

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

ROGER J. CORMIER,
Appellant

G2-19-049

v.

CITY OF GARDNER,
Respondent

Appearance for Appellant:

Colin R. Confoey, Esq.
Kaplan and Confoey
225 Friend Street, 5th Floor
Boston, MA 02114

Appearance for Respondent:

John M. Flick, Esq.
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Commissioner:

Cynthia A. Ittleman

DECISION

On March 5, 2019, the Appellant, Roger J. Cormier (“Appellant”), pursuant to G.L. c. 31, s. 2(b), filed the instant appeal at the Civil Service Commission (“Commission”) contesting the decision by the City of Gardner (“City”) to bypass him for promotion to the position of sergeant in the City’s Police Department. I held a full hearing at the Armand P. Mercier Community

Center in Lowell, MA, on May 13, 2019.¹ The hearing was digitally recorded and both parties received a CD of the proceedings.²

FINDINGS OF FACT

The Parties together submitted twenty-one (21) Exhibits without objection. The Appellant submitted three (3) Exhibits to which the City objected, and the City submitted one (1) Exhibit to which the Appellant objected. One additional Exhibit was ordered produced by the Respondent and was filed post-hearing with the Commission. Specifically, the Respondent was ordered to produce transcribed notes of Police Chief Neil Erickson's interview notes, as his original, handwritten notes were illegible. Based on the documents submitted, the testimony of the following witnesses:

For the City of Gardner:

- Mayor Mark Hawke
- Deputy Chief James Trifiro
- Chief Neil Erickson (Retired)
- Chief Richard Braks

For the Appellant:

- Deputy Chief John Bernard (Retired)
- Patrol Officer John Smith
- Patrol Officer Roger Cormier, Appellant

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

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

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from credible evidence; a preponderance of the evidence establishes the following:

1. The Gardner Police Department (“Department”) has approximately forty-one (41) employees including: one (1) Police Chief; two (2) Deputy Chiefs; two (2) Lieutenants; (5) Sergeants; four (4) Detectives; and nineteen (19) police officers. (City of Gardner website www.gardner-ma.gov)
2. The Mayor of Gardner serves as the Appointing Authority for all appointments and promotions in the Police Department and the City Council confirms the appointment. Mayor Mark Hawke (“Mayor Hawke”) testified at the hearing of this appeal that he relies very heavily on the recommendation of the Police Chief regarding which candidate to appoint or promote. (Testimony of Mayor Mark Hawke).

Fall 2015 Civil Service Sergeant’s Promotional Exam

3. In the Fall of 2015, the Appellant took the Civil Service Sergeant Promotional Examination. The Appellant received a score of 80. (Testimony of Appellant).
4. The state’s Human Resource Division created a list of eligible candidates for promotion to Sergeant for the Gardner Police Department. The Appellant was ranked first on this list of two and Officer L was second on the list. (Ex. 5 and Testimony of Appellant).
5. No certifications were generated from this eligible list because there were no promotions to fill, according to an Affidavit of Debra A. Pond, Director of Human Resources for the City of Gardner. (Ex. 5A and 6).

Fall 2016 Civil Service Sergeant's Promotional Exam

6. Chief Neil Erickson called for another promotional examination for the ranks of Sergeant and Lieutenant during the month of August 2016. The Appellant spoke to Chief Erickson on August 24, 2016, questioning his decision to call for another examination. The Appellant recalled the Chief explaining that he did so because he wants the officers to get better at taking the exams so they can pass.³ They discussed the list and the Chief told him that he does not have to take the exam again because he is on an active list.

(Testimony of Appellant).

7. On or about October 5, 2016, the Appellant took the Civil Service Sergeant Promotional Examination again and received a score of 81.4. Another eligible list was created by HRD. The Appellant was ranked first on the list of two candidates. (Ex. 5B & 6 and Testimony of Appellant).

8. No certifications were generated from this eligible list either because there were no promotions to fill, according to the Affidavit of Debra A. Pond, Director of Human Resources for the City of Gardner. (Ex. 5B and 6).

Fall 2017 Civil Service Sergeant Promotional Examination

9. During the summer of 2017, Chief Erickson called for another promotional examination for the rank of sergeant and lieutenant. In a July 10, 2017 email, the Chief also announced to the Department that “we [are] going to start having Oral Boards for part of

³ The Appellant testified that back in 2014, the Chief called for a promotional exams for Sergeant and Lieutenant on the basis that he may retire in 2015. The Appellant and two (2) sergeants took the Lieutenant's Exam. The Appellant and four (4) other patrol officers took the Sergeant Exam. Every single person failed both examinations. The Chief did not retire in 2015, as initially anticipated. He retired in December 2018. The Appellant noted that the test costs \$250 every time he takes it and that he does believe people get better at the exam by taking it multiple times, they get better by studying. (Testimony of Appellant).

⁴ The Appellant also took the Lieutenant's Promotional Exam in the Fall of 2016, along with two sergeants. Everyone failed the lieutenant's exam.

the selection process for advancement starting this series of exams. That will allow for a better process in selection.” (Testimony of Appellant and Ex. 8).

10. This civil service promotional examination was administered during the Fall of 2017. The Appellant took the Lieutenant’s Exam⁵ but did not elect to take the Fall 2017 Sergeant Exam since he had already scored an 81 on the 2016 examination and he knew that his score was good through February 1, 2019. (Testimony of Appellant).
11. The Fall 2017 Exam resulted in a new eligible list for Sergeant. On the Sergeant’s list, the Appellant was tied for first with then-Detective A (both with a score of 81). Officer L was second on the list. Officer W was ranked third on the list. (Ex. 5C).
12. By letter dated January 15, 2019, Gardner Mayor Mark Hawke, the Appointing Authority, notified the Appellant that he was bypassing him for promotion to the rank of sergeant. The bypass letter details that Officer L, who was ranked second, was chosen for the promotion. This bypass letter indicated that the Appellant was not selected for the following negative reasons:
 - As noted above, after the panel interviews Officer Cormier was identified as the fourth candidate for promotion selection.
 - Over the course of Officer Cormier’s employment with the Gardner Police Department, he has been verbally critical of superior officers and Department administration.
 - Officer Cormier has been insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. (Ex. 2)
13. The January 15, 2019 bypass letter also indicated that Officer L was chosen for the position of Sergeant for the following positive reasons:
 - He has a Bachelor’s Degree in Criminal Justice.

⁵ The Appellant tied for first on the Fall 2017 Lieutenant’s Examination. Sgt. M., who also took the exam, was ultimately promoted to Lieutenant. The Appellant did not file a bypass appeal because he was not bypassed, as he was tied on the list with the chosen candidate.

- He has worked as a police officer with the City of Gardner Police Department for more than eight (8) years.
- Over the course of his employment with the City, he has exhibited strong communication skills, as well as flexibility to deal with the public in a positive manner.
- There are no disciplinary actions in Officer L’s disciplinary file
- After completing the interview process and reviewing each candidate’s responses, the candidates were ranked in order of hire preference as follows:
 1. Then-Detective A
 2. **Officer L**
 3. Officer W
 4. Appellant (Ex. 2)

14. By letter dated January 20, 2019, Mayor Hawke, the Appointing Authority, notified the Appellant that the Mayor was bypassing him for another vacancy for the position of Sergeant.⁶ The bypass letter details that Officer W, who was third on the list, was chosen for the promotion. This bypass letter indicated that the Appellant was “the first candidate on the certification....” The Appellant was not selected for the following reasons:

- As noted above, after the panel interviews Officer Cormier was identified as the fourth candidate for promotion selection.
- Over the course of Officer Cormier’s employment with the Gardner Police Department, he has been verbally critical of superior officers and Department administration.
- Officer Cormier has been insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. The most recent disciplinary incident occurred on or about December 13, 2018, resulting in a verbal warning. (Ex. 3)

15. The January 25, 2019 bypass letter indicated that Officer W was chosen for the position of Sergeant for the following positive reasons:

- He has taken several classes towards an Associate’s degree in criminal justice.
- He has worked as a police officer with the City of Gardner Police Department for more than six (6) years.
- Over the course of his employment with the City, he has exhibited strong communication skills, as well as flexibility to deal with the public in a positive manner.

⁶ There were two vacancies within a short time of each other. The Appellant was bypassed for both sergeant vacancies by lower ranked candidates.

- There are no disciplinary actions in Officer W’s disciplinary file.
- After completing the interview process and reviewing each candidate’s responses, the candidates were ranked in order of hire preference as follows:
 1. Then-Detective A
 2. Officer L
 - 3. Officer W**
 4. Appellant(Ex. 3)

Background of the Appellant

16. Richard J. Cormier (“Appellant”) was born and raised in Gardner, MA, graduating from Gardner High School in 1987. He attended Mt. Wachusett Community College from 1988-1992 and obtained an Associate degree in Electronic Engineering Technology.

(Testimony of Appellant and Ex. 7).

17. The Appellant was appointed a Patrol Officer for the Gardner Police Department (“Department”) on February 20, 1995 and has been so employed for twenty-four (24) years). During his tenure at the Department, he has served in two (2) specialty assignments – Community Policing for a year and a half (1.5) and Foot Patrol for two (2) years. He has also served as Officer in Charge (“OIC”) on eight (8) occasions.

(Testimony of Appellant). The Appellant has not undergone or sought any additional training as a Gardner Police Officer, other than mandatory in-service training.

(Testimony of Chief Erickson and Dep. Chief Braks).

18. Within the Appellant’s Personnel File at the Department, there are numerous letters sent to the Chief of Police commending the Appellant and his fellow officers for their police work throughout his time at the Department. Some of the quotes from the letters are as follows:

- In 2001, a woman and her husband noted “what a kind, considerate, helpful officer.” The Appellant was “just so wonderful to him.” Further, she stated, “He’s certainly a credit to the uniform he wears.” (Ex. 23)

- In 2008, the branch manager of a bank that had been robbed, who was also a City Councilor at the time, commended the officers for their expedited reaction to the situation and how they interacted with the staff and. He extended his gratitude to the officers and noted that he is proud to have the Gardner police protect his own family. Chief Erickson handwrote on the note, “Great work everyone. Thanks.” (Ex. 23).
 - In another letter sent in 2012, a mother wrote of her adult son who was found by the Appellant and his fellow officers after an overdose, who survived. The mother wrote to the Appellant and the other officers, “[T]hank you for giving our son back.” Chief Neil Erickson noted on the letter, “I hope everyone reads this. I think this is the moment everyone strives to accomplish... Great job. Great teamwork.” (Ex. 23).
19. Also included in the Appellant’s personnel file are four (4) official Commendations (1997-1998) by then-Chief Cronin, each of which commended the Appellant for his hard work, professionalism, and the pride he brings upon the Department. (Ex. 23)
20. As for the Appellant’s disciplinary history at the Gardner Police Department:
- On June 8, 2011, the Appellant was suspended for two (2) days for insubordination (argumentative with Sergeant Czasnowski with regards to writing a report) and for arriving late to three (3) police details and becoming argumentative and demeaning towards Sergeant Trifiro when confronted about his tardiness. When confronted, the Appellant told Sergeant Trifiro that he was on a “power trip” and that he was “only an acting sergeant.” The Appellant said that “if this was going to be the type of working relationship they were going to have, he wasn’t going to be a happy camper.” He was ordered to send an email to the Deputy Chief and Sergeant Trifiro, about the reason for being tardy. The Appellant remained defiant and said that he would only send it to the Deputy Chief and not the Sergeant and that he would only write the email because he had to, not because he wanted to. The disciplinary notice, written by Chief Erickson acknowledges that the Appellant admitted to his behavior and that he appreciated his honesty. The Chief indicated that the original discipline was for five (5) days, but he only imposed two (2) days because of his honesty. The January 15, 2018 bypass letter refers to this instance of discipline in 2011 as a “written warning” when indeed, it was a suspension.⁷ (Exs. 2 and 17).
 - A written internal affairs report filed by Deputy Chief Braks indicates that, on December 13, 2018, the Appellant violated *Rule 6.3 -Courtesy* and violation of *General Order on Dispatcher Access*. The Appellant entered the dispatch area to discuss an issue he had with the dispatch team, in violation of the General Order established in April 2018. The Appellant admits he got “a little heated” during the conversation. He was directed from the dispatch area by his supervisor. The

⁷ Although Exhibit 17 references a two (2) day suspension, Chief Neil Erickson testified that he believed that the suspension was reduced from two (2) days to one (1) day.

Appellant was supposed to go to his supervisor, Sergeant Trifiro, with any complaints. He was immediately spoken to by Sergeant Trifiro regarding his conduct and by Deputy Chief Braks, both of whom witnessed the incident. Deputy Chief Braks warned the Appellant that he could not go into the dispatch area and noted that he was brash and unreasonable in his interaction with dispatch employees. His strong demeanor and elevated tone were unacceptable. A note of this incident was placed in the Appellant's internal affairs file.⁸

Dep. Chief Braks notes that, in addition to the contents of the dispatch complaint, Dep. Chief Braks reminded the Appellant on December 13, 2018 of their November 28, 2018 conversation, less than one month prior, wherein he warned the Appellant that he must stop making demeaning and degrading comments about other employees. He notes that they specifically spoke about how he was making comments to officers and civilian employees in the department while working, focused upon how the department has been run and the poor decisions made by supervisors. He reminded him that they discussed how he has frequently spoke negatively about certain supervisors and administrative officers over a number of years and that cannot continue. He told him that his comments have not gone unnoticed, and he was not being selected for an administrative team as a result of this behavior. The Appellant expressed that he had a basis for those beliefs and those complaints should have been addressed with him before he became disgruntled. He stated that someone should have told him or stopped his behavior when it began. Dep. Chief Braks told him that he was addressing it now. The Appellant agreed to restrain himself but that his opinions would not change.⁹ (Ex. 25)

21. The Appellant has a reputation in the Department of speaking ill of his superiors.

Sergeant James Trifiro ("Trifiro"), with twenty-five (25) years on the force and twenty years (20) in the United States Coast Guard, retiring as a Lieutenant Commander, has known the Appellant his entire career. They were friends when they worked together.

Their relationship changed when Trifiro became a supervisor and reprimanded the Appellant for his tardiness to three (3) police details back in 2011. Since then, the

⁸ The Appellant argues that he was never officially disciplined by the Department for this matter. He does not contest that this incident occurred, however. (Testimony of Appellant). Dep. Chief Braks testified that, when he spoke to the Appellant that day following the incident, he was giving him a warning verbally but then the Chief told him to put it in writing. The incident is memorialized in the Appellant's Internal Affairs File, following a further investigation by Dep. Chief Braks, which involved getting a statement from all witnesses of the event. (Testimony of Dep. Chief Braks and Ex. 25).

⁹ The Appellant argues that this December 18, 2018 incident should not be considered a *formal* disciplinary matter in his record. He claimed that he was never given a copy of the internal affairs finding that he violated any rules of the department. He was spoken to at the time of the incident and acknowledged the facts of the case, yet he thought that was the end of the matter.

Appellant barely speaks to him. If he asks the Appellant for something, he responds but otherwise they do not speak. Sergeant Trifiro has been told by many Department officers that the Appellant has called him a “piece of shit,” that he is “not a leader,” and that “others should have his position.” (Testimony of Sergeant James Trifiro).

22. Deputy Chief Richard Braks has twenty (20) years on the force. He wishes that the Appellant had a better rapport within the Department, as he does with the community. He noted that the Appellant is a great patrol officer, but that he has problems with superiors - which has been a consistent theme all along the way. He is willing to speak out against top administrators and he has personally heard the Appellant speak in derogatory terms about the command staff. (Testimony of Dep. Chief Braks).
23. As his supervisor through the years, Dep. Chief Braks often heard the Appellant speaking ill of a certain Deputy Chief who has since retired, calling him a “piece of shit” and calling Sergeant Trifiro the same derogatory term. Deputy Chief Braks said that is his default nickname for supervisors the Appellant has a problem with. He has also heard the Appellant scrutinize Chief Erickson, essentially keeping a “tally of the Chief and certain officers.” He never spoke of the Chief in a favorable manner and has told Dep. Chief Braks that he has no respect for the Chief or Sergeant Trifiro. Braks noted that Sergeant Trifiro appeared to be the co-worker the Appellant did not like the most. The Appellant told Dep. Chief Braks that he did not like or trust Sergeant Trifiro. (Testimony of Dep. Chief Braks).
24. I found Deputy Chief Braks to speak carefully, softly, and considerately during his testimony. He was willing to give the Appellant credit for his strengths and to also speak candidly of the Appellant’s weaknesses. I credit his testimony.

25. Chief Neil Erickson, has been with the Department for forty-one (41) years and seventeen (17) as the Chief. The Appellant stopped communicating with him, except for essential communication, dating back to the 2011 discipline. He had heard from retired- Deputy Chief B that the Appellant said that “they were all screwed up” on the command staff. The Chief had not taken the initiative to speak to the Appellant to clear the air between them. (Testimony of Chief Erickson).

Promotion of then-Detective A – Not a Bypass of Appellant

26. By 2018, promotions for supervisory positions in the Department were forthcoming due to multiple anticipated retirements throughout the year, which would generate open lieutenant and sergeant positions. Deputy Chief Bernard gave his notice in April 2018 and both Chief Erickson and a sergeant (Sergeant Brow) were slated to retire in December 2018, as well. (Testimony of Appellant).

27. The Appellant was tied on the eligible list with a detective who worked in the Narcotics Division, then-Detective A. In April 2018, Chief Erickson announced he would accept “Letters of Interest” for the Narcotics Detective position that then-Detective A held. (Testimony of Appellant).

28. Deputy Chief John Bernard (Dep. Chief Bernard) retired from the Gardner Police Department after thirty-one (31) years of service in 2018. He recalled that Chief Erickson was seeking “supervisor training school” for then-Detective A prior to conducting interviews for the sergeant position. (Testimony of Deputy Chief Bernard).

29. Deputy Chief Bernard had a conversation with Chief Neil Erickson about the Appellant and his chances for promotion. Dep. Chief Bernard recalled that the Chief stated that “he would never promote Richard Cormier.” When he asked why, the Chief indicated that the

Appellant had been suspended years ago, that he was not a team player, and that he was not fit to command. Dep. Chief Bernard told the Appellant what Chief Erickson had said about him. (Testimony of Dep. Chief Bernard).

Oral Board Interviews, May 30, 2018

30. On April 24, 2018, Chief Neil Erickson sent an email to Mayor Hawke and the Director of Human Resources, Debra A. Pond, forwarding a copy of his previous July 10, 2017- email to the members of the Department concerning the Oral Board Interviews. The Chief reminded the relevant officers of the upcoming promotional interviews in a May 26, 2018 email, wherein he notified the officers of the order in which they would take place. (Ex. 8, 9 & 10).
31. Chief Erickson told the Appellant that he was not required to participate in the interview because he was on a previous eligible list, and he had not provided notice of an interview prior to his 2016 promotional examination. The Appellant opted to do the interview anyways. (Testimony of Chief Erickson and Appellant).
32. The Oral Board consisted of Chief Erickson, Acting Deputy Chief Braks of the GPD, Chief Albert of the Westminster Police Department, and Chief Barrett of the Ashburnham Police Department. (Testimony of Appellant, Chief Erickson, and Dep. Chief Braks).
33. The interviews took place on May 30, 2018, and did not proceed in the order initially listed in the Chief's May 26, 2018 email. Then-Detective A was not interviewed second, as indicated in Exhibit 10, rather, he was interviewed last. Additionally, Deputy Chief Braks was present for only three (3) full interviews and had to step out during the fourth

interview¹⁰, which was with then-Detective A. Dep. Chief Braks does not have any notes relative to the final interview.¹¹ (Testimony of Dep. Chief Braks Exhibit 13).

34. Chief Erickson developed the questions for the sergeant's Oral Board interviews and may have utilized suggestions from other members of the board. At the hearing of this matter, the City was unable to produce any notes from Chief Albert or Chief Barrett. Additionally, Chief Erickson's notes were illegible and had to be transcribed post-hearing. Dep. Chief Braks took notes during the interviews he was in attendance for. (Exhibit 12A-12D, 13A-13C and post-hearing Transcription).
35. The Oral Board did not utilize a scoring system to rank the respective candidates. The candidates' answers were not scored or ranked individually, not all interviewers knew of the respective rankings of the candidates on the certified list before the interview, nor were the interviews audio or video recorded. The only ranking of the candidates was pursuant to a discussion that was held by the Oral Board after all interviews were conducted. (Testimony of Chief Erickson).
36. The final rankings of the candidates occurred at the end of the interviews. Once they determined the overall ranking of the four candidates, they may have discussed the specifics of each candidate. Deputy Chief Braks would personally "key in" on the interviewee's answer to Question 9 in particular – "Please tell us how you are preparing yourself for promotion to Sergeant." Dep. Chief Braks wanted to know what each candidate had done to further his career. (Testimony of Dep. Chief Braks).

¹⁰ Dep. Chief Braks testified that he did not leave the interview because of any type of conflict of interest with then-Detective A. He simply left the room unexpectedly to tend to Department business. He cannot recall what the matter was about. (Testimony of Dep. Chief Braks).

¹¹ The Appellant testified that he was interviewed first in the Sergeant interview. This interview took place immediately after the Appellant interviewed for the Lieutenant promotion (of which he was not promoted). The Appellant was given the opportunity to not partake in the Sergeant interview since he had just interviewed for Lieutenant, but the Appellant opted to partake in both.

37. The Board unanimously agreed on the order of the ranking, with then-Detective A ranked first, Officer L ranked second, Officer W ranked third, and the Appellant ranked fourth. They minimally disagreed on the ranking of the second and third place candidate and vice versa, but ultimately agreed on the final order. (Testimony of Dep. Chief Braks).
38. Dep. Chief Braks found then-Detective A to be a strong candidate who had made Detective. He had a lot of schooling, had a bachelor's degree, he requested further schooling through the Department and had taken "a personal stance progressing himself." He was ranked first in the interview. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).
39. Dep. Chief Braks found Officer L to be an officer he could rely on to get something done – he would "get involved." Braks noted that he had personal knowledge of his ability to communicate with the community at large. He noted that he has a BA from Fitchburg State and also sought additional educational opportunities through the Department. Officer L was ranked second in the interview. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).
40. Dep. Chief Braks found that Officer W had gone through eighty (80) hours of training to become a Massachusetts Criminal Justice Training Academy teacher at that level. He sought this opportunity for advancement on his own and even offered to go without getting paid. The Dep. Chief notes that Officer W had taken several other classes to prepare for advancement in his career. There was no discipline history in his personnel file. (Testimony of Dep. Chief Braks).
41. When the Oral Board discussed the Appellant, they spoke of how the Appellant always wanted to advance himself, but he did not have any non-mandatory training nor did he

request any advanced training with the Department through the years. As a Lieutenant, Braks was responsible for these advanced training requests by officers. He does not know of any request made by the Appellant for further schooling when he was Lieutenant. Prior to the hearing, Dep. Chief Braks noted that he asked the current-Lieutenant in charge of educational opportunities of any requests by the Appellant that Braks simply did not know about – and there were none. He also noted that the Appellant was the only candidate, of the four, with a history of disciplinary action. (Testimony of Dep. Chief Braks).

42. To Chief Erickson, a candidate's position on the certification carries weight but other factors are important as well. He noted that "the interview carried a lot of weight." The interview was used in combination with the rapport he had with the officers, he stated. Chief Erickson testified that "...my knowledge of Officer Cormier over the years - he had been non-communicative with me -he wouldn't even acknowledge a 'hello.' He struggled but acknowledged it the past two years." The Chief also indicated that the Appellant's 2011 discipline "added to his thoughts last year relative to Officer Cormier becoming a sergeant." He concluded that his decision was cumulative and that the Appellant's "non-communication with me was a big issue and his discipline history" and that the new sergeant would have to be able to work with him. His issues with the Appellant were not personal, just professional. (Testimony of Chief Erickson).
43. Chief Erickson had never called for an Oral Board before during any hiring process during his time as police chief and he had only ever bypassed a candidate on one (1), possibly two (2) occasions. He noted that then-Detective A's father had been a Lieutenant with the Department and Officer L's grandfather had been on the force as well. He stated

that none of that was a factor in choosing those candidates for the position of Sergeant. (Testimony of Chief Erickson).

44. On July 22, 2018, then-Detective A was promoted to Police Sergeant based on the certification generated following the 2017 promotional exam. Since the Appellant was tied on the certification with then-Detective A, the Appellant could not file a bypass appeal since he was not bypassed. (Ex. 6 and Testimony of Appellant).

Promotion of Officer L, Bypass #1 of Appellant

45. Following the October retirement of Sergeant Brow (“Brow”), Chief Erickson recommended to Mayor Hawke that he appoint Officer L (2nd on the list) for the position Sergeant, bypassing the Appellant. On December 17, 2018, Officer L was sworn in as a permanent Sergeant. Officer L had been acting Sergeant since Brow’s October 2018 retirement. (Testimony of Appellant and Chief Erickson).
46. At the time of his swearing in, Officer L had been on the force for eight (8) years. He had a Bachelor’s degree in Criminal Justice. (Ex. 2). Chief Erickson noted that Officer L was promoted due to his interview in May 2018, his background, and schooling. (Testimony of Chief Erickson). He was ranked second in the interview ranking. (Testimony of Chief Erickson and Dep. Chief Braks). Regarding his interview performance, Deputy Chief Braks found that he was a strong candidate with a lot of schooling, who had requested more schooling through the Department and had focused on progressing himself. (Testimony of Dep. Chief Braks).
47. In the City’s January 15, 2019 bypass letter, it noted that the Appellant was not chosen for the position due to his fourth place ranking in the Oral Board, he has been verbally critical of his superior officers and the Department administration, and he had been

- insubordinate with Department Supervisors, with one such incident resulting in a written warning being placed in his file. (Ex. Promotion of Officer W, bypass #2 of Appellant
48. On December 26, 2018, Chief Erickson officially retired from the Department and Deputy Chief Braks took over as Chief, creating another series of promotions. On January 9, 2019, now-Chief Braks announced that Sergeant Trifiro would be promoted to Deputy Chief, thereby creating a vacancy for another Sergeant promotion. (Testimony of Appellant)
49. Now-Chief Braks recommended to the Mayor that Officer W be chosen for the position of Sergeant, bypassing the Appellant. (Ex. 3).¹² When asked at the hearing of this matter why he recommended Officer W over the Appellant, now-Chief Braks indicated that Officer W had “better answers (in the Oral Board) and had been working in leadership and taking courses for training.” At the time of his swearing-in, Officer W had six (6) years of experience as a patrol officer. He did not have a college degree, was third on the certification list, and was ranked third in the Oral Board process. (Ex. 3)
50. Officer W has no official disciplinary history in his file, yet Chief Erickson recalled an incident that Officer W was involved at the Department golf tournament and he drove off the road into a swamp. According to Chief Erickson, Officer W said that his cell phone fell and when he went to pick it up, he drove off the road. When asked if Officer W had been drinking, the Chief initially hedged his answer finally noting that “he was pretty sure he had something to drink.” When asked by Appellant’s counsel if the fact that he had been drinking, did that factor in the Chief’s decision to give an oral reprimand, the Chief said, “No.” (Exs. 3 and 6)

¹² The Appointing Authority relied on the candidate rankings from the immediately prior sergeant promotional process because it took place so close in time to it.

51. The January 25, 2019 bypass letter to the Appellant noted that Officer W had been selected because he had taken several classes towards an Associate degree in Criminal Justice, he has worked as a police officer for six (6) years, over the course of his employment, he has exhibited strong communication skills and has shown flexibility to deal with the public in a positive manner. The bypass letter notes no disciplinary history for Officer W and also notes that Officer W took the initiative to enroll in an eighty (80) emergency vehicle operation instructor course and became a certified instructor with the Massachusetts Police Training Council. Officer W took this course on his own time to further his experience and knowledge. (Ex. 3).
52. Now-Chief Braks does not believe that the Appellant would be able to work with this current command staff, based on his history of insubordination with the Department. Following the retirement of Chief Erickson, Deputy Chief Braks became the Chief and then-Sergeant Trifiro became Deputy Chief. (Testimony of Dep. Chief Braks).

Applicable Law

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a 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 Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. Considering the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited. The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006).

Analysis

The question before the Commission is whether the Appointing Authority has shown, by a preponderance of the evidence, that the Appellant’s history of insubordination and poor working relationship with the command staff, his disciplinary history, his lack of continuing police training and education, taken in conjunction with his fourth place ranking in the interview

provided “reasonable justification” to bypass the Appellant for promotion to the rank of Sergeant. Whereas the Commission is to conduct a fresh review of the facts, the Commission must consider its factual findings within the restricted context of the legitimacy and reasonableness of the appointing authority’s actions. Beverly v Civil Service Comm’n, 78 Mass. App. Ct. 182, 186 (2010). In doing so, the Commission “may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations by the appointing authority.” Cambridge, at 304, citing School Comm. Of Salem v. Civil Service Comm’n, 348 Mass. 696, 698-99 (1965).

Appellant’s History of Insubordination, Use of Demeaning Language, and Disciplinary History

The City has proven by a preponderance of the evidence that the Appellant has a proven history of insubordination and use of demeaning language directed towards superior officers and the command staff at the Gardner Police Department. The Appellant has been employed as a patrol officer for twenty-four (24) years. He has worked with Chief Neil Erickson, Sergeant Trifiro, and Deputy Chief Braks for decades. Testimony revealed little to no issues in the way the Appellant interacted with other officers early in his career, with the Appellant being friendly with Sergeant Trifiro when they started out together as patrol officers. Sergeant Trifiro considered the Appellant a friend back then. As Sergeant Trifiro and Chief Erickson moved up in the ranks, the Appellant’s attitude and demeanor towards these men began to devolve. At the hearing of this matter, Sergeant Trifiro, a Coast Guard veteran and now-Deputy Chief of the Gardner Police, willingly testified to both positive and negative attributes of the Appellant in a calm and deliberate manner and I credited his testimony.

The Appellant first became insubordinate with Sergeant Trifiro the very first time the Sergeant disciplined him. The Appellant was also disciplined for a separate instance in 2011,

wherein he was argumentative and insubordinate with Sergeant Czasnowski relative to writing a report. With regards to the incident involving Sergeant Trifiro, the Appellant was late for three (3) police details, ranging from a couple minutes to an hour late in 2011. The Appellant does not dispute that he was late; he took issue with, as he claimed, other officers doing worse. The Appellant became argumentative when confronted with a reasonable inquiry into his consistent tardiness for reporting for details. He told the Sergeant that “he was on a power trip,” and that he was only “an acting sergeant.” The Appellant warned Sergeant Trifiro that, “if this was going to be the type of working relationship they were going to have, he wasn’t going to be a happy camper.” Sergeant Trifiro ordered the Appellant to write an email to the Deputy Chief indicating his reasons for being tardy, and to also forward it to the Sergeant. The Appellant refused to send the email to the Sergeant, saying that he would write the email to the Deputy because he had to, not because he wanted to. The Appellant was suspended for two (2) days total for both the Czasnowski and Trifiro incidents, of which was reduced to one (1) day, thereafter. Because the Appellant admitted to this incident, the Appellant did not receive a five (5) suspension for his behavior, as Chief Erickson originally intended.¹³

Following this discipline, the Appellant’s behavior toward Sergeant Trifiro and Chief Erickson, who ultimately handed down the 2011 discipline, did not improve. It has been seven (7) years since the 2011 discipline and the Appellant continues to barely speak to Sergeant Trifiro. Sergeant Trifiro testified to having been told by many Department officers that the Appellant has called him a “piece of shit,” that he is “not a leader,” and that “others should have his position.”

¹³ The January 15, 2019 bypass letter refers to the punishment for this incident as a written warning. The Appellant, Chief Erickson, and Sergeant Trifiro all testified to a one (1) day suspension.

Deputy Chief Braks, who has moved up the ranks in the Department over his twenty (20) year career, and who is now the current-Chief of the Department, testified to the Appellant's foul language directed towards Sergeant Trifiro. I credit Deputy Chief Braks' testimony. He has heard the Appellant call Sergeant Trifiro a "piece of shit" and that he neither likes nor trusts Sergeant Trifiro. He has personally heard the Appellant call a former-Deputy Chief a "piece of shit," as well. Deputy Chief Braks stated that the Appellant is a great patrol officer and that he wished he had as good a rapport within the Department as he does in the community. He has had problems with superiors, which "has been a consistent theme all along the way." He is willing to speak out against top administrators and Deputy Chief Braks has personally heard the Appellant speak in derogatory terms about the command staff.

The Appellant, since the 2011 discipline, would barely speak a word to Chief Erickson, not even able to respond to the Chief's "hello." The Chief noted that the Appellant begrudgingly says hello in response to him the past two (2) years. Deputy Chief Braks saw the Appellant essentially keep a "tally of the Chief and certain other officers." He never spoke of the Chief in a favorable manner, according to Deputy Chief Braks, having told Braks that he has "no respect for the Chief." At the hearing of this matter, the Chief was unable to reconcile how he could possibly promote the Appellant to a supervisory role within the Department that he runs, if the Appellant was simply unable to even speak to the Chief, going on almost a decade. The Chief noted in his testimony that the Appellant's "non-communication with me was a big issue" and that a new sergeant would have to be able to work with him.

The Appellant argues that Chief Neil Erickson simply bypassed him from promotion due to a bias he has against the Appellant. The Appellant makes this claim without acknowledging the obvious issues with his behavior over the years which has clearly led to the Chief's opinion

of the Appellant. It is unreasonable for the Chief of any Department not to evaluate and utilize twenty-four (24) years of an officer's behavior when the Chief is deciding whether that employee is a good candidate for promotion to a supervisory role. The Chief is not biased so much as the Chief has formed a well-reasoned opinion of the Appellant. The Chief cannot simply wipe the slate clean and evaluate the Appellant as if he has never met him. This is not a bypass for original appointment to the position of police officer; this is for appointment to a role with even more responsibility and the new sergeant must be able to communicate and work with the existing command staff. At the time the decision was made to bypass the Appellant twice, Chief Erickson was the chief; however, following his retirement, Deputy Chief Braks was promoted to Chief and Sergeant Trifiro was promoted to Deputy Chief. It would be irrational to believe that the Appellant would suddenly be able to work constructively alongside Deputy Chief Trifiro, let alone even bring himself to speak to him. Deputy Chief Braks testified that, in his opinion, the Appellant would not be able to work alongside the new command staff, even with the retirement of Chief Erickson. This is not a large Department in terms of the number of supervisors. There are two (2) lieutenants and (5) five sergeants. The Appellant's anticipated poor behavior, due to the pattern he has exhibited for years, could certainly have a major impact on the Department and its morale and this is not a risk the Department was willing to take. It is not the Commission's role to substitute its judgment for that of the Appointing Authority in this regard.

In addition to his 2011 discipline for insubordination and tardiness, the Appellant was disciplined in December 2018 for violation of a Courtesy Rule and a General Order on Dispatch Access. This incident was not listed in the first bypass letter, and therefore, the Commission did not take this one incident into consideration for that bypass. The Commission did take this incident into consideration for the second bypass, however. This incident took place during the

pendency of the Appellant's candidacy for promotion to sergeant. Both Deputy Chief Braks and Sergeant Trifiro witnessed the December 2018 incident, wherein the Appellant barged into the dispatch area in the Department. The General Order, established in April 2018, prohibited patrol officers from entering the dispatch area. In addition to entering the area, the Appellant spoke in a brash manner to a dispatcher, which he admits "got a little heated." Sergeant Trifiro asked him to step outside to speak with him, in an effort not to embarrass the Appellant. Deputy Chief Braks testified that the Appellant's demeanor and elevated tone were unacceptable. The dispatch employee the Appellant confronted that day felt disrespected. A note of this incident was placed in the Appellant's internal affairs file. The Appellant was under the impression that he was not disciplined for this incident and felt he was only "spoken to" about the incident and did not even receive a "verbal warning." Both Sergeant Trifiro and Deputy Chief Braks testified that they were not looking to formally discipline the Appellant, that they just wanted him to listen, to be respectful, and to know that his behavior was unacceptable. The Commission finds, by a preponderance of the evidence standard, that this incident of misconduct occurred, regardless of what the formal discipline the Department imposed was labelled.

Worthy of note is a conversation Deputy Chief Braks had with the Appellant just two weeks prior, on November 28, 2018, wherein he warned the Appellant that he must stop making demeaning and degrading comments about other employees. Deputy Chief Braks noted that he specifically spoke to the Appellant about how he was making comments to other officers and civilian employees in the department while they worked, focused upon how the department was being run and poor decision being made by supervisors. He told the Appellant that these comments have not gone unnoticed. The Appellant, even in light of this stark warning in late-November, could not control himself and still barged into the dispatch area that day, confronting

the dispatch employee, right in front of his supervisors. The purpose of the General Order was to prevent this type of confrontation because the dispatch area needed to be free of distractions. The Appellant was on notice that he was only supposed to go to his own supervisor, Sergeant Trifiro, with any issues he had with dispatch. It is was not lost on the Department, or the Commission, that the Appellant was right in the middle of his candidacy for promotion, yet he chose to conduct himself in this manner at such an inopportune time.

Preparation for Promotion; Educational Advancement and Initiative

In addition to his history of a pattern of insubordination, derogatory language, and his disciplinary history for similar misconduct, the Appellant was also bypassed due to his lack of continuing police education, as compared to those officers chosen for promotion. As noted in both bypass letters, the Department took a keen interest in those officers when took the initiative to further their standing in the Department by taking advantage of additional educational opportunities made available by the Department, other than those which are mandatory in-service training, over the years. Deputy Chief Braks, during his time as lieutenant in charge of making arrangements for officers in their pursuit for continuing education courses, never once recalls a time when the Appellant asked to be enrolled in a course. He also checked with the current lieutenant in charge of that now and he was told that the Appellant sought no such courses over his twenty-four (24) year career. Braks testified that this was an issue the Department considered when it came to whether to promote the Appellant over other candidates.

Officer L, who was the first officer to bypass the Appellant for promotion to Sergeant, has a Bachelor degree in Criminal Justice from Fitchburg State and is currently enrolled in a Master's degree program in Criminal Justice. Officer L has a certification as a field training officer, among other similar certifications. which was of interest to the Department. In

comparison, the Appellant has an Associate degree in Electronic Engineering dating back to 1992 along with some courses in criminal justice, although the Appellant had not communicated the criminal justice course to the Department prior to the hearing of this matter, nor was it mentioned on his resume. Deputy Chief Braks noted that Officer L is someone “he knew could get something done – he would get involved.” Braks said he had personal knowledge of his ability to communicate with the community.” The January 15, 2021 letter notes that Officer L has no history of discipline in the Department and has shown, over the course of his employment, strong communication skills, as well as flexibility to deal with the public in a positive manner.” The Department considers Office L to “be a self-starter who has excelled in both drug and criminal investigations.” He was ranked second after the interview process, as opposed to the Appellant fourth ranking.

Additionally, Officer W, who bypassed the Appellant for a promotion to Sergeant, had taken the initiative to advance his career opportunities by taking an eighty (80) hour course at the Massachusetts Criminal Justice Training Academy to become a teacher at that academy. He sought this on his own, willing to pay for it by himself, which the Department did not have him do. He has also taken several other classes through the Department to prepare for advancement, Deputy Chief Braks testified. He does not have a college degree but has taken college courses in criminal justice. The bypass letter indicates that Officer W has a strong history communication and flexibility with the community at large. Officer W does not have a record of disciplinary action in his file, although the Chief testified to an incident for which he was verbally warned about driving off the road after a Department golf tournament, which the Chief believes he may have been drinking at. The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was

reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.”

Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983).

Oral Board Interviews

Lastly, the City points to the Appellant’s ranking in the interview process, as compared to Officers L and W, as yet another reason for bypass, in conjunction with the Appellant’s history of insubordination, his poor working relationship with superiors, his prior disciplinary history, and lack of educational initiative. 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. Connor v. Andover Police Department, Case Number G2-16-159 (2017), citing, 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.” Flynn v. Civil Service Comm’n., 15 Mass.App.Ct. 206, rev.den., 388 Mass.1105 (1983).

There were deficiencies in the Department’s Oral Board interviewing process.¹⁴ This was the first time the City had utilized the interview process and it showed. For instance, the interviews were not audio or video recorded nor were the candidate’s answers to individual questions scored numerically, which would lead to some objectivity in an inherently subjective exercise. No such scoring system was used. The Oral Board’s only ranking of candidates was

¹⁴ Chief Erickson gave the Appellant the choice to forego the interview altogether, since he was on a prior certification list and was not given notice of the interviews prior to his 2016 exam. The other candidates took a 2017 exam and were given the proper notice. The Appellant elected to take part in the interview.

made following a discussion after all interviews were conducted. Each interviewer put the candidates in their own ranking order and then the interviewers compared their rankings.

Chief Erickson, Deputy Chief Braks, and two local chiefs from other towns conducted the interviews. To the City's credit, the out-of-town interviewers, the Chief of Ashburnham, and the Chief of Westminster, added a level of objectivity to the process since these Chiefs did not know candidates. Their status as current-chiefs added a depth of experience to the ranking process. All four interviewers took notes. The City provided the Chief and the Deputy Chief's notes to the Commission; however, the Chief was unable to locate any notes the other two interviewers took during the interviews. The Chief believes he may have inadvertently thrown them away when he was cleaning his officer out prior to his retirement. Unfortunately, the Chief's notes were illegible and had to be transcribed post-hearing. Further, Deputy Chief Braks unexpectedly was called from the fourth interview, of then-Detective A, so he did not take any notes of that interview.

A copy of the questions asked during the interview to each candidate was provided to the Commission for review, along with the available notes. Deputy Chief Braks noted that Question Nine (9) on the list of questions was especially important to him, since the answers to that question was indicative of how each candidate had prepared himself through the years to become a sergeant. Deputy Chief Braks testified to the advanced training that candidates ranking first through third (then-Detective A, Officer L, and Officer W) had undertaken to prepare for advancement in their career as a major distinguisher among those candidates and the Appellant. Once the interviewers ranked each candidate one through four, the group at-large discussed each candidate. The group itself ultimately agreed unanimously on the ranking of the four candidates, with the Appellant ranking fourth. The group may have disagreed slightly, and momentarily,

about the ranking of the second and third place candidates (Officer L and Officer W), but they ultimately agreed that Officer L would be second and Officer W would be third. None of the interviewers disagreed with one another about then-Detective A ranking first and the Appellant's rank of fourth.

In light of the objective deficiencies in the actual interview process, I do not find the interview *itself* to be a sufficient reason for bypass of the Appellant; however, the interview taken in *conjunction* with all of the aforementioned reasons for bypass is a different matter entirely. The impact this interview process had on the City's decision to bypass the Appellant is overshadowed by the weight of the evidence establishing the City's reasonable justification in bypassing the Appellant based on his work history, his demonstrated disdain for members of the current command staff, his disciplinary record, and his lack of initiative to further prepare for any promotion in rank educationally. If the merits for bypassing a candidate for promotion are justifiable, procedural matters need not be considered.

A bypass may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates... in such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with the fundamental purpose of the civil service system, to ensure decision-making in accordance with basic merit principles.

Henderson v. Civil Service Comm'n, 54 N.E.3d 607 (2016) citing Sherman v. Randolph, 472 Mass. 802, 813 (2015). So long as the basis upon which the City bypassed the Appellant for promotion, which includes his history of insubordination, his pattern of demeaning language against superior officers, his disciplinary history, and his lack of additional training as compared to other candidates, is adequately supported by substantial evidence (with or without consideration of the Appellant's interview), the Commission shall not substitute its judgment for the City. Cambridge, at 305.

For all the above reasons, the Appellant's appeal under G2-19-049 is hereby denied.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman,
Commissioner

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

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)(I), 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:

John M. Flick, Esq. (for the City)

Colin Confoey, Esq. (for Appellant)