellant & Fitzpatrick*)

4. As the APD's K-9 officer, Officer Connor and his canine partner (Niko, who passed away in 2012⁴ and his current dog) have been responsible to support Drug Unit searches and tracking searches for crime suspects, lost children and missing elderly persons. This work regularly calls for Officer Connor to direct other officers in tasks that he needs them to perform in the search operation. Officer Connor also holds a bi-annual two-day drug class for Andover ninth graders, part of which is a demonstration showing how his dog searches for drugs and tracks people. (*Exh. 7; Testimony of Appellant*)

5. As part of the NEMLEC K-9 Team, Officer Connor and his dog assist police departments throughout Northeastern Massachusetts in suspect, narcotics and missing person searches. Officer Connor and his dog were part of the NEMLEC K-9 Team that responded to the Boston Marathon Bombing in 2013. (*Exh. 7; Testimony of Appellant & Fitzpatrick*)

6. Officer Connor is a member of the United States Police Canine Association (USPCA), which holds annual Police Dog Trials in which Connor and Grimm have competed every year since 2013. In 2014, Officer Connor was the chairperson for the USPCA Police Dog Trials, and had overall responsibility for fundraising for the event, arranging for a venue, food and lodging for the competitors (human and canine), securing vendors, and organizing the awards banquet. In 2015, Officer Connor again helped organize that year's Police Dog Trials by securing the lodging, venue and food, as well as a donation from the APD Police Union. (*Testimony of Appellant & Fitzpatrick*)

7. Among his other duties for the APD, Officer Connor was selected as the APD's Taser instructor, which entailed teaching and certifying other APD officers in Taser use. He was selected to serve for several years as a member of the APD's Mountain Bike Patrol. He has also

⁴ When Niko passed away, Officer Connor was honored with the 2012 Robert T. Black Award, given to honor the APD's "Officer of the Year." (*Testimony of Appellant; Administrative Notice [https://www.andoverma.gov/269/Robert-Black-Award]*)

provided informal mentoring and guidance to junior officers on job-related judgement calls, both with and without a superior officer present, such as whether to arrest a person in front of a child.

(Testimony of Appellant)

8. Officer Connor is a decorated combat veteran who enlisted in the United States Marine Corp in 1988 and served on active duty until 1992. He attained the supervisory rank of Lance Corporal (E-3) around 1990 and the rank of Corporal (E-4) in 1991. He was trained in explosives and combat engineering and was deployed to Iraq where he was responsible for supervising and managing “Fire Teams” of four to six marines in the construction of underground bunkers and other defensive combat structures. He also handled disposal of hazardous materials. *(Exh. 7;*

Testimony of Appellant)

9. After discharge from active duty, Officer Connor attended San Diego State University and earned a bachelor’s degree in criminal justice in 1997. While attending college, he served as a Juvenile Probation Intern with the San Diego County Probation Department and, upon graduation, worked as a Juvenile Probation Officer for that agency until 1998, when he returned to Andover to accept the appointment as an APD patrolman. *(Exh. 7; Testimony of Appellant)*

10. In 2003, Officer Connor earned a master’s degree in criminal justice from Western New England College (now Western New England University). *(Exh. 7; Testimony of Appellant)*

The APD

11. The Andover Town Manager is the Appointing Authority for civil service appointments and promotions within the APD, upon the recommendation of the Police Chief. *(Exhs.3 through 5; Testimony of Keefe)*

12. The APD is comprised of approximately 63 sworn officers, including a Police Chief, six (6) Lieutenants, eight (8) Sergeants, 38 Patrolman and 10 Reserve Officers. *(Testimony of Keefe)*

13. The APD's command staff consists of Patrick Keefe, Chief of Police (APD 1998, US Army combat veteran, Lt Col. US Army Nat'l Guard); Lieutenant Edward Guy, who serves as the Executive Officer (Methuen Police Dep't 1984, APD 2004, 2006 Robert T. Black Award, USAF veteran; and Lieutenant Frank Fitzpatrick, Support Services Lieutenant (APD 2006, 2011 Robert T. Black Award). (*Exhs. 16 through 18; Testimony of Keefe, Guy & Fitzpatrick*)

14. An APD Sergeant is the first-line supervisor, who serves as the sole liaison between patrolmen and the leadership (Lieutenants). It requires coaching and mentoring patrol officers, ensuring compliance with all laws and regulations, and with all follow-up paperwork. The job is considered the "most difficult position" in the APD. (*Testimony of Chief Keefe*)

The APD's Prior 2015 & 2016 Sergeant Promotions

15. On April 18, 2015, the APD administered a departmental promotional Assessment Center examination for APD Sergeant. Officer Connor took and passed the Assessment Center examination and his score of 84 (including education & experience credits and veteran's points), placed him third on the 2015 eligible list of seven APD officers. (*Exh. 2; Testimony of Keefe*)

16. In August 2015, the APD promoted to Sergeant the officer ranked first on the 2015 eligible list. On September 6, 2016, the APD promoted to Sergeant the officer initially ranked second on the 2015 eligible, whose name then appeared first on the departmental promotional certification from which the promotion was made. Officer Connor, who appeared within the "2n+1" formula, along with the candidate then ranked third on the certification, just below Officer Connor, both were considered and interviewed for these two appointments that ultimately went to a higher ranked candidate. (*Testimony of Appellant & Keefe*)

17. After the September 6, 2016 appointment, the candidate then ranked third, just below Officer Connor, came to Lt. Guy for advice about his interview. Lt. Guy, who believes "leaders

are readers” recommended that the candidate read periodicals, some of which are kept at the APD police station, on “leadership topics.” Lt. Guy also spoke with Officer Connor to discuss ways he could improve on his initial interview performance. (*Testimony of Guy*)

The September 20, 2016 Appointment Process

18. On September 9, 2016, as a result of a retirement, a new vacancy for Sergeant was created for which the APD issued Requisition No. 02771 for a departmental promotional certification (SGT092016) dated September 20, 2016. Officer Connor’s name then appeared first on the certification along with the candidate just below him on the 2015 eligible list, now second, and the third candidate next in rank order on the eligible list, all of whom signed az\s willing to accept. (*Exh. 3; Testimony of Keefe*)

19. According to Chief Keefe, he knew how the candidates ranked on the certification but did not know their assessment center scores: “Placement on the list gets [the three candidates] an interview.” A panel consisting of Lt. Guy, Lt. Fitzpatrick and Deputy Town Manager John Mangiaratti was established to conduct interviews of all three candidates on September 20, 2016. (*Exhs. 9 through 15, Testimony of Appellant, Keefe, Guy, Fitzpatrick & Mangiaratti*)

20. Chief Keefe had participated in all promotional interviews since becoming Police Chief in 2013, but recused himself from the September 20, 2016 interviews because he had (positive) personal relationships with both Officer Connor and the now second-ranked candidate. All three attended the police academy together and joined the APD in 1998. Chief Keefe considers all three “friends”. Chief Keefe’s son “hangs out” with the second-ranked candidate’s son. (*Testimony of Keefe & Guy*)

21. Lt. Guy was the person who suggested that Chief Keefe recuse himself in the third hiring. Although neither he nor Chief Keefe believed that the Chief’s personal friendship with Officer

Connor and the second-ranked candidate posed any actual risk of favoritism, Chief Keefe agreed with Lt. Guy's advice that, in the interest of preserving the integrity of the process for the benefit of the third-ranked candidate, it was best to avoid even a perception of bias.⁵

22. Due to Chief Keefe's recusal, for the first time since he became Chief, the Deputy Town Manager was substituted for Chief Keefe on the interview panel. Although this was his first APD interview panel, Deputy Town Manager Mangiaratti had participated on a number of other interview panels for other positions with Andover, and, before that, for the Town of Westford MA. (*Testimony of Keefe & Mangiaratti*)

23. Chief Keefe, Lt. Guy, and Lt. Fitzpatrick all had direct percipient knowledge of the APD patrolmen who were being considered for promotion through professional interaction with them as peers and superior officers over the years. All three members of the command staff had also come up through the ranks and served as a Detective. Lt. Guy and Lt. Fitzpatrick both knew about Officer Connor's military service in the Marine Corps and, as indicated above, Lt. Fitzpatrick and Officer Connor worked together at NEMLEC. Lt. Fitzpatrick knew the third-ranked candidate "best", as he was neighbors with the family and had sponsored that officer when he originally applied to become an APD officer. Chief Keefe and Lt. Guy attended the Dog Trials that Officer Connor chaired. (*Testimony of Appellant, Keefe, Guy & Fitzpatrick*)

24. The September 20, 2016 interviews were not audio or video recorded. The panelists did not discuss the candidates amongst themselves or rate them until after all interviews were completed, at which time they each assigned a ranking (from 1 to 3, lower is better) to each

⁵Chief Keefe did participate in the interviews for the April 2015 promotion (in which Officer Connor was interviewed) and in the September 6, 2016 interview for which both Officer Connor and the second-ranked candidate in the September 20, 2016, then third, were both considered. Chief Keefe testified that, in hindsight, although neither of those appointments involved a bypass, he should not have been involved in the September 6, 2016 appointment either, for the same reason he recused himself in this cycle. No candidates raised any objection or concern to Chief Keefe's participation in the prior two Sergeant promotions. (*Testimony of Appellant, Keefe & Guy*)

candidate. Panelists received no instructions on how to score candidates or what criteria they should apply in evaluating them. Except for the final rankings, no other scoring or metrics were used by the panelists to weigh or evaluate the candidates' interview performance or qualifications. (*Exh. 15; Testimony of Guy, Fitzpatrick & Mangiaratti*)

25. Each interview panelist received a pre-printed "Sergeant Evaluation Form" which included space for a written narrative on three overall assessments: "Overall/Comments", "Pre-Interview" and "During Interview". The form also contained a series of seven interview questions that were asked of each candidate, with space for the interview panelist to provide a narrative related to the candidate's response to each question. (*Exhs. 9 through 14; Testimony of Guy, Fitzpatrick & Mangiaratti*)

Officer Connor's September 20, 2016 Interview

26. Officer Connor was the first candidate to be interviewed. His interview lasted about 15 minutes. He was suitably attired and presented each panelist with a copy of his resume and a letter of recommendation from the Police Chief of an adjoining town, who knew Officer Connor for twelve years, nine years of which they trained and worked together as K9 handlers. The letter stated:

"I believe he is an excellent candidate to be promoted to Sergeant . . . and will attest to his integrity and genuine love of this profession. . . . As a K9 officer, Officer Connor had to maintain physical conditioning [and] knowledge to make split second decisions He not only had to be concerned about his own well-being, but that of the other officers and his K9 and the decision he would make in the best interest of the dynamic situation. These are qualities of a great supervisor . . . whether on a routine shift, or at a significant event. . . ."

Officer Connor also provided a commendation from the former Andover Police Chief for "professionalism and coolness under pressure at the infant death you responded to on March 13, 2003 [Y]our compassionate handling of . . . situation demonstrated the best we have to offer as law enforcement professionals." (*Exhs. 7 & 9; Testimony of Appellant*)

27. Officer Connor observed each panelist look over his resume packet, so he did not reiterate the details of his accomplishments listed on the resume. He did reference his military experience and leadership ability as a K9 officer, indicating that he was someone who would lead “by example” and “from the front” and “take bits and pieces” learned from all of his fellow superior officers. He also pointed to his work with high school students. He said he sought the promotion as the “next step” in his career. When asked about what recommendations for improvements at the APD, he pointed to the “FTO [Field Training Officer [Program]]” and suggested it would be valuable to rotate new officers on shifts so that they get the experience of different FTOs. (*Exhs.9, 11,13; Testimony of Appellant, Gray, Fitzpatrick & Mangiaratti*)

28. Lt. Guy’s interview notes for Officer Connor’s interview state, in part:

Observations/Comments: *Suit, Resume*

Pre-Interview: *Seemed a little nervous*

During Interview: *had good answers on most questions. Did not articulate a specific plan [as to] what he would do in role. Stated he would get out of car or tell people to get out of car and talk to people. Did not expound on answers to question 3.*

(*Exh. 9*)

29. Lt. Fitzpatrick’s interview notes for Officer Connor’s interview state, in part:

Observations/Comments: *good resume and supporting documents*

Pre-Interview: *handshake, eye contact*

During Interview: *calm thought through his responses. Prepared well, clearly evident Officer Connor was himself in interview.*

Please provide for us a definition of what a leader is to you? Now please provide your definition of a Manager: Please provide an example of a person whom you believe is a great Leader and someone whom you would wish to exemplify. *Leads by example + from the front + learn from mistakes. Spoke about military background in Marines. . . knew difference between Leader + Manager. Takes bits and pieces from everyone, chose not to pick a Leader, learn from everyone.*

Can you point to a weakness and/or weaknesses that you believe are present within the Andover Police Department? What would you do to improve these issues? *Weakness is FTO program FTOs change shifts whereas there should be an FTO on each shift. Good answer to question . . .*

(*Exh. 11*)

30. Deputy Town Manager Mangiaratti took few notes during Officer Connor’s interview, writing in “During Interview” only the word “prepared” and brief notes on each of the seven

questions: “experience as K9”, “talk to others”, “lead by example”, “be prepared”, “understands his role”, “FTO training process can be improved” and “invested in town”. (*Exh. 13*)

The Second Ranked Candidate’s September 20, 2016 Interview

31. The second-ranked candidate also began as an APD patrolman in 1998. His resume shows that he was initially assigned to Patrol for two years, then transferred to the Traffic Division for four years, back to Patrol for three more years and, since 2007 has worked in the Detective Division. Prior to his appointment to the APD, he worked as a flooring installer (1990-1997) and as an Andover middle school custodian (1997-1998). He volunteers teaching about the APD to Andover students and coaches Andover youth sports. He served one year as the APD Patrolmen’s Union President. He earned an Associate’s Degree in Criminal Justice in 1998 and obtained his Bachelor’s Degree in Criminal Justice from Western New England College (now Western New England University) in 2001. His resume also lists dozens of OJT training he received from 1998 through March 2016. (*Exh. 8*)

32. The second-ranked candidate’s letter of recommendation came from the candidate’s direct supervisor for the past three years. The letter states, in part:

“As the Detective Sergeant for the Andover Police Department I . . . recommend Detective [name redacted] for the position of Police Sergeant. . . I feel he is very qualified for the position.

“[H]e has worked in detectives for nine years. . . . conducted criminal investigations, some of these were complex and/or serious in nature. As the detective on some of these scene’s [sic] he has taken on a role that equals a supervisor. He has excellent organizational abilities and strong leadership skills. If you combine this with dependability and dedication I know he would be a good candidate for promotion to this rank.”

(*Exh. 8*)

33. The second-ranked candidate said he wanted the promotion to “give back to younger officers” and would apply “stress reduction through emotional intelligence.” He mentioned reading books and articles on leadership. He provided examples (student government, captain on

sports teams, Union President and business owner) that showed he been a “leader looking to improve” his whole life. (*Exhs. 10 &12; Testimony of Guy & Fitzpatrick*)

34. Lt. Guy’s interview notes for the second-ranked candidate state, in part:

Observations/Comments: *Suit, Greeting to Board, Resume*

During Interview: *very articulate, Answered questions thoroughly, expounded on answers, confident, leadership roles – negative toward testing process, military points⁶*

Please provide for us a definition of what a leader is to you? Now please provide your definition of a Manager: Please provide an example of a person whom you believe is a great Leader and someone whom you would wish to exemplify. *Leader influences people - manager a position of authority that conducts tasks. Identifies an APD Sergeant [knowledgeable/communications skills] and APD Lieutenant [approachable, knowledgeable, assist young officers] he would emulate.*

Can you point to a weakness and/or weaknesses that you believe are present within the Andover Police Department? What would you do to improve these issues? *Good place to work. Improve SRO [School Resource Officer] in middle school . . . Rotational basis throughout schools . . .*

(*Exh. 10*)

35. Lt. Fitzpatrick’s interview notes for the second-ranked candidate state, in part:

Observations/Comments: *Very strong entrance, resume, squared away paper work*

Pre-Interview: *confident, eye contact, handshake, very ready and prepared*

During Interview: *very well thought out answers. Was able to answer two/three part questions without seeking clarification. Excellent materials, showed leadership quality and his vision of what he would do if promoted.*

(*Exh. 11*)

36. Deputy Town Manager Mangiaratti made only one note during the second-ranked candidate’s interview, writing “SRO Middle Schools SOAP” on the weaknesses in the APD that the candidate would improve upon. (*Exh. 14*)

The Decision to Bypass Officer Connor

37. After all of the three candidates were interviewed, the interview panel completed a rating sheet which displayed each panelist’s individual ranking of each candidate (from 1-3, lower is

⁶ This appears to relate to the candidate’s contention, noted by both Lt. Guy and Lt. Fitzpatrick, that the second-ranked candidate he was truly the “strongest candidate based on [pure exam] score” and he had been ranked below Officer Connor solely because Officer Connor was a veteran (which added two points to his final score) and he was not. Lt. Guy, as a veteran himself, considered the second-ranked candidate’s attitude about the preference granted to veteran's a “negative” on him. (*Exhs. 10 & 12; Testimony of Guy & Fitzpatrick*)

better). The form showed that each candidate was ranked exactly the same by each panelist – The second-ranked candidate on the certification received a “1” from each panelist; Officer Connor received a “2” from each panelist, and the third candidate (lowest on the certification) received a “3” from each panelist. (*Exh. 15*)⁷

38. Each panelist believed that Officer Connor performed well in the interview and was qualified for the Sergeant’s position, but that the second-ranked candidate on the certification had performed better at the interview. (*Testimony of Guy, Fitzpatrick & Mangiaratti*)

39. Typically, each candidate’s interview performance rankings were totaled and the candidate with the lowest total interview performance score would be recommended for hire; if there were a tie, the candidate ranked higher on the certification would be recommended. That step was not taken here, but, as each candidate received the same panelist rankings, totalizing would not have changed the comparative result. (*Exh. 15; Testimony of Keefe*)

40. After the interview panel completed their ratings, Chief Keefe received the rating sheet, the interview forms and the candidates’ resumes. In a post-interview debriefing, the panelists orally indicated to Chief Keefe that they believed the second-ranked candidate had done a “significantly better” job in answering the interview questions. (*Testimony of Keefe*)

41. What impressed Lt. Guy and Lt. Fitzpatrick most about the second-ranked candidate that set him apart from Officer Connor and the third-ranked candidate was the second-ranked candidate’s greater level of self-confidence and careful preparation, not only for the interview, but also as one who showed that he possessed the strong communications skills at all levels they looked for in a patrol supervisor, as shown by his articulate, detailed and “thought out” responses to the panel’s questions. (*Testimony of Guy & Fitzpatrick*)

⁷ The panelists’ had different recollections about how the rating sheet was actually completed. I infer that, more likely than not, each panelist knew what ratings the other panelists had chosen before actually recording his rating onto the form. (*Exh. 15; Testimony of Guy, Fitzpatrick & Mangiaratti*)

42. Based on the interview panel rankings and the panelists' oral debriefing, Chief Keefe met with the Andover Town Manger and recommended that Officer Connor be bypassed in favor of promoting the second-ranked candidate. He brought no documents with him for the Town Manager's review to this meeting. (*Testimony of Keefe*)

43. By notice dated September 20, 2016, and Form 16-II dated September 22, 2016, the Andover Town Manager officially notified the Massachusetts Human Resources Division (HRD) of the promotion to Sergeant of the second-ranked candidate listed on Certification SGT092016, effective September 27, 2016, and the non-selection/bypass of Officer Connor. (*Exhs. 4 & 5*)

44. On September 21, 2016, the day following the promotional decision, Chief Keefe met with Officer Connor and informed him that he had recommended the second-ranked candidate for promotion and that Officer Connor would receive a bypass letter. (*Testimony of Keefe*)

45. By letter dated September 22, 2016, Chief Keefe informed Officer Connor of the reasons for selecting the lower-ranked candidate, based solely on the positive factors he possessed. Chief Keefe's bypass letter stated no negative reasons for bypassing Officer O'Connor and stated: "While you were not selected for promotion on this occasion, I encourage you to apply for any future vacancies that may arise during the life of the current eligible list." The affirmative reasons for appointing the lower-ranked candidate were stated as follows:

'Officer [name redacted] has a strong command presence within the Andover Police Department. He also has proven leadership ability as demonstrated by his service as the President of the Patrolmen's Union. Officer [name redacted] has divers work experience throughout his 18 years of police service, having worked in Patrol, Traffic, Detectives and as an Evidence Officer. During his eight years as a Detective, he led both peers and superior officers through crime scenes and investigations. Officer [name redacted] is a self-motivated officer and has demonstrated a strong willingness to take on additional duties and responsibilities. Officer [name redacted] also possesses great communications skills.]

"During the interview, Officer [name redacted] was well-prepared and articulated numerous leadership roles he has served in his life (e.g. Union President, coach, volunteer). He also articulated a step-by-step plan on how he would handle his new shift if chosen as a Sergeant,

which the interview panel found to be well-thought out. The interview panel also found his responses to interview questions to be clear and concise and appreciated how he expounded on each of his answers. Officer [name redacted] discussed in detail the topic of handling stress on the job and addressed emotional intelligence as part of one's ability to deal with stress. He also demonstrated strategic thinking in explaining a plan to place a roving School Resource Officer in the Town's middle schools to improve police/student relations."

(Exh. 6)

46. Chief Keefe personally drafted the September 22, 2016 letter, with assistance of counsel. The letter draws mainly from the information provided to him about the interviews by the interview panelists and through their interview notes. He also drew on his own personal prior professional knowledge, experience and observations of the candidates. In particular, his statement about the selected candidate's "command experience" within the APD was his own personal observation, along with the information he had been given about the interview performance from Lt. Guy and Lt. Fitzpatrick. (Exhs. 6, 19, 12 & 14; Testimony of Keefe)

APPLICABLE CIVIL SERVICE LAW

Civil Service Examinations & Appointments

The core mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31 for "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and ensuring that "all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31,§1.

The principal mechanism to ensure adherence to these principles in hiring and promotion are the regular competitive qualifying examinations administered by the Massachusetts Human Resources Division (HRD), open to all qualified applicants, from which "eligible lists" of successful applicants are established, ranking them in order of their exam scores, along with certain statutory credits and preferences. The eligible list is then used to create a "Certification"

(containing the names of at least three candidate for each open position – known as the “2n+1” formula – also listing the names in the same rank order as they appear on the eligible list, from which an appointing authority must select the candidate(s) for the civil service appointment. G.L.c 31, §§6 through 11, 16 through 27; Personnel Administration Rules (PAR), PAR.09.

An Assessment Center Examination is one form of competitive examination, often used by appointing authorities (sometimes in conjunction with the more traditional form of written examination as well) to establish lists for promotional appointments (as opposed to original appointments for which a written examination alone is more typical). An Assessment Center Examination usually involves a day-long examination process designed by an expert in public safety testing approved by HRD, during which candidates are required to prepare written and/or oral responses to hypothetical scenarios that test their technical competence and management abilities, which are observed and scored by a panel of expert evaluators in an anonymous fashion, applying pre-determined objective criteria. See, e.g., Wilbanks v. Human Resources Div., 30 MCSR 316 (2017); Clarke v. Human Resources Div., 29 MCSR 1 (2016); Daley v. Town of Wilmington, 28 MCSR 460 (2015), aff’d sub nom, Town of Wilmington v. Civil Service Comm’n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

In order to deviate from the rank order of preferred hiring, and appoint a person below the “person whose name appears highest” on the Certification, an appointing authority must provide a specific, written statement of all of the reasons – positive or negative, or both – consistent with basic merit principles, for bypassing the higher-ranked candidate. G.L.c.31,§1,§27; PAR.08(4). ”Such statement shall indicate all . . . reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass. . . . 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.” Id.

Bypass Appeals to the Commission

A person who is bypassed may appeal under G.L.c.31,§2(b) for de novo review by the Commission. On appeal 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)

“Reasonable justification 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.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

In selecting public employees of skill and integrity, appointing authorities are vested with a certain degree of discretion. City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). It is not necessary, however, for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” Rather, the governing statute, G.L.c.31,§2(b), gives the commission broad “scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground.” City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997). In deciding “whether there was reasonable justification” shown for an appointing authority’s exercise of discretion, the Commission's primary concern is to ensure that the action comports with “[b]asic merit principles.” G.L.c.31,§1. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 188 (2010); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); MacHenry v. Civil Serv. Comm'n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass.1106 (1996); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). Although the commission does not “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority”, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*) The Commission holds that a bypass is not justified where “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).

Candidate Interviews

Police departments and other public safety agencies are properly entitled to, 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 principle of civil service law. E.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983). The Commission’s decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: Anthony v. Springfield, 23 MCSR 201 (2010); Gagnon v. Springfield, 23 MCSR 128 (2010); Boardman v. Beverly Fire Dep't, 11 MCSR 179 (1998). Examples of the latter: Conley v. New Bedford Police Dep't, 29 MCSR 477 (2016); Phillips v. City of Methuen, 28 MCSR 345 (2015); Morris v. Braintree Police Dep't, 27 MCSR 656 (2014); Monagle v. City of Medford, 23 MCSR 267 (2010); Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Belanger v. Town of Ludlow, 20 MCSR 285 (2007); Horvath v. Town of Pembroke, 18 MCSR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005); Saborin v. Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep't, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep't, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep't, 10 MCSR 133 (1997).

The Commission has given heightened scrutiny to interviews when it appears they became a means to nullify the results of a duly administered, objective Assessment Center Examination.

Daley v. Town of Wilmington, 28 MCSR (2015), aff'd sub nom, Town of Wilmington v. Civil Service Comm'n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

ANALYSIS

Under the specific circumstances of this case, Andover's selection of the lower-ranked of two qualified candidates from the list for promotion to Sergeant, bypassing Officer Connor, the more highly ranked candidate on the list, solely on the basis of a subjective assessment of candidates' relative interview performance does not pass muster as reasonable justification to bypass him. He deserves a fresh consideration of his candidacy under a properly conducted selection process consistent with basic merit principles under civil service law.

First, Andover's selection process placed the decision entirely in the hands of the interview panel, and gave no weight to performance in the Assessment Center Examination. Apparently, none of the interview panelists knew the candidate's scores on the Assessment Center Examination. Chief Keefe believed that the sole value to a candidate's placement on the eligible list was to provide the candidate a chance to participate in the interview that controlled the selection decision. The Commission need not decide that promotional interviews can never be used as the key determinate for selection. When such a process is used, however, it must be subject to heightened scrutiny, especially when it follows an Assessment Center Examination, for which candidates prepare thoroughly in advance and appear before HRD approved independent evaluators who score the candidates on a broad range of objective and statutorily prescribed criteria.

Second, although Andover's interview process provided a few safeguards against unduly subjective decisions, more should be required. None of the interviews were recorded. Only two of the three interview panelists took notes to any significant degree. Chief Keefe (due to his

recusal) was obliged to accept the panel’s recommendations based on the limited interview notes, the candidate’s resumes and the undocumented oral briefing he received from the panelists. The candidate’s responses to interview questions were not scored individually or using any specific pre-determined metrics. The panel’s recommendation, and, therefore, the promotional decision, rested exclusively on an overall ranking of the three candidate’s interviews and, even as to the overall rating, the panelists used no uniform metric sub applied their own personal criteria.⁸

Third, the limited interview notes from the two panelists who made them establish that, in their initial impressions about Officer Connor’s performance, they differed with each other. Lt. Guy thought Officer Connor “*seemed a little nervous*” but gave “*good answers to most questions*” (*emphasis added*). Lt. Fitzpatrick, however, had a quite positive impression (“*calm thought through his responses. Prepared well . . . was himself in interview.*”), somewhat at odds with what Lt. Guy perceived, what Chief Keefe wrote in the bypass letter, and how all of the witnesses portrayed their recollections at the Commission hearing. A more thorough rating system, rather than the rough and wholly subjective overall ranking that was used, would have better captured these subjective assessments and provided a more objective basis to confirm why the panelists concluded that the lower-ranked candidate’s performance was “significantly” better.

Fourth, Officer Connor argues that the process was biased, or at least skewed against him, pointing out two concerns: (1) what he perceived as the Chief’s strong personal ties with the selected candidate and (2) the favoritism shown for that candidate because he served as a detective, allegedly giving an advantage in the eyes of the APD command staff, all of whom also served as detectives as they came up through the ranks that Officer Connor, who chose to specialize as a K9 officer, could not share.

⁸ For example, each panelist appeared to believe a single integer from “1” (best) to “3” (worst) had to be assigned to rate each candidate. There was no understanding that the ratings could be fractional or that two candidates could be assigned the same numerical rating to indicate roughly equivalent performances.

As to the former, I find no basis to believe that Chief Keefe's personal associations with the lower-ranked candidate influenced him or the panel in selecting that candidate over Officer Connor. To the contrary, each of the APD command staff who testified before the Commission demonstrated their high level of professionalism and showed no sign that their personal, as opposed to professional, opinions about any candidate influenced their decisions.

As to the latter, I agree with the Appellant that command staff's familiarity with the lower-ranked candidate's service as a detective was likely a factor in the conclusion that he possessed a "strong command presence" and "proven leadership ability" and that the command staff did not have the same perception of the job of K9 officer. Although the Appellant proffered some evidence that his leadership experience was equivalent, this does not show the sort of bias or favoritism that is prohibited under civil service law. Rather, the Commission views this type of judgment, formed by professional, on-the job, experience with a subordinate, to be a legitimate basis on which to form an opinion which the Commission is not in a position to second-guess. If that judgment is flawed, the responsibility to educate the command staff lies with the Appellant, not the Commission.

That is not to say, however, that a promotional process which does not provide a sufficiently transparent and objective means to assure that the legitimate use of such professional judgment can excuse an unduly subjective decision-making process that is insufficient to be fairly reviewed on appeal to the Commission. Evidence of undue influence is often difficult and illusive to prove after-the-fact. As the U.S. Supreme Court once noted in the context of disparate treatment in an employment discrimination case: "[P]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995). Thus, despite the absence

of conclusive proof of undue influence or bias, here, the lack of a sufficiently objective and transparent interview process that has, in effect, nullified the results of the ADP's Assessment Center Examination, requires that Officer Connor's bypass must be overturned so that he is assured at least one further opportunity for consideration consistent with civil service law.

Interviews certainly have, and must continue to have, a legitimate place in the promotional process, as one component in combination with others, such as assessment centers, employment history (commendations and discipline) and/or background investigations, and this can be especially appropriate in the selection of a police officer for promotion to a position of a superior officer in the force. The commission should not dictate to an appointing authority which of the many means of evaluating a candidate's suitability for promotion to use, or what specific weight to give to each of them. Here, however, the flaw in the process was two-fold: (1) the exclusive use of an interview as the determining factor as to which of two undisputedly qualified candidates to promote, essentially giving no weight to the assessment center results or any other factor; and (2) the unduly subjective nature of the appointing authority's evaluation of this exclusive factor in the selection. Had some weight been given to the assessment center performance and/or had a more objective method been used to assess the candidate's interview performance that is fairly capable of de novo review by the Commission, the decision made here might well have been accepted as reasonably justified. Hopefully, Andover will adjust its process and eliminate the problematic concerns that arose in this case.

CONCLUSION

In sum, for the reasons stated herein, the appeal of the Appellant, Michael Connor, in Appeal G2-16-159, is *allowed*. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Michael Connor, shall be placed at the top of all future

certifications for promotion to the position of Sergeant in the Andover Police Department until he is selected for appointment or bypassed after a selection process that conforms to civil service law and rules consistent with this Decision.

Civil Service Commission
/s/Paul M. Stein
Paul M. Stein, Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [NO]; Camuso [YES], Ittleman [NO], Stein [YES] and Tivnan [YES], Commissioners) on December 7, 2017.

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:

Rebecca C. E. Tatum, Esq. (for Appellant)
Wendy H. Chu, Esq. (for Respondent)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

MICHAEL CONNOR,
Appellant

CASE NO. G2-16-159

v.
ANDOVER POLICE DEPARTMENT,
Respondent

OPINION OF CHRISTOPHER BOWMAN

I respectfully reach a different conclusion here and believe that the appeal should be denied.

To me, the evidence does not show that the Town nullified the results of the candidates' rankings on the Certification based solely on the results of an allegedly flawed interview process.

First, while it is very common for cities and towns to be unaware of the examination scores of individual candidates, they *are* aware of the candidates' rankings on the Certification from which promotional appointments are made. The evidence appears to show that the candidates' rankings here were common knowledge and that candidates were actually interviewed in the order of their ranking on the Certification.

Second, the stated reasons for bypass, contained in the bypass letter, are not limited solely to the candidates' interview performance. Rather, the Town also references the selected candidate's diverse work experience in the Department, including patrol, traffic, detective work and evidence officer.

Third, I simply don't agree that the interview process, which is inherently subjective, lacked the type of objectivity and transparency that is required. Rather, each of the interview panelists actually testified at the de novo hearing before the Commission and provided specific, detailed reasoning for their unanimous conclusion that the selected candidate performed better during the

interview and that he simply had a better grasp of the leadership duties associated with the position of sergeant and how he would go about handling them if promoted. Importantly, Commissioner Stein concluded that at least two of the interview panelists who testified before him “demonstrated their high level of professionalism and showed no sign that their personal, as opposed to professional, opinions about any candidate influenced their decisions.” To me, that is precisely the type of fair and impartial review process that the Commission should *endorse*, not overturn or second-guess.

For all of the above reasons, I believe the appeal should be denied.

/s/ Christopher C. Bowman

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL CONNOR,
Appellant

CASE NO. G2-16-159

v.
ANDOVER POLICE DEPARTMENT,
Respondent

OPINION OF CYNTHIA ITTLEMAN

I respectfully dissent from the majority opinion. Interviews are, by their nature, subjective and, for that reason, the Commission carefully reviews bypasses based, at least in part, on the interview process, on a case by case basis. However, given the pertinent, well-established case law about the Commission's role in reviewing actions taken by appointing authorities, we should not be determining how much weight should be ascribed to interviews, as compared to the weight ascribed to examinations or assessment centers, as the majority decision appears to open the door to do.

/s/ Cynthia A. Ittleman