

Decision mailed: 12/5/11
Civil Service Commission 03

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
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**Frederick Elwell,
David Blouin and
Frederick Perry,**
Appellants
v.

Docket Nos: G2-11-97, -98, -114

City of Lynn,
Respondent

Appellant's Attorney:

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AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appointing Authority's Attorney:

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Commissioner:

Daniel M. Henderson

DECISION

The "Appellants", Frederick Elwell, David Blouin and Frederick Perry (hereafter "Elwell", "Blouin" and "Perry"), pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) from a decision of the City of Lynn, (hereafter "City" or "Lynn") the Appointing Authority, through its public works department (hereafter "DPW") for failing to promote them to the labor service position of "Working Foreman/DPW 1st Class". The City preliminarily determined through an initial, interview-written question evaluation process that Blouin and Perry were unqualified for the position. The City initially determined through the interview-written question portion

that Elwell was only marginally qualified but that further in the evaluation process determined that he was unqualified, after review of his personnel file including numerous documented incidences of poor performance and prior discipline, including suspensions. In effect, the City determined that the promoted candidate (“Hogan”) was the best qualified candidate of the candidates considered. A hearing of these appeals was held at the Commission on August 17, 2011, which was digitally recorded, with CD copies being provided to the parties. The parties submitted post-hearing proposed decisions.

FINDINGS OF FACT

Twenty-eight (28) Exhibits were entered into evidence at the hearing with the parties agreeing to file the HRD delegation agreement post hearing, as Exhibit 29. Giving appropriate weight to the Exhibits and inferences reasonably drawn therefrom and from the testimony of the following witnesses:

- Jay Fink, City of Lynn Commissioner of DPW
- Lawrence Donahue, City of Lynn Associate Commissioner of DPW

I make the following findings of fact:

1. The seniority dates of the relevant individuals competing for the promotion to the labor service position of Working Foreman/DPW 1st Class, are:
 - Fred Elwell, August 31, 1987
 - David Blouin, September 30, 1993
 - Frederick Perry, March 20, 1995
 - Tom Hogan, October 27, 1997 (Exhibit 26)
2. On November 17, 2010, the Lynn Public Works Department posted a posting for Working Foreman/DPW 1st Class. That posting remained up for five days. Six

persons signed the posting. One was not eligible and not given consideration, as he was not of the next lower classification, which left five applicants. All of the applicants who remained were DPW 1st Class employees, thus holding permanent status in the next lower title. (Exhibits #17 & #18, Testimony of DPW Commissioner Fink)

3. For at least 20 years, the Lynn Public Works Department has used a process for selection of applicants involving an interview including written questions and answers, all of which are scored. Additionally, the Department conducts an oral interview in order to permit applicants to extenuate upon their qualifications. (Testimony of DPW Commissioner Fink)
4. Following its usual practice, the City previously used this same process of interview with written questions for a promotional position of Working Foreman/DPW 1st Class posted in August, 2007. These three Appellants: Elwell, Blouin and Perry plus two others signed that posting. However, one of the other candidates, George Potter received that promotion from Commissioner Fink, on September 24, 2007. (Exhibit #21 and testimony of Associate DPW Commissioner Donahue)
5. DPW Commissioner Jay Fink has held this position for the City since 2004. He is the appointing authority for the City's DPW for civil service purposes. Every promotion that he has made for the City has followed this same process. All three of these Appellants: Elwell, Blouin and Perry have been through this same promotional process before this present promotional process. Commissioner Fink has 20 years' experience in DPW management and every hiring or promotional

decision he has been involved in has followed this type of interview, written questions and evaluation process. (Testimony of DPW Commissioner Fink)

6. The written portion of the interview process in this present promotion consisted of twenty-eight questions. Each candidate answered the same 28 questions. All of the twenty-eight questions related directly to the safety in and/or proficient performance of the position functions. Information relating to those questions was available to each of the applicants through their on the job experience or City provided publications or notices. A sample of written questions used in the past, in this process was submitted by the City. (Testimony of DPW Commissioner Fink, Exhibit #19)
7. The twenty-eight (28) written questions were garnered from questions asked in past promotional evaluations or from courses or training sessions given to all DPW labor employees in the past. For example the "Traffic Control Safety Zone" and "Dig-Safe" questions regarding street maintenance was taken from a prior safety training course and publication provided to all DPW labor employees. All of the questions related to general knowledge picked up in the course of performance of the regular or routine functions of the labor service positions at the DPW.
(Testimony of DPW Commissioner Fink, Exhibit # 20)
8. The City uses the titles of 1st Class laborer and 3rd Class laborer; the title of 2nd Class laborer is not used by the City. The position of 1st Class laborer, which is being sought here is the Equipment Operator position, a supervisory position which might have a crew to supervise and has no limit to the labor service duties

or functions assigned, except possibly a technical assignment like fleet maintenance mechanic. (Testimony of DPW Commissioner Fink)

9. The obvious importance of work site safety was explained as it concerns fellow workers or the public and the potential liability involved in a lack of knowledge of or compliance with the relevant regulations. This is specifically important with the required notification of "Dig-Safe" at least 72-hours in advance of starting a street excavation so that the appropriate safety "color Markings may be made by "Dig-Safe" and that the excavation project must begin within 30 days by law or the older markings may have been altered or disappeared, after that time period. The different colored markings indicate the location of water, sewer, electric or gas lines. This is especially important safety and liability related knowledge to have for a Working Foreman or 1st Class laborer, a supervisory position. (Testimony of DPW Commissioner Fink, Exhibit #20)
10. Question #5 of the 28 written questions asked, pertained to concrete work.

Concrete is usually delivered and dumped in a time sensitive manner given that a delay is costly, concrete sets-up quickly. The Crew must then be at the site with all of the necessary tools and equipment ready to proceed with the work. Any delay is not tolerated by concrete setting-up. Lack of knowledge or preparation could be costly and consequential in this situation. (Testimony of DPW Commissioner Fink)
11. It was shown that the DPW employees were expected to pick up the required relevant information, knowledge, skill and proficiency for this promotional position through the experience of performing the duties or otherwise on his own.

The Union Contract or “CBA” between the Appellants’ union and the City in Article 7- Section 4 states in part: “... *that there is no obligation on the part of the City to provide a training period for any position in the City. If an employee desires to become proficient in order to qualify for a particular position, he will obtain the necessary training prior to applying therefore.*” (Emphasis added)
(Testimony of DPW Commissioner Fink and Exhibit #25)

12. The 28 written questions asked for pertinent information regarding regular Foreman position functions. This supervisory Foreman position obligated the person to have a solid understanding of, for instance; the safety aspects of operating a dump truck containing various materials. Getting the raised truck bed caught up on high-tension electrical overhead wires or trees, or for instance, knowing the weather effects, (heat, cold, rain, snow) on asphalt, concrete or chemicals like calcium chloride.(Testimony of DPW Commissioner Fink and Exhibit #1)
13. Questions #7 and #8 for instance, asked for an answer showing basic understanding and compliance with the Federal “ADA”, or Americans with Disabilities Act, regarding wheel chair ramps slope and minimum width. Mass. also has a corresponding law, G.L. c. 151B. (Testimony of DPW Commissioner Fink and Exhibit #1)
14. Question # 23 required knowledge of the minimum height (7’) of signs which is important for uniformity, and graffiti and vandalism avoidance. (Testimony of DPW Commissioner Fink and Exhibit 1)

15. Question # 25, for instance required knowledge the proper fuel mixture for chain saws. Improper fuel mixture could permanently damage a chain saw, an expensive piece of equipment. (Testimony of DPW Commissioner Fink and Exhibit 1)
16. Questions # 26-28, required basic knowledge of construction measurement units and math proficiency. (Testimony of DPW Commissioner Fink and Exhibit 1)
17. There was no testimony or other evidence submitted to show that the questions were not reasonably related to the position, were unfair, or sought information not reasonably available to any of the applicants, in the course of or through the performance of their assigned duties and functions. (Exhibits and testimony and reasonable inferences)
18. Source material and supporting data for most of the interview questions was submitted. The candidates' answer sheets and the panel evaluation sheets were submitted as exhibits during the hearing. Additionally, DPW Commissioner Jay Fink testified and explained the job-relatedness of all the 28 questions. (Exhibits and testimony)
19. The first four questions were directly related to fundamental questions of safety on the job.(Exhibits #1-#6, Testimony of DPW Commissioner Fink)
20. David Blouin failed to answer 3 of the first 4 questions correctly. He received partial credit for a correct answer on the fourth of such questions.(Exhibit #6)
21. Fred Perry failed to answer 3 of the first 4 questions correctly. (Exhibit #5)
22. Ultimately, the scores on the written questions were determined for the competing candidates, as follows:
 - Tom Hogan 95%
 - Larry Donahue 74% (not considered and not part of this proceeding)

- Fred Elwell 58%
- David Blouin 27%
- Fred Perry 11%

(Exhibits #1-#6, testimony of Commissioner Fink)

23. Based upon the scores to the questions and taking into particular account the safety questions, the City determined preliminarily that David Blouin and Fred Perry unqualified for the position. (Exhibits #5-#11, Testimony of DPW Commissioner Fink)
24. Although Fred Elwell did not obtain a passing grade (58%), for the purposes of this hearing alone, the City conceded that based upon the written interview questions, Fred Elwell remained marginally qualified for the position. (Exhibit #4, testimony of Commissioner Fink, City's argument)
25. There was no testimony or other evidence submitted to show that any of the questions were not reasonably related to the position, were unfair, or sought information not reasonably available to any of the applicants, in the course of or through the performance of their assigned duties and functions. (Exhibits and testimony and reasonable inferences)
26. The 28 written questions to be answered in this interview/evaluation process all appear to be in the range of information acquired during the performance of a variety of labor service duties and assignments. It also appears from the 28 questions, that the greater the length of labor service experience, the more familiar this information would become. (Exhibit #1, Exhibits and testimony, reasonable inferences)

27. If the competing candidates had been given advance general notice of the written questions to be answered; it is possible that a candidate could quickly memorize the answers to the expected questions and therefore perform well. However, a test of memory was not the purpose here. The purpose was to measure the familiar knowledge and application of that knowledge that was expected to have been previously acquired from their labor service job-experience and other experience or through special interest or training; not through concentrated reading and memorizing. (Exhibit#1, Exhibits and testimony, reasonable inferences)
28. The City had the applicants submit to a personal evaluation by a panel of senior supervisory personnel in the Department. The City evaluators: Commissioner Jay Fink, Associate Commissioner Manny Alcantara, Associate Commissioner Larry Donahue, Assistant Superintendent George Potter, and Assistant Superintendent Jeff Stowell completed the evaluations of the individuals seeking the promotion (with the exception of Larry Donahue evaluating Larry Donahue Jr.). (Exhibits #7-#11, Testimony of Commissioner Fink and Associate Commissioner Donahue)
29. On the basis of personal evaluation, Stowell found all applicants qualified. On the basis of personal evaluation, Associate Commission Alcantara found Hogan to be the most qualified, but found all others to be qualified. On the basis of personal evaluation, Donahue found Hogan to be the most qualified and Fred Elwell to be generally unqualified. George Potter on the basis of evaluation found Hogan to be the most qualified, Perry and Blouin to be generally qualified, and Elwell to be unqualified. Jay Fink, the Commissioner of the DPW, found Perry qualified,

Blouin generally qualified, Hogan the most qualified and Elwell borderline qualified. (Exhibits #7-#11, Testimony of DPW Commissioner Fink)

30. In addition to the interview and written questions, and the personal evaluation, the personnel records of each applicant were reviewed as well as the attendance records. (Exhibits #7-#16, testimony of Commissioner Fink)
31. Inasmuch as Elwell was the only qualified applicant other than Hogan as previously noted, Commissioner Fink took into consider Elwell's prior documented disciplinary history including a three day suspension in December, 2005 wherein Elwell abandoned his sanding route without notifying his supervisor contrary to Departmental policy. He had taken a Departmental Sand Truck to his home during a snow emergency and salted his own driveway and got something to eat. He failed to adequately secure and park it, causing significant damage when the Sand Truck slid down the driveway, across the street, and into a neighboring stone wall. (Emphasis added) (Testimony of Commissioner Fink, Exhibit # 21)
32. Elwell received a memo notice of "Poor Pothole Repair" on May12, 2009 from Commissioner Fink. This was rated as "very poor workmanship" for leaving the pothole repairs 1-1/2" above existing grade, not shaping the repairs in square or rectangular shape and not sealing the edges with emulsion.(Exhibit # 21)
33. Elwell received a letter from Commissioner Fink dated August 2, 2010 responding to Elwell's request to be temporarily promoted to working foreman. Elwell received a negative assessment from Fink with reference to several events and poor performance generally. The assessment referred to then Assistant Superintendent Larry Donahue's appraisal, that Elwell "could not fulfill the duties

of a working foreman because, despite your many years in the department, you do not possess the necessary skills to perform some of the construction functions that you could be charged with overseeing.” and further that Elwell agreed with Mr. Donahue’s assessment. The City also agreed then to place Elwell on various crews to give him an opportunity to learn such skills. The letter goes on to state that: “On numerous occasions in the past, you have failed to be responsible for your own actions which make one question your ability to lead a crew.” (Emphasis added) (Exhibit #21, testimony of Commissioner Fink)

34. The August 2, 2010 letter describes in detail such an event occurring on July 26, 2010. The letter ends with a caution that Elwell needed to learn necessary skills, to demonstrate independent judgment, performance and efficiency, “...without being held by the hand.” Elwell did send a reply letter disputing the assessment of his performance of July 26, 2010. Commissioner Fink testified that Elwell performed no cleaning that day. The same debris remained at the end of the shift as at the beginning, while Elwell was observed reading a newspaper or sitting around. (Emphasis added) (Exhibit #21, testimony of Commissioner Fink)

35. On April 1, 2011, Commissioner Fink sent Elwell a written-warning letter regarding his lack of performance and production by failing to properly direct and supervise a recent-hire DPW worker, (Smith), on March 24, 2011. Elwell and Smith only cleaned five (5) trucks in an 8-hour shift and 2 of the 5 trucks had to be redone, while Elwell took too long for lunch that day. Elwell was warned that this dereliction would not be tolerated in the future, and further discipline up to

termination would result for any disciplinary actions. Elwell was specifically reprimanded for ineffectual supervisory and exemplary demonstration regarding the new hire Smith, despite Elwell's 20 plus years' experience as a 1st Class operator. (Exhibit #22)

36. On January, 27, 2011 Commissioner Fink sent Elwell a letter describing his failure to report in a timely fashion to a call in an emergency snow situation on January, 18, 2011. This caused a potential public safety road situation. Elwell was also notified that he had been repeatedly warned about this type of dereliction in the past. This was yet another written-warning letter to Elwell. (Exhibit #22)

37. Elwell also received several disciplinary suspensions and written warnings during 1994-97, from the previous DPW Commissioner Stephen Smith. (Exhibit #22)

38. There also were other incidents of a disciplinary nature in which Elwell was given a verbal warning. For instance Commissioner Fink once found Elwell at a sub shop on the other side of the City, outside of his assigned area at 2:00 PM with his shift ending at 3:00 PM. Elwell's explanation then- "I was hungry". (Testimony of Commissioner Fink)

39. Elwell has consistently exhibited a lack of judgment, responsibility and maturity in the performance of his assigned duties for the DPW, throughout his career. Elwell's lack of fundamental knowledge and responsibility related to work assignments despite many years of experience is an indication of Elwell's lack of desire or willingness to take the time and effort to learn and improve. The effect of Elwell's inadequacies would be magnified if he were promoted to this Working

Foreman position, the supervisor of a crew. (Exhibits and testimony of Commissioner Fink)

40. The Appellants provided no testimony or evidence contesting the job relatedness of the questions posed and the inadequacy of the answers provided by the Appellants or the accuracy of the interview-written questions, the personal evaluations and the personnel file assessment regarding past performance.

(Exhibits and testimony)

41. The Union did not produce any testimony or documents to contest the testimony of either Commissioner Jay Fink or Associate Commissioner Larry Donahue.

Associate Commissioner Donahue has worked for the City for 38 years. He was a Working Foreman in 1988. He became a Superintendent in 1995 and this same evaluation process was used then for his Superintendent promotion. This same process has also been used by the DPW for promotions at least for the past 15 years, including in prior promotions in which the Appellants were candidates. The Union has not objected to this process since 1995. Associate Commissioner Donahue had previously been a Union elected official. (Exhibits, testimony of DPW Commissioner Fink and Associate DPW Commissioner Donahue)

42. Both DPW Commissioner Fink and Associate DPW Commissioner Donahue testified in a straight-forward, unhesitant and consistent manner. They have a self-assured professional demeanor. They both displayed good memories yet did not volunteer answers they were not sure of. They referred to documentation for details of which they were unclear. Fink's letters entered as exhibits display a solid, concise yet detailed writing style. Both men take the responsibilities of their

respective positions very seriously and expect their employees to do the same.

Both witnesses held up very well under cross-examination. I did not detect any overtone of bias or any other impermissible motive toward any of the Appellants. I find both witnesses to be very reliable and credible. (Exhibits, testimony and demeanor of Commissioner Fink and Associate Commissioner Donahue)

43. The Appellants Frederick Elwell, David Blouin and Frederick Perry did not testify in this matter nor was any explanation offered for their failure to do so.

(administrative notice)

CONCLUSION

It is well established under the Civil Service Law, that a “bypass” means the selection of a candidate from an eligible list prepared from a certification of applicants established according to their relative ranking on a competitive civil service examination for appointment or promotion to an “official service” position, when the successful candidate’s score was lower than the score of the unsuccessful candidate, and the appointing authority is able to justify the “bypass” for “sound and sufficient reasons” which must be approved by the personnel administrator, Human Resources Division (HRD) or HRD’s delegated representative, as here DPW Commissioner Fink. G.L.c.31, §26; PAR.02. See, e.g., Cotter v. City of Boston, 193 F.Supp.2d 62 (D.Mass.2002), rev’d other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003); Thompson v. Civil Service Comm’n, Middlesex C.A. No. MICV1996-5742 (Sup.Ct. 1996). An unsuccessful, lower ranked candidate who is “bypassed” is entitled to appeal to the commission for a de novo review of the sufficiency of the reasons for the bypass pursuant

to G.L.c.31, §2(b). See, e.g., See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996)

The same principles concerning a “bypass” for purposes of official service appointments and promotions, however, do not apply in the case of labor service appointments or promotions for which competitive civil service examinations are not required. Rather, labor service promotional appointments are made from “rosters” prepared on the basis of an applicant’s seniority, applying the “2n+1” formula to a list of qualified candidates “with the greatest length of service”. G.L.c.31, §§ 28 & 29; PAR.09; PAR.19. The Commission has consistently decided that an appointing authority is authorized to promote any applicant from among the requisite number of “2n+1” qualified labor service candidates who apply for the position, without stating reasons and, so long as such a qualified candidate with the requisite seniority is chosen, other unsuccessful candidates do not have standing to challenge their non-selection as an “aggrieved” party authorized to file a “bypass” appeal to the Commission under G.L.c.31, §2(b). See Brienzo v. Town of Acushnet, 20 MCSR 530 (2007); Murzin v. City of Westfield, 20 MCSR 305 (2007).

Here, Blouin with a score of 27% and Perry with a score of 11% on the 28 written questions, testing fundamental or routine position knowledge, were preliminarily determined to be “unqualified” and were not even considered for this promotion. A labor service promotional bypass occurs when a qualified candidate for the position also fits properly within the “2n+1” group of applicants, is not chosen and a lower candidate is

chosen. Here only the Appellant Elwell and the chosen candidate Hogan were the only two candidates considered. However, it is noted that Elwell was determined by the City to be generally or barely qualified, due to his score of 58% on the written question part of the interview process.

However, upon further evaluation by the City, it was determined that Elwell was unqualified due to the contents of his personnel file. His personnel file reflected a lengthy past DPW employment history of poor performance, rules violation and a lack responsibility and judgment. It showed that he was especially lacking in the area of individual performance, responsibility and supervisory ability. The City showed by a preponderance of the credible evidence in the record that Elwell was unqualified for this promotional Working Foreman/DPW 1st Class position. This is a supervisory position in which a crew of laborers are directed and controlled. Therefore, any inadequacy on the part of the Working Foreman supervisor would be magnified and exacerbated.

The City produced a volume of documentary and testimonial evidence to support its determination that Elwell was unqualified for this position and that Hogan, the successful candidate, was well qualified and clearly the best person for this promotion. The City was fully justified to select Hogan and was not required to choose Elwell solely based on his seniority, in the face of his serious long term record of poor performance, irresponsibility, immaturity, rules violation and discipline. Elwell's personnel file clearly documented his lack of job related knowledge, application of the knowledge and compliance with rules. He utterly showed his lack of individual performance and responsibility and also his failure of supervisory ability as in the example with the new hire Smith.

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)

The City would be derelict in its promotional authority and obligations to promote an unqualified candidate like Elwell to an important and consequential supervisory position like Working Foreman. The City has acted in a thorough, professional, compliant and traditional fashion here in the evaluation of these candidates. Accordingly, for the reasons stated above, the appeals of the Appellant, Frederick Elwell-Docket No. G2-11-97, Appellant David Blouin-Docket No. G2-11-98 and Appellant Frederick Perry-Docket No. G2-11-114, are hereby *dismissed*.

Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, McDowell and Stein, Commissioners) [Marquis absent] on December 1, 2011.

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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:

Joseph L. DeLorey, Atty.

David F. Grunebaum, Atty.

John Marra, Atty, HRD