

Decision mailed: 10/25/10  
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

Daniel P. Dowd,  
Appellant

Case No. G2-07-202

v.

Town of Charlton,  
Respondent

Appellant's Attorney:

Frank J. McGee, Atty.  
1952 Ocean St.  
Marshfield, MA 02050

Respondent's Attorney

Robin L. Craver, Town Administrator  
Town of Charlton  
37 Main Street  
Charlton, MA 01507

Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of MGL chapter 31, §§ 2 and 27, the Appellant, Daniel P. Dowd, (hereinafter "Appellant") has filed this appeal alleging that he was improperly bypassed by the Town of Charlton (hereinafter "Town") for promotion to the position of Sergeant in the Town of Charlton Police Department (hereinafter, "the Department"). Appellant contends that his name appeared first on the eligibility list for promotion to the rank of Sergeant and that for the reasons set forth below, his appeal should be granted by the Commission. The Appellant filed a timely appeal to the Commission and a private hearing was held on November 5, 2008 at

the offices of the Civil Service Commission (hereinafter "Commission"). The hearing was recorded on two (2) audio cassettes. Twenty-one (21) exhibits were entered into evidence. Witnesses were sequestered. Both parties filed proposed decisions.

### **FINDINGS OF FACT**

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

- Charlton Police Chief, James A. Pervier
- Charlton Town Administrator, Robin L. Craver
- Appellant, Daniel Dowd

#### **I make the following findings of fact:**

1. Appellant, Daniel P. Dowd (hereinafter, "Appellant" or "Dowd") has been a police officer since September 20, 1997. (Exhibit 15, testimony of Dowd)
2. Appellant has served as a Correctional Officer in the Worcester Sheriff's Department from 1997 to 1998. (Exhibit 15, testimony of Dowd)
3. Appellant served as a Reserve/Intermittent Officer with the Town of Oxford Police Department from 1994 until 1997, when he laterally transferred in September 1997, to the Department. (Exhibit 15, testimony of Dowd)
4. While a member of the Department, Appellant has served as the Department's Court Officer and Liaison with the DA's Office, Firearms Licensing Officer, Sex Offender Registration Officer, Breathalyzer Certification Officer, Narcotics Evidence Officer, and N.I.B.R.I.S. Reporting Officer. (Exhibit 15, testimony of Dowd)
5. On March 30, 2007, the Appellant and the competing candidates here did take a competitive Civil Service Examination administered by the Human Resources Division (HRD) for the rank of full time Police Sergeant. The Town of Charlton made a requisition to HRD for

certified eligibility list for the appointment of one position of Police Sergeant. The Human Resources Division issued a certification, #251211, showing Appellant's name at the top of the list. The Appellant scored 86, Officer Gary N. Mason (hereinafter, "Mason") scored 85, and Officer Kevin Cloutier (herinafter, "Cloutier") scored 79.

6. The Board of Selectmen (BOS) is the Appointing Authority for the Town of Charlton. Town Administrator Robin L. Craver (hereinafter, "Craver") is an employee of the Town of Charlton or the BOS. (Testimony of Pervier and Craver)
7. Craver, the Town Administrator assembled a five member panel to interview the three candidates. Craver had only been the Town Administrator for approximately six (6) months at this time. The panel members were: Town Administrator Robin L. Craver (hereinafter, "Craver"), Fire Chief Charles E. Cloutier Jr., Police Lieutenant Carl G. Ekman, Police Chief James A. Pervier (hereinafter, "Pervier"), and Holden Police Chief George R. Sherrill. (Testimony of Pervier and Craver)
8. On April 6, 2007, Police Chief Pervier informed the candidates of the oral examination or interview scheduled for April 25, 2007. (Exhibit 6, testimony of Pervier)
9. However, the candidates did not receive any written or oral notification or information regarding any scoring process involved with this interview or assessment center. The announcement for this Sergeant position did not include any notice of an interview or assessment center aspect to be included in the civil service written exam score. The Town did not submit the interview/assessment center plan or process in writing to HRD for approval. HRD did not approve this process in writing. The questions for the interview were compiled on the day of the interview. Individual questions were submitted to the Town Administrator and she selected the questions to be asked. (Testimony of Pervier and Craver)

10. The idea for the use of an interview panel came from Craver. She also picked the panel members and designed or set up the interview process, questions to be asked and the score evaluation system. Chief Pervier did not know Craver's background at the time Craver proposed the idea and the set-up of a panel interview, since she had only recently been appointed as Town Administrator. Chief Pervier deferred to Craver on this issue. (Testimony of Pervier and Craver)
11. Chief Pervier did not make any mention of an interview component to the selection process when he made his presentation to the BOS for permission for this promotional appointment to this position of Sergeant. (Testimony of Pervier and Dowd)
12. Neither Pervier nor Craver was absolutely sure of the identity of all of the numbered panel members on the compilation scoring sheets. They were not sure but believed that panel member # 3 is Craver. Pervier testified that Craver took all of the score sheets and totaled them on her own. Pervier did not see the individual score or tally sheets after they were collected by Craver. Pervier did not see the summary score compilation sheet (Exhibit 4) created by Craver until after the Appellant filed this appeal. Pervier did not see the letter drafted and mailed by Craver to HRD containing the reasons or justification for bypass prior to it being mailed. Therefore, HRD was not aware that Pervier had scored Dowd and Mason equally on their interview performances. (Testimony of Pervier and Craver, Exhibit 4))
13. Chief Pervier viewed Dowd and Mason like they were his "two sons". He (panelist #2) scored Dowd and Mason equally at a total score of 44 on their interview performance. Chief Pervier considered Dowd and Mason to be the two best Sergeants in the Department. It is noted that Charlton Police Lieutenant Carl Ekman is the second highest ranking officer in the

Charlton Police Department. He is panelist #2 and he gave a total interview score of 42 to Dowd and a total interview score of 36 to Mason. (Testimony of Pervier, Exhibit 4)

14. Craver (panelist #3) on the other hand gave Dowd the lowest score of the three candidates, a total score of only 32. On question #5 she gave Dowd a very low score of only 2, while all of the other panelists gave Dowd the highest score of 5. She gave Mason the highest possible score of 5 on question #5. (Testimony of Pervier and Craver)

15. Craver's explanation for giving the Appellant the lowest score of the panel members, on question #5 regarding sexual harassment, was that she had more "sensitivity" and more knowledge in the area of sexual harassment than the other panel members. She admitted that her appraisal of the candidates' answers, like that of the other panel members was subjective in nature. (Testimony of Craver)

16. On April 25, 2007, over the course of roughly one (1) hour per candidate, the individual members of the panel asked each candidate ten questions and each was assigned a point value between one (1) and five (5). The points were totaled at the end. There were no "correct" or "incorrect" answers to the questions. The questions were "open ended". The answers were graded on the subjective impressions of each panel member. The panel did not discuss expectations or scoring guidelines prior to its administration of the oral examinations. (Testimony of Pervier and Craver, Exhibit 7)

17. Craver admitted that both she and the Charlton Fire Chief, who is panelist # 4, had no particular expertise or credentials in police work or police work evaluation. The Fire Chief did not have any expressed understanding of the concept of "community policing", the subject matter of one of the interview questions. (Testimony of Pervier and Craver, Exhibits 4 & 7)

18. The panel interview also involved an essay portion. However, because the Appellant was interrupted twice while writing his essay, the panel decided to disregard the essay portion. (Testimony of Pervier and Craver)
19. As a result of the interview or “Oral Exam” total score, the panel concluded that Appellant had a total score of 200, candidate Mason had a total score of 207, and candidate Clothier had a total score of 197. (Testimony of Pervier and Craver)
20. The panel then combined the Civil Service exam score with the score each candidate received from the “Oral Exam”. In the case of Appellant, his Civil Service score of 86 was combined with “Oral Exam” score of 200 giving him a total Civil Service score and “Oral Exam” score of 286. The panel combined the Civil Service score of 85 with the “Oral Exam” score of 207 to give Mason a total score of 292. (Testimony of Pervier and Craver)
21. Craver awarded Dowd with a total score of only 32 for his answers to the ten interview questions. This total score of 32 was the lowest total score that Dowd received from any of the panel members. However, she awarded Mason with a total score of 41 for his answers to the ten interview questions. The nine (9) point advantage that Craver awarded to Mason exceeded the seven (7) point total advantage that the entire panel including Craver had awarded to Mason for a total interview score, (207 to 200). Subtracting Craver’s scores from both Dowd’s and Mason’s interview total score would have provided a two (2) point advantage to Dowd, a total interview score of 168 to Mason’s 166. (Testimony of Pervier and Craver, Exhibit 4, reasonable inferences)
22. When the civil service examination score results were finalized, Chief Pervier told the Appellant that he “had the job”. (Testimony of Appellant)

23. Chief Pervier also stated to other officers that appellant “was getting the job.” (Testimony of Appellant)
24. Shortly after Chief Pervier informing the Appellant that he was “getting the job”, Chief Pervier informed him that he would be conducting interviews to determine who would get the job. (Testimony of Appellant)
25. Chief Pervier admitted to having conversations with Dowd, Mason and others regarding this promotional appointment. He also admitted to making the unqualified statement that it would go to the “highest scorer”; prior to Craver’s decision to include an interview component to the evaluation process. He admitted that he did not qualify his statement about “highest scorer” and had not articulated any reference to an interview component to the scoring. Only after meeting with Craver and within 1-3 days thereafter, did he first discuss the interview component with anyone. He discussed it first with Sgt. Maxfield. (Testimony of Pervier)
26. When he heard about this new interview-component, the Appellant asked Chief Pervier why he was not going to get the job. The Chief replied “politics”. (Testimony of Appellant)
27. Chief Pervier stated that although he wanted Appellant in his command structure, he had to work with the Selectmen. He was dependant upon the Board of Selectmen for budgetary and other Departmental matters. (Testimony of Pervier)
28. The Appellant testified that Chief Pervier had told him that that the Civil Service Commission had “no teeth” and that all it could do was to place him at the “top of the list” for the next appointment. Chief Pervier denied making this particular statement but admitted that the Civil Service Commission was routinely discussed by everyone in the Department and that many statements, including similar such expressions had been made by various people at various times in the past. (Testimony of Pervier and Appellant)

29. The competing candidate Mason being lower on the certification bypassed the Appellant and was promotionally appointed by the Town to this position of Police Sergeant on May 8, 2007. (Exhibit 2)
30. Subsequent to this appeal, the Appellant was promoted to the rank of Sergeant by the Town filling another position on July 1, 2007. (Testimony of Appellant, Exhibit 13)
31. The Appellant has great respect for the Town, Chief Pervier and the entire Charlton Police Department. He does not want to be disruptive or divisive in the pursuit of his appeal. Appellant Dowd testified that he was only continuing to pursue his appeal as a matter of principle and that he is seeking a retroactive seniority date for civil service purposes only back to the date of this bypass or May 8, 2007. (Testimony of Appellant)

#### **CONCLUSION OF THE MINORITY (HENDERSON, STEIN)**

This case involves the bypass of the Appellant for promotion to a permanent civil service position. This action is governed by G.L.c.31, Section 27 provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted unless HRD had received a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass.”

These requirements create the rule that that, in the normal course, candidates should be selected according to their relative placement on the eligibility list, which creates a rank ordering



based on their scores on the competitive qualifying examination administered by HRD for the position. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (“A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.”).

In order to deviate from this general rule, the appointing authority must show specific reasons, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., 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); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). See also Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles. . . . the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass. 1106 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with [all] basic merit principles”).

All candidates are entitled to be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission has been clear that it will not

uphold the bypass of an Appellant where it finds that “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988). See Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”)

The task of the Commission on hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . 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.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited.

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established through substantial, credible evidence presented to the Commission 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, 321, 577 N.E.2d 325, 329 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Appointing Authorities are charged with the responsibility of exercising sound discretion<sup>1</sup> and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and stated the following: “On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of **a sound discretion**, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) See the following line of cases as quoted in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272.”

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<sup>1</sup> The commission regularly receives proposed decisions from parties, which rely on the oft-cited precedent for such alleged wide discretion and purportedly limited commission oversight found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm’r, 400 Mass. 597, 601 (1987). The quotation from the Callanan opinion, however, was made in the entirely different context of considering the statutory discretion of the Personnel Administrator [HRD] to establish eligible lists, and had nothing to do with the standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for “sound and sufficient” reasons that must be provided to “justify” a “valid” bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the “sound and sufficient reasons” in the Mayor of Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. This erroneous reference to the appointing authority’s “wide” or “broad” discretion in the place of the correct, “sound” or “valid” discretion in hiring or promotional selection has subsequently infected numerous commission and superior court decisions and at least one Appeals Court decision. For an example of erroneous citation of “broad discretion” through City of Cambridge See Town of Burlington & another vs. James McCarthy, 60 Mass. App. Ct. 914, (2004) For an example of accurate citation of “sound discretion” See Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971) and Goldblatt cited in Charles W. Flynn & others vs. Civil Service Commission & others 15 Mass. App. Ct. 206, 209 (1983)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘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.’ ” Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s proof of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony rebutting that evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300,

303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (same)

In reviewing the commission’s action, a court cannot “substitute [its] judgment for that of the commission” but is “limited to determining whether the commission’s decision was supported by substantial evidence” and is required to ‘give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn there from.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 242-42 (2006) and cases cited.

The Appellant presented evidence to show that there had been a sudden and unexpected change in the promotional process and the appointing authority failed to explain or justify this sudden change in the process. The Appellant had the highest score on the promotional Civil Service examination, and been told that the highest scorer on the exam would receive the promotion. The Town Administrator Craver was new to the job and she initiated and set-up the new interview panel component to the selection process. She offered no convincing explanation for the sudden interjection of this component into the process. Craver chose the panel members, decided on the interview questions, scoring method and did the scoring tabulations. Police Chief Pervier did not have any meaningful part in establishing this new component. His participation on the interview panel was due to the direction of Town Administrator Craver, a BOP employee. This panel interview or oral examination was poorly designed and implemented. The panel was made up of five members with Craver and the Charlton Fire Chief being two non-police

professionals on the panel. The scoring of candidates by the individual panel members has been found to be highly inconsistent due in part to the subjective nature of the scoring and lack of a proper defined scoring method. There was no right or wrong set of answers held up for measure. Craver's scoring of the Appellant's and the bypassing candidate Mason's answers were at variance with the other panel members. Her variant scoring of these two candidates provided the entire scoring advantage to Mason. The panel interview component was arbitrary and capricious in form and was only a pretextual measure to hide some impermissible factor such as bias in favor of the other candidate.

When subtle subjective ingredients are interjected into the selection process for impermissible purposes, it is rare to find any direct evidence of it. However, here the evidence is clear that Chief Pervier expected the highest civil service exam score to determine the selection between two very capable and highly qualified candidates. He had clearly stated this fact to the competing candidates and others. Surprisingly, the newly appointed Town Administrator belatedly created and implemented a panel interview component to the selection process. The result of this additional component and the Town Administrator's input was the replacement of the Appellant as the highest scoring candidate, and his bypass for this promotional appointment. There were direct statements and circumstantial evidence indicating political or other impermissible considerations involved in this selection process. The Appellant also testified that he spoke with Chief Pervier, who told him the promotion was his, but that "politics" was in play and that the Chief had to work with the Board of Selectmen on police and budgetary matters. Board of Selectmen is the appointing authority here and the employer of the recently hired Town Administrator Craver. The BOS made the ultimate decision and was responsible for his bypass.

The Appellant spent time and energy in preparation for the objective civil service exam. He scored the highest. The panel-interview component was belatedly and hastily created and interjected into the process of evaluating these candidates. The panel had non-police members lacking the training experience to properly evaluate the answers to the interview questions. There was no set of qualified correct answers to the questions for comparison. The scoring was completely subjective. The scoring sheets were immediately collected and later tabulated by Craver. Craver's scoring of Mason and Dowd was at variance with the other panel members and provided more than the entire scoring-differential advantage to Mason, resulting in Dowd's bypass. Police Chief Pervier scored these two candidates as equal. Panel member Lt. Ekman, the second highest ranking officer in the Department actually scored Dowd considerably higher than Mason on the interview component. The panel interview process and its scoring were severely flawed and tainted. It amounted to an arbitrary and capricious process in opposition to the fundamental purposes and the basic merit principles outlined Chapter 31 §1.

For all the above stated reasons, the Appointing Authority has failed to sustain its burden of proof by a preponderance of the credible evidence in the record. It has failed to establish sound and sufficient reasons to justify its bypass of the Appellant. It appears that there was an irregular or tainted process employed with at least some indication political or other impermissible considerations. The Appellant did not receive fair and impartial consideration.

We conclude that, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, that the Civil Service Commission should direct the Town of Charlton and the Human Resources Division to revise the Appellant's

seniority date for civil service purposes only, back to the date of Mason's appointment, May 8, 2007.

For the minority:

Civil Service Commission



Daniel M. Henderson

### **CONCLUSION OF THE MAJORITY (BOWMAN, MARQUIS, McDOWELL)**

The instant appeal involves a promotional appointment to the position of sergeant in the Town of Charlton. The Appellant and the selected candidate were separated by one (1) point on the certification issued to the Town by the state's Human Resources Division. The Appellant had a score of 86 and the selected candidate had a score of 85.

In making its selection, the Town chose to conduct interviews and consider factors beyond the civil service scores of the respective candidates. The authority to interview candidates is inherent in G.L. c. 31, § 25. Flynn, 15 Mass. App. Ct. 206, 208 (1983). The interview panel consisted of the Town Administrator, who is the Appointing Authority, the Town's Police Chief and Fire Chief; a Lieutenant from the Charlton Police Department; and Police Chief from the Town of Holden. All of the candidates were asked the same questions and the same criteria was used to assess their performance. Respectfully, the record does not support the hearing officer's conclusion that the interview process was flawed, tainted, arbitrary and capricious.

After the interviews were completed, the panel deemed Gary Mason to be the most qualified candidate for promotion. The Town's Police Chief, who served on the panel, penned a memorandum outlining the reasons for the panel's recommendation stating in relevant part, "... it is clear that out of the three candidates, that Officer Gary N. Mason, Jr. came out on top as the



superior candidate given his written and oral test scores, his education, training, experience, past and present performance and community involvement ... Officer Mason has great initiative and a strong work ethic, which combined together serve as a catalyst to precipitate new and positive changes in the Charlton Police Department.” While the Police Chief commended the other candidates, including the Appellant, his recommendation was unequivocal in support of Mr. Mason. This is contrary to the Appellant’s testimony, accepted by the hearing officer, that he was told by the Police Chief that the decision was based on “politics”. The record does not support this conclusion.

Finally, the hearing officer erroneously states in footnote 1 on page 11 that the Appeals Court of Massachusetts has effectively been misled into falsely believing that Appointing Authorities have “broad discretion” when choosing individuals from a certified list of eligible candidates on a civil service list. Years of precedent-setting judicial decisions and countless decisions issued by this Commission do not support the hearing officer’s statement.

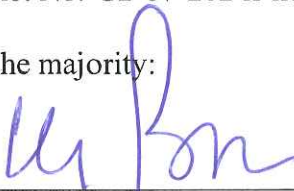
When applying the correct standard of review, the record clearly shows that the Town, after exercising its discretion to use a review panel and interview process and determining how much weight to give to that interview and other factors, provided sound and sufficient reasons to justify the bypass of the Appellant based on merit and policy considerations. The Commission may not, as the hearing officer seeks to do here, assume the role of a “super-appointing agency.”

Burlington v. McCarthy, 60 Mass. App. Ct. at 915. The appointing authority is “invested with broad discretion” in the task of “selecting public employees of skill and integrity.” Cambridge v. Civil Service Commission, 43 Mass. App. Ct., 304-05 (1997). It is not within the authority of the Commission “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Cambridge, 43 Mass. App. Ct at 305.

For all of the reasons stated in the Conclusion of the Majority, the Appellant's appeal under

Docket No. G2-07-202 is hereby *dismissed*.

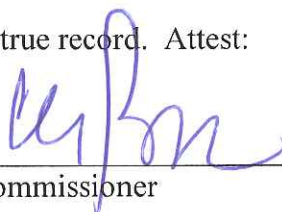
For the majority:



\_\_\_\_\_  
Christopher C. Bowman  
Chairman  
October 21, 2010

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Marquis, Commissioner – Yes; McDowell, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No) on October 21, 2010.

A true record. Attest:



\_\_\_\_\_  
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), 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:

Frank J. McGee (for Appellant)

Robin L. Craver, Town Administrator, Town of Charlton (for Appointing Authority)