

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

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

Frank Gallo,

Appellant

v.

Docket No. G2-08-182

City of Lynn,

Respondent

Appellant's Attorney:

Susan F. Horwitz  
Sandulli Grace, P. C.  
44 School Street, Suite 1100  
Boston, Massachusetts 02108  
(617) 523-2500 ext 15

Respondent's Attorney:

David F. Grunebaum  
Tobin, Sullivan, Fay & Grunebaum  
60 Williams Street, Suite 330  
Wellesley, MA 02481  
(617) 237-0877 ext 24

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c.31, § (2b), Appellant, Frank Gallo (hereafter "Gallo" or "Appellant") seeks review of the Personnel Administrator's (hereafter "HRD") decision to accept the reasons of the City of Lynn (hereinafter "Appointing Authority" or "City"), for bypassing him for promotional appointment to the position of police sergeant. The Appellant filed a timely appeal at the

Commission. A full hearing was held on November 19, 2008 at the offices of the Civil Service Commission. Two (2) audio tapes were made of the hearing. Both parties filed post hearing proposed decisions at the Commission.

**FINDINGS OF FACT:**

Exhibits (Joint Exhibits 1 through 25) and a stipulation of facts were entered into evidence at the hearing. Appellant made an oral motion to sequester witnesses, which was allowed and witnesses were appropriately instructed. The Appellant raised the preliminary matter of his written request, dated October 23, 2008 to the City for documents and information, (Exhibit 25) to which the City failed to respond. The City failed to respond in writing and argued that the request was “onerous”; yet it had the witnesses available for this hearing to testify and be cross-examined regarding the requested documents and information. The issue and the Appellant’s proposed remedy were taken *de bene*. Based on these exhibits, the stipulation and the testimony of the following witnesses:

For the Appointing Authority:

- Chief John Suslak
- Deputy Chief Kevin Coppinger
- Deputy Chief Kenneth Santoro

For the Appellant:

- Appellant Frank Gallo
- Captain Ted Blake
- Lieutenant Peter Holey

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

1. In 2007, Officer Gallo took an open competitive examination for the position of police sergeant in the Lynn Police Department. He scored 90 on

the exam and was ranked number one (1) on the certification # 280491.  
(Exhibit 1)

2. The City made a requisition to HRD for a certified list of qualified candidates from which the City intended to make three (3) promotional appointments to the position of police sergeant. HRD issued that list, certification #280491, dated June 14, 2008. The Appellant was listed on the top of that certification. The Appellant was bypassed for promotion by three other named candidates, who appeared lower on the certification. Exhibit 1)
3. By letter dated July 17, 2008 the City of Lynn notified the state Human Resource Division (HRD) that it was by-passing Appellant for promotion to sergeant. (Exhibit 1) However, that letter incorporated by reference Police Chief John W. Suslak's letter of July 1, 2008, for the City's stated reasons and justification for the bypass of the Appellant. The only stated reasons, in summary, justifying the bypass were the 12 year old discipline and Officer Gallo's "excessive use" of his contractual sick leave. (Exhibit 1)
4. Police Chief John W. Suslak's letter of July 1, 2008 which stated the City's reasons and justification for the bypass of the Appellant is four (4) pages single spaced. The only two reasons, in summary, stated in that letter for the bypass were the 12 year old(1996) discipline and the claim of Officer Gallo's "excessive use of sick time", which sick leave use is covered by the collective bargain agreement (CBA). However, that lengthy letter also contains many assertions, allegations, assumptions and opinions in serious descriptive language; the sum total of which creates a strong negative or prejudicial effect against the Appellant, beyond these summarily stated two reasons. (Exhibit 1, reasonable inference)
5. The Human Resource Division, pursuant to G.L. c. 31 § 27, approved the City's reasons for bypass by letter dated July 21, 2008. (Exhibit 1)
6. Appellant Frank Gallo has been a patrol officer in the Lynn Police Department since January 1980. (Exhibit 1)
7. Prior to joining the Lynn Police Department, Gallo was in the Marines for two (2) years from 1975 to 1977. He was promoted twice and was honorably discharged as a Corporal. (Exhibits 17 and 20D)
8. Gallo is married and also has a mother who he helps care for, due to problems associated with her age and lack of mobility. (Testimony of Gallo)
9. For the first 14 years as a patrol officer on the Department Officer Gallo was on cruiser patrol and some plain clothes assignments. During this time he made approximately 1000 arrests (Testimony of Gallo)

10. Due to his excellent performance as a patrol officer, Gallo was selected to be on the Drug Task Force. He was assigned to the Drug Task Force for three (3) years, until the 1995 drug testing incident. (Testimony of Gallo)
11. However, Chief Suslak continued to feel a lack of forgiveness towards Gallo for his 12 year old transgressions. He still views this as a "betrayal of the trust" placed in Gallo as a member this "highly distinguished unit". Chief Suslak still firmly believes that Gallo should have been terminated from his position in 1996. He continued to rely on the 1995 pre-discipline and non-charged events as the basis of his strong negative opinion of Gallo. (Testimony of Suslak)
12. In late 1995, while assigned to the Drug Task Force, Officer Gallo was scheduled by his supervisor to be routinely drug tested. Gallo came forward on the day of his scheduled drug test and acknowledged to his supervisor that he had a problem with cocaine. The supervisor had Gallo complete the scheduled drug test anyway, resulting in a positive reading. (Testimony of Gallo and Coppinger)
13. Officer Gallo immediately sought treatment (1995) at Beech Hill Hospital. Both Deputy Coppinger and Chief Suslak were aware of Gallo's sleep apnea at that time. (Exhibit 15A, Testimony of Suslak and Coppinger)
14. Over the years in the Department, Gallo has received many commendations and acknowledgments for his excellent police service. He also sought to improve his education since the drug incident and related (1996) untruthfulness discipline for altering the documentation of the post-hospital treatment plan. He received his BA degree from Curry College in 2001. (See exhibits 20B, 20C and 20F)
15. However, due to other medical problems including being diagnosed with sleep apnea and high blood pressure Gallo was unable to complete the Beech Hill treatment program at that time. (Exhibit 15A and 15B) (Testimony of Gallo)
16. Officer Gallo, while out on medical leave, sought treatment for his various health issues. (Exhibits 15B, 15C)
17. Officer Gallo then enrolled in a treatment program at Salem Hospital, which he successfully completed on July 29, 1996. (Exhibits 15C and 15D)
18. Gallo also continued with an Aftercare Group Program from July 29, 1996 – September 9, 1996. (Exhibit 15E)

19. However, in August 1996, Gallo was required to file documentary proof with the Department, regarding the treatment and aftercare programs. A document was submitted to the Department concerning Officer Gallo's follow-up care, Gallo had scratched out a reference to AA meetings on that document. (Testimony of Gallo).
20. When Deputy Coppinger met with Gallo and asked about the scratch out Gallo initially denied making the scratch out on the document. A few minutes later, after a break and consultation, he admitted to Deputy Coppinger that he had in fact scratched out the words on the form "AA meetings as scheduled." (Testimony of Gallo and Coppinger)
21. Gallo testified here and at the City's 1996 disciplinary hearing explaining that he made the scratch out because he thought this was unclear and would create confusion, he was concerned that it would delay his return to work. He further explained that it was due to being in a non-pay status for eight months and under financial pressure, including being at risk of having his home foreclosed. (Testimony of Gallo)
22. Gallo was required by the Department to produce documentation to verify that he had completed the hospital rehabilitation part of the decision, as a prerequisite to returning to his position as a police officer. He was required to produce a Post Hospital Patient Care Plan (Ex. 22) or as Chief Suslak referred to it "a post hospital release form, a treatment form". Gallo was represented by an attorney and a union representative during this ongoing process of securing documentation to facilitate his return to active duty. (Testimony of Suslak, Coppinger, Gallo)
23. Because Gallo had altered the form and initially denied altering the form he was charged with violations of Department Rules on Truthfulness and Conduct Unbecoming an Officer. (Exhibit 16A)
24. Because of these charges, Police Chief Hollow and Deputy Coppinger recommended that Officer Gallo be terminated. (Testimony of Coppinger)
25. Pursuant to MGL c. 31, the City held a disciplinary hearing for the appellant on these charged Department Rules violations. The hearing was held on October 8, 1996. (Exhibit 16A)
26. The Hearing Officer Attorney Michael Marks, explained in his decision dated October 11, 1996, that the allegations revolved around the single document which was altered so that the words "AA meetings as scheduled" were obliterated and that Officer Gallo has admitted responsibility for making those alterations in the original document. (Exhibit 16A at 3)

27. In the Hearing Officer's Decision he stated that Officer Gallo was an outstanding police officer. He further stated that the officer's alteration of the document was a "serious mistake" and requires discipline. (Exhibit 16A at 5)
28. The Hearing Officer Michael Marks then stated that the issue was "should an officer with 16 years experience as a Lynn police officer with an unblemished record be terminated from his employment for altering a document?" The Hearing Officer concluded that "termination is too severe a punishment when one takes into consideration all of the relevant circumstances." The Hearing Officer then recommended: 1) that Officer Gallo be returned to service as a Lynn Police Officer; 2) that Officer Gallo be suspended from his position as a Lynn police officer during the period of his absence, specifically the time from March 2<sup>nd</sup> to the present, which is that period covering the time he was without a salary; 3) that Officer Gallo for two years from the date of his reinstatement should be subject to random drug testing; and 4) that Officer Gallo agree that any disciplinable event shall be the basis for immediate termination without right of appeal, except that Officer Gallo may appeal the question of whether or not the event had occurred. This last condition is intended to be interpreted as a last chance agreement. (Exhibit 16A)
29. Hearing Officer Marks recommended an eight (8) month suspension, in effect time already served. It is admitted that Gallo was disciplined for altering the document and then lying about it to a superior, when asked about the alteration. Gallo was not disciplined for the preceding drug use and positive drug test or other preceding events. The Mayor concurred, and adopted Hearing Officer Marks' findings and recommendations. (Exhibit 16A, testimony of Suslak and Coppinger)
30. Officer Gallo accepted the eight (8) months suspension and all these conditions and acknowledged that he would abide by the conditions. (Exhibit 16B)
31. The City offered Exhibit 22 in to evidence to which the Appellant objected. This document has numerous subsections. The Exhibit was taken *de bene* with the oral instruction from this hearing officer that the events preceding the disciplinary event of the altered hospital report would not be considered. Therefore the bulk of Exhibit 22 is excluded as being prior to the disciplinary event, prejudicial and confusing. Exhibit 16, Attorney Michael Marks' disciplinary decision, other exhibits and testimony address the circumstances of and the disciplinary charges, hearing, findings, conclusions and recommendations in sufficient detail and clarity. (Exhibit 22)
32. In November 1996 Officer Gallo also sent a letter of apology to Deputy Coppinger, which he admits receiving. ( Testimony of Coppinger, Exhibit 21)

33. Officer Gallo was then returned to duty in November 1996 as a patrol officer. He fully complied with all the conditions of his discipline and underwent two (2) years of random drug testing. He has performed his duties for the past 12 years with no further issues concerning drugs or truthfulness and no other discipline. (Testimony of Gallo)
34. Officer Gallo has worked primarily as a "House Officer" during these 12 years. House Officer is a regular patrol officer assignment within the Lynn Police Department. There are four (4) or more patrol officers acting as House Officers on each shift. (Testimony of Lt. Holey).
35. Officer Gallo works primarily as a House Officer because he performs the duties and responsibilities so well. He does an excellent job, knows all the technical aspects of the job and works extremely well under pressure and stress. He is one of the best House Officers. (Testimony of Lt Holey and Captain Blake)
36. Officer Gallo is regularly assigned as a House Officer because he does the job so well, it is not punishment and there is no restriction on his being assigned to street patrol or any other patrol officer position. (Testimony of Lt. Holey and Captain Blake)
37. Even though Officer Gallo is regularly assigned as a House Officer he does work on the streets on occasion, as all patrol officers are required to do at least once a month. He also works some overtime and details. (Testimony of Holey and Gallo)
38. The contract between the City of Lynn and the Lynn Police Department provides that officers "shall be granted fifteen (15) days of sick leave at the beginning of each year. Provided that ten (10) days of said leave may be used for family illness." (Exhibit 2)
39. Under the Department policies, to use sick leave an officer calls in to have a sick slip made out. (Exhibit 3) When calling in, an officer is only required to state whether the illness is to the officer or a family member. (Exhibit 4)
40. Officer Gallo has always followed Department procedures for calling in sick and there have been "illness report" slips completed for all of his sick leave utilization (Testimony of Gallo and Exhibit 10).
41. Due to his own health issues, including his sleep apnea as well as caring for his wife who has had health issues and operations over the past years and caring for his mother, Officer Gallo has often needed to use his 15 days sick leave each year. (Testimony of Gallo and Exhibit 19)

42. Chief Suslak has been concerned in general about officers' use of sick leave and there have been correspondence in the Department concerning these issues and the Union's objections to the Chief's claim that officers are abusing sick leave. (Exhibit 5, 6, 7, 8, and 9)
43. In 2006 Chief Suslak met with many officers to discuss their sick leave use. Officer Gallo met with the Chief at this time. At the meeting Officer Gallo stated that he used his sick leave due to his ongoing health issues. (Testimony of Chief and Gallo)
44. Prior to this meeting no one had ever before questioned Officer Gallo about his sick leave use. (Testimony of Gallo)
45. Chief Suslak acknowledged at the hearing that there was no evidence that Officer Gallo ever used a sick day when neither he nor a family member was sick, the allowed usage. (Testimony of Suslak)
46. After the meetings with officers in 2006, Chief Suslak suspended some officers for claimed abuse of sick leave. **There was no discipline taken against Officer Gallo for sick leave abuse.** It is inferred that Gallo presented less culpable circumstances on sick leave use to the Department, than the charged officer(s). (Testimony of Chief Suslak and Gallo, reasonable inference)
47. **The Union challenged by the grievance process the suspension of the other officer(s) for alleged sick leave abuse based on sick leave use.** Chief Suslak testified at that arbitration hearing and presented the same or similar: (as this hearing) testimony, statistical evidence and documents including his memos expressing official dissatisfaction with departmental sick leave usage. (Exhibit 13, Testimony of Suslak, Exhibits)
48. In an **arbitration Decision issued July 6, 2007**, Arbitrator James Litton found that use of sick leave, by those charged officers [one named officer] does not support a determination of abuse. Use of sick leave can be based upon legitimate needs and are not necessarily misuse. The Arbitrator concluded that the discipline of the named officer was based on statistical evidence or patterns of use over many years, (through June, 2006) which may reasonably cause suspicion. However, the sick leave use was also susceptible to more than one reasonable interpretation. The City lacked just cause to discipline the charged officer(s). (Exhibit 13 at 4-15)
49. The arbitrator also found that where an officer follows established procedure for taking contractual sick leave and it is approved there is no basis for later disciplining the officer. (Exhibit 13 at 15)



50. The arbitrator therefore overturned the discipline issued in that case. (Exhibit 13)
51. Since his return to work in 1996 Officer Gallo has consistently performed all his duties with distinction. (Testimony of Holey and Blake)
52. Officer Gallo did not take the promotional exam for Sergeant until 2007, because he felt it right to rebuild confidence in and prove himself as a police officer. (Testimony of Gallo)
53. Finally Gallo discussed with his supervisors whether to take the sergeants exam and his supervisors encouraged him to do so. (Testimony of Gallo)
54. At no time in 1996, when he was disciplined or since that time had he ever been told that he was permanently barred from being promoted due to the 1996 discipline. (Testimony of Gallo)
55. In Lynn no one had ever before been bypassed for promotion to police sergeant. (Testimony of Chief)
56. In deciding to recommend bypass of Officer Gallo in this case, Chief Suslak did not interview Officer Gallo or the other officers on the list. He did not request resumes or any other information from the candidates and the Chief did not speak to Officer Gallo's supervisors as to Officer Gallo's work performance. (Testimony of Chief and Holey and Blake)
57. Both Captain Blake and Lieutenant Holey did supervise Officer Gallo, Blake for 5-7 years and Holey for 6 years. They both felt that Gallo was reliable, knowledgeable an excellent performer and good under pressure. Gallo was a multi-tasker and someone who could be counted on. Neither of these two supervisors had ever had any problem with Officer Gallo. (Testimony of Holey and Blake)
58. Both Captain Blake and Lieutenant Holey are straight forward and professional in appearance and demeanor. They answered questions under direct and cross-examination with equal aplomb. They appear honest, bright, insightful and observant. They had no negative experiences supervising Gallo; on the contrary their experiences have been entirely positive. They inspire confidence in their responses, and represent the Department well. I find their testimony to be reliable and credible. I attribute great weight to their testimony on Gallo's competence, performance and character. (Testimony and demeanor of Holey and Blake)
59. In deciding to recommend bypass of Officer Gallo, Chief Suslak did review Gallo's personnel file but did not review the personnel files of the

other competing candidates. The Lynn Police Department does not use EPRS or another regular, written employee performance review system. (Testimony of Chief)

60. Chief Suslak stated in his July 1, 2008 letter that "it is not unusual for sergeants to appear and testify in court". He raised the ethical obligation to disclose Gallo's past disciplinary record, which would be used by defense counsel to undermine his credibility, compromising the prosecution of the case. However, the Chief: cited no authority and no opinion obligating such disclosure, was not aware of any such obligation, had not made an inquiry for an opinion and was not even aware of the number of court appearances Gallo had made as a witness or if he had been challenged on this issue, since the discipline had been imposed. There is not any reliable evidence presented here to support or reasonably infer this disclosure-obligation-compromise scenario claimed by the Chief. The Chief's claim as stated in the letter is conjecture. (Testimony of Suslak, Exhibit 1)
61. Chief Suslak believed at the time of his July 1, 2008 letter that Gallo is presently "unfit to be promoted to sergeant", solely due to his actions while a member of the Drug Task Force; which actions had prompted his hospitalization and treatment. These actions preceded the altering of the hospital document and subsequent lying about it, the basis of the discipline in 1996. (Testimony of Suslak, Exhibit 1)
62. **Chief Suslak recommended in his July 1, 2008 letter** that Officer Gallo be bypassed because he continued to believe that Officer Gallo should have been terminated in 1996 and he wanted to continue to exert a punishment on Officer Gallo for the 12 year old misconduct. (Testimony of Chief) The Chief also improperly claimed in the letter that Officer Gallo was misusing sick leave since he had used all of his available sick leave over a period of many years. However, the Chief, at that time had the benefit of **the arbitrator's decision, dated July 6, 2007**, concluding that the City lacked just cause to discipline similarly situated officer(s) for sick leave abuse, overturning the discipline imposed. Chief Suslak testified at that arbitration hearing and presented substantially the same documentation evidence as he presented at this hearing. (Exhibit 1, Testimony of Chief)
63. Chief Suslak is neat and professional in demeanor and appearance. He is bright and articulate. He is forthright and definite in his responses. He holds his opinions and assessments firmly. He still believes that Gallo's misconduct in 1995, as a member of the Drug Task Force deserved termination and he now believes that further punishment is in order for Gallo. He is harsh and severe in his continuing outlook towards Gallo, in the face of Gallo's subsequent rehabilitation, and good performance record over twelve plus years. The Chief did include in his letter: the sick leave abuse issue, despite its' previous resolution in Gallo's favor by an Arbitrator and the

unsubstantiated claim of Gallo's special vulnerability to a witness credibility-attack. However, I believe that these are further examples of how firmly the Chief continues to hold his opinions, despite a lack of corroboration or even a contrary conclusive determination. The Chief may not be biased against or hold a grudge against Gallo personally, as he would probably feel the same emotional and psychological reaction against any other person similarly accused of what he continues to believe was serious misconduct. He honestly described his characterization of the twelve year old events in serious descriptive language. The Chief should have removed himself entirely from the promotional selection process, due to his strong entrenched personal views, and resulting inability to be impartial. (Exhibit 1, Testimony and demeanor of Chief)

64. The Appellant, Frank Gallo has been a member of the Lynn Police Department for 29 years. He had held various assignments over the years and then most recently as a "House Officer" for the past 12 years. He has worked on the street and worked overtime but rarely details. He has no restrictions on his duties or assignments. He readily admitted all of the details associated with the 1995-1996 events and discipline. He described the sleep apnea he has suffered from 1995, its prevention of his completion of the Beech Hill program and his continuing treatment for it. He sincerely described his regrets for and the negative effect of the untruthfulness discipline on himself personally, his reputation and on his career. He knows that it takes time to earn back trust and reestablish integrity. That is why he waited twelve years to take the sergeant's promotional exam, and only after receiving encouragement from his supervisors. He explained his reasoning for scratching-out the reference to AA meetings on the hospital form, because he thought it would delay his return to work, as he was suspended and on a no-pay status, facing possible bankruptcy and home foreclosure. He has worked to improve himself professionally, receiving commendations and certificates of training over the years. He received his BA degree in 2001. He was never told by the Department that he was permanently barred from promotion. He appears to be rehabilitated, performing his duties and responsibilities as a police officer very well and has not received any subsequent discipline since 1996. He is found to be a sincere, credible and reliable witness. (Testimony and demeanor of Appellant)
65. By letter dated July 17, 2008 the City of Lynn notified the state Human Resource Division that it was by-passing Appellant for promotion to sergeant. (Exhibit 1) The only reasons provided in the main, for the bypass were the circumstances of the 12 year old discipline and Officer Gallo's use of his contractual sick leave. (Exhibit 1)
66. At the time that Officer Gallo was by-passed and Officers Robert J. Godbout, Michael P. Kenny and Timothy Magio were promoted over him to sergeant; a review of the sick leave use of these individuals shows that each also uses a significant amount of sick leave. The total sick leave usage among

these candidates from 2003 through 6/2008 was similar, although Gallo's was highest. Each of the candidates had used the 15 day maximum in at least one of those years. In particular, Officer Kenney used 15 days in 2005, 2006, 2007 and had used more days in the first 6 months of 2008 than Officer Gallo (Exhibit 14)

#### **CONCLUSION OF THE MAJORITY (Bowman, Marquis, McDowell, Stein):**

The majority of the Commissioners adopt the findings of fact of Commissioner Henderson, who was the hearing officer regarding this appeal, but respectfully disagree with Commissioner Henderson regarding his conclusion, noted below as the conclusion of the minority.

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

"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 for a candidate higher on the list to be bypassed, the appointing authority must submit “sound and sufficient” reasons that affirmatively justify picking a lower ranked candidate, which must be supported by a “preponderance” of credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. G.L.c. § 2(b). 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); Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”)

All candidates must be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of arbitrary and capricious 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 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”); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme requiring approval by HRD, subject to appeal to the Commission, was “sufficient to satisfy due process”).

In a bypass case, the Commission is charged to review whether the Appointing Authority sustained this burden of affirmatively proving, based on a preponderance of the evidence presented at the hearing before the Commission, that it had “reasonable” justification for making an exception to the legislative expectation that selection will be made on rank ordering, which is necessary to allow a bypass. E.g., City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) See, e.g., Cambridge v Civil Service Comm’n, 43 Mass.App.Ct. 300,303-304 (1997) (dicta indicating that Commission has some discretion *”to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.* To illustrate, while it might be rational for an appointing authority to consider a candidate’s twelve year old conviction of assault and battery, it would not be a proper consideration if a statute or regulation existed that prohibited consideration by public employers of a conviction that occurred more than ten years prior to the time of the appointment decision. *‘Justified,’ in the context of review, 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.’ ”*) (*emphasis*

added). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (affirming Commission's decision to reject appointing authority's reliance at the appointing authority level hearing on appellant's failed polygraph test and evidence of a domestic abuse order and adopting appellant's testimony to the Commission as credible evidence supporting the overturn of a police officer's unjustified discharge)

A "preponderance of the evidence test requires the Commission to determine whether, on the 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, 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)

Under these established principles, the Commission majority concludes that the City of Lynn has established by a preponderance of the evidence that one of the reasons stated for bypassing Mr. Gallo is sound and sufficient grounds for his non-selection to the promotion of to police sergeant. The majority of the Commission agree with the minority that the City's assertion that Officer Gallo had abused his sick time allowance does not constitute a sound and sufficient reason for bypass, where the evidence clearly showed that his use of sick time was entirely consistent with the practice of the officers in the department and that an Arbitration Award dated July 6, 2007 (one year prior to the bypass) had determined that the City did not have just cause to discipline a similarly situated officer. The majority also agree

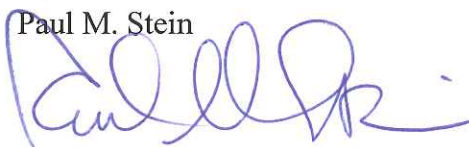
that such a clearly improper rationale might be viewed as evidence of potential bias and pretext that, would, in another case, perhaps could warrant the allowance of the appeal.

Here, however, the City has proved that Officer Gallo was guilty of abusing cocaine and, compounding the error, committing an act of “untruthfulness” about it as well. He has since fully acknowledged his wrong, which occurred over 12 years in the past, and the minority position has some force that the passage of such a long period of time, makes it incumbent on the appointing authority to bring to the table some quantum of proof that the transgression, albeit stale, is still a relevant factor on the applicant’s fitness to perform the essential duties of the position to which he aspires. Rehabilitation is the hallmark of our democracy, and there should be no such thing as a permanent and “automatic disqualifier” of an applicant who has truly been fully rehabilitated. On the other hand, substance abuse and untruthfulness are one of the most important qualities abhorrent to the station of a law enforcement officer and one who has shown he or she is likely to abuse drugs or fudge the truth does not deserve the privilege of the office.

The essential determining factor in this case is that the United States Supreme Court, for better or for worse, requires that criminal prosecutors can be required to disclose to the defense certain information about the “untruthfulness” of a potential police witness or supervisor, in some cases, even if the defense does not specifically request it. E.g., United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); “*Police Officer Truthfulness and the Brady Decision*”, 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at [policechiefmagazine.org](http://policechiefmagazine.org). Since there is some discretion as to what, and for how long a



disclosure of indicia of untruthfulness is required or appropriate under the so-called "Brady Rule", the majority of the Commissioners conclude that the Commission is obliged to defer to the Chief of Police here, whose judgment is that Officer Gallo's past conduct could compromise a future criminal prosecution, which is clearly a factor directly related to his fitness to serve. Certainly, reasonable law enforcement executives might differ with his conclusion, but the Commission cannot step in to override a decision lawfully-grounded in constitutional law, as made by the Chief of Police here.

Paul M. Stein  
  
For the Majority

**CONCLUSION OF THE MINORITY (Henderson):**

In a bypass appeal, the Commission must decide whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and 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).

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.” Town of Falmouth v. Civil Service Commission, et al, 447 Mass. 814 (2006), quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of CivilServ. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A "preponderance of the evidence test requires the Commission to determine whether, on the 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 Commission, 31 Mass. App. Ct. 315 (1991). 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).

All candidates must be adequately and fairly considered. The Commission 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). Also, Basic merit principles, as defined by Chapter 31 of the General Laws, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993).

It has been found here that Chief Suslak, who wrote the critical bypass letter, relied exclusively on his own negative, subjective opinion of the Appellant's qualifications to be promoted to police sergeant. His view of the Appellant's qualifications rest entirely on a severe and unforgiving assessment of the circumstances surrounding and preceding the twelve year old disciplinary matter. He held a very strong belief that the Appellant should have been terminated from his position as a result of the 1996 discipline, instead of the imposed eight (8) month suspension and related conditions. The Appellant completed the suspension and fulfilled the related conditions. He was subsequently returned to his position and performed all of his duties well, without incident since then. The Appellant was at the top of the civil service eligibility list. Yet the appointing authority in the exercise of its perceived discretion chose the three lower ranking, competing candidates.

However, Appointing Authorities are charged with the responsibility of exercising sound discretion 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."

In the instant case, the City violated basic merit principles in several ways. Initially, the Appellant is presumed to be qualified for the position, having met all of the prerequisites established by HRD, passing the qualifying exam and being placed on the top of the relevant certified civil service list. Thereafter, he was bypassed, by the selection of candidates who appeared lower on the certification and/or scored lower on civil service exam. However, "[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." Sabourin v. Town of Natick, Docket No. G-01-1517 (2005); Bardascino et al v. City of Woburn, Docket No.: G1-04-134, G1-04-120, G1-04-111 (2006).

Basic merit standards require that an employer not act in a pre-textual or improper manner when taking a personnel action such as reviewing suitable candidates for hire. Here there was no real consideration of Gallo since his bypass was predetermined by the Chief.

Even with the heightened scrutiny that is rightly imposed upon police officers, Police Commr. of Boston v. Civil Serv. Commn., 22 Mass. App. Ct. 364, 370-371 (1986). The Appellant is capable of performing the duties of a police sergeant and that has been established as a matter of record over the period of at least the previous twelve years. Chief Suslak's opinion of the Appellant's lack of fitness to serve as a police sergeant is unsubstantiated, arbitrary and violates the basic merit principles upon which the civil service system is founded. See G.L.c. 31, § 1 and Cambridge, 43 Mass. App. Ct. at 304.

Such a decision is contrary to Basic Merit Principles as all candidates must be adequately and fairly considered. The commission 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).

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, 359 Mass. 214 (1971). Basic merit principles as defined in M. G. L. c 31, Section 1 require that employees be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration and that they are protected from arbitrary and capricious actions.

See Tallman v. City of Holyoke, G-2134, Cotter, et al. v. City of Boston, et al. United States District Court District of Massachusetts, Civil Action Number 99-1101, \*Young, CJ).

In this case, the bypass was not based on adequate reasons or supported by credible evidence and violated basic merit principles. Gallo was not treated equally and his bypass was arbitrary and capricious. See Thomas v. City of Westfield. Case No. G-416S (1999).

In this case the selection process was inherently flawed since the Appointing Authority did not adequately or fairly consider Frank Gallo for the sergeant's positions. The City instead relied on the twelve year old discipline and circumstances preceding it; despite fulfillment of all of the imposed conditions, demonstrated rehabilitation and a solid subsequent record of exemplary performance. The Chief even tried to inject the issue of Gallo's special susceptibility to a credibility attack as a witness, upon disclosure of this 1995-96 event, as a reason for bypass. However, this specific scenario claim is found to be conjecture on the Chief's part as he made no attempt to inquire into and establish support for this claim. If this issue had arisen in the past or were to arise in the future with Gallo, it would be a matter for the District Attorney and the Trial Court to resolve. The matter of obligated disclosure, the nature and use of the disclosure and its effect on any given Trier of fact, whether Judge or jury is unclear and speculative at best.

Lynn Police Chief Suslak conducted no meaningful evaluation of the candidates based on objective factors. There were no criteria established, no interviews conducted and no weight given to Gallo's long history of excellent work performance, education, military experience and the evaluation of his supervisors.

Instead, the bypass was based entirely upon Gallo's prior misconduct for which he was already disciplined, 12 years earlier and his valid use of his earned contractual sick leave, which validity had previously been determined by an arbitrator to be permissible.

Chief Suslak's letter which was the basis of the bypass effectively imposes a permanent bar on Gallo from being promoted and imposes "double jeopardy" or an *ex post facto* punishment over the 1996 incident for which he was previously disciplined.

A. It is Wrong For Gallo's Prior Misconduct to Create an "Automatic Disqualifier" for Promotion.

Gallo submitted to hospitalization, a follow-up program and other monitoring and assisting conditions as agreed upon by the City. This remedy was akin to an employee assistance program (EAP) and appears to have worked as intended. He also served his eight month suspension and abided by all of the other conditions imposed upon him. He should not now after twelve years of exemplary performance be subjected to a separate and distinct additional punishment, which would be contradictory of the rehabilitative intent and purpose of the original agreed upon disposition. This approach would be contrary to common sense, if not public policy. Permanent and continuing punishment by disqualification, despite proven rehabilitation and long term model performance would send the wrong message to anyone cognizant of the circumstances of discouraging attempted rehabilitation and long-term solid performance.

In Gallo's case, the Appointing Authority has also abused its discretion in the bypass of Officer Gallo. Officer Gallo was an exemplary police officer prior to his problems and misconduct in 1995-1996. However, he sought and received EAP type rehabilitation at that time and fully accepted responsibility for his wrongdoing. He accepted the Decision of the Appointing Authority in 1996: to consider his time without pay as an eight month

suspension, to undergo two (2) years of random drug testing and to be under a last chance agreement in the event of any further discipline. Officer Gallo then returned to work and met all his obligations under the penalties imposed upon him. In addition, he wrote a letter of apology to Deputy Coppinger and acknowledged that he needed to earn the trust of his superiors. This was in 1996. Since then he has worked hard to be a good police officer and to regain his superiors trust. As Gallo testified, that was why he waited until 2007, a passage of 11 years before taking the promotional exam for sergeant.

Gallo met all his obligations under the 1996 discipline and has performed his duties as a police officer commendably since. (Testimony of Holey and Blake) Gallo completed his requirements for a Bachelor of Arts degree in 2001. (Exhibit 20A and 20B), received training and was certified in Emergency Medical Dispatch in 2003, 2005, and 2007, (Exhibit 20B at 8,9,10 and 11) received Certificates of Achievement from Federal Emergency Management Agency (FEMA) in National Incident Management in 2005 and 2006 (Exhibit 20B at 12), completed Leaps/CSIS training in 1999 (Exhibit 20B at 13), received a letter of Appreciation for Community Police Service in 1998 (Exhibit 20C at 10-15), received a letter of appreciation in 2007 for making suggestions to reduce crime (Exhibit 20E at 1-2), Officer Gallo has also continued to make recommendations to improve Department operations (Exhibit 20E). Therefore Officer Gallo has done everything in his power to fully rehabilitate himself. It is wrong, to effectively, permanently, deny Officer Gallo the ability to be promoted, it is an abuse of discretion, unsound judgment and is not supported by the preponderance of the credible evidence.

**B. The Decision to Bypass Gallo is Based Upon the Chief's Bias Against Gallo**



In the case of Joseph Kerrigan v. Hudson Police Department 17 MCSR 54 (2004) the Commission overturned a promotional bypass where the bypass was due to the bias and personal animosity of the police chief. In that case because the chief's bypass letter unjustifiably focused on allegations against Kerrigan while ignoring all the positive information about Kerrigan, the Commission found bias on the part of the Chief. Id at 56. Similarly, in Gallo's case, Chief Suslak has relied entirely on Gallo's actions in 1995-96 for which he was already disciplined and Gallo's valid and validated use of his sick leave as the basis for this bypass. Both Chief Suslak and Deputy Coppinger admitted that they support the bypass because they believe that Gallo should have been terminated in 1996. Whether there was any point at which Gallo should be considered eligible for promotion, Deputy Coppinger said he stood by his judgment that Gallo should not be promoted. However, it is wrong to continue to penalize Gallo for actions which were previously addressed and for which he has fully served his punishment. In 1996 there was a hearing and the Appointing Authority decided not to terminate Gallo. Gallo was found to be an officer worthy of being given another chance. It is therefore wrong for Chief Suslak to now, twelve (12) years later; continue to hold a grudge against Gallo and to therefore prevent him from being promoted. Neither Chief Suslak nor Deputy Coppinger should have participated at all in this selection and bypass process, due to their strong opinions, which amounted to a predetermination to bypass Gallo.

The Chief has claimed that because Gallo was found to be untruthful in the 1996 incident concerning the form provided to Deputy Coppinger, that Gallo is **now** completely untrustworthy and is now especially susceptible to a credibility attack as a witness in court. The Chief made this bald inflammatory claim in his bypass letter. Yet, in his testimony

admitted that he had no basis for this claim and had not even inquired into the number of times Gallo had actually testified in court since the discipline was imposed. That specific conclusion is mere conjecture and there was no evidence presented to support that claim. The Chief made no effort to inquire into it and obtain a substantiating opinion. For the past twelve (12) years Gallo has fully functioned as a police officer and his veracity has not been questioned. As Gallo testified here, he has testified in court and was a witness in a deposition for the Department in a civil suit against the City. At no time during these twelve (12) years or in these situations in particular has there been any issue with Officer Gallo's truthfulness. The Chief has no sound and sufficient basis for making such claims that there is a present issue of Gallo's truthfulness or more so, if he were promoted to sergeant. It should not have been included in the bypass letter, yet the taint and prejudicial effect can not now be removed; as the usual remedy granted by the commission is prospective.

The Chief's letter of July 1, 2008 which stated the City's reasons and justification for the bypass of the Appellant is four (4) pages single spaced. The only two reasons, in summary, stated in that letter for the bypass were the 12 year old (1996) discipline and the claim of Officer Gallo's "excessive use of sick time", which sick leave use is covered by the collective bargain agreement (CBA). However, that lengthy letter also contains many assertions, allegations, assumptions and opinions in serious descriptive language; the sum total of which creates a strong negative or prejudicial effect against the Appellant, beyond these summary stated two reasons.

Although there is not a specific number of years, after which old discipline is automatically *stale* for purposes of bypass, the passage of time is certainly a relevant consideration as to the validity of relying on prior discipline as a basis for a bypass. In the

case of Stanley v. Town of Watertown G1-04-468 (2007) the Commission found that Watertown did not meet its burden for bypassing Mr. Stanley for the position of firefighter when the Chief's personal bias against Mr. Stanley colored the recommendation to the Appointing Authority and when the Chief justified the bypass in part based on Stanley's conduct nine (9) years earlier. Id. at 8. Also, in Tabb v. City of Medford G-99-827 (2005) the Commission found the bypass of an individual for a firefighter position to be invalid where the appellant's ten (10) year old, "stale" driving record was used to justify the bypass. Id. at 4.

In Gallo's case, it is wrong to rely on the 12 year old conduct and discipline, for which he has fully accepted responsibility, proved his rehabilitation and served his punishment as a continuing basis for refusing to allow Gallo to be promoted.

Additional evidence of Chief Suslak's bias against Gallo, or his circumstances, is his use of Gallo's sick leave usage as a basis for the bypass decision. The record is clear that Gallo fully complied with all Department and contractual obligations in using his sick leave. He called in and slips were prepared for all leave. There was no evidence that the City or Department ever denied Gallo's request for sick leave. There was no evidence presented that Gallo ever used sick leave when it was not for legitimate illness of his own or a family member. There was no evidence that Gallo at any time misrepresented the facts of any of his claims for sick leave. Gallo's legitimate use of sick leave is not in anyway a valid basis for bypassing Gallo for promotion to sergeant. This merely shows that the Chief is trying to deny Gallo a promotion to sergeant for using sick leave; as an example to discourage others from similarly using their contractual sick leave. The Chief's citing of the Appellant's sick leave use, in his letter as a reason for bypass is concerning. The Chief's letter is dated July 1,

2008; yet the contractual sick leave use issue had been decided in the Appellant's favor in an Arbitrator's decision dated July 6, 2007. The Chief knew at the time he wrote the letter that this issue was inoperative. That it certainly was not a valid reason for a bypass. See also Pierslak v. Town of Needham G2-07-2110 (where the Commission overturned the bypass of the promotional appointment to the position of Fire Lieutenant. Where claims of misuse of sick time "did not hold up" to review and since the Appellant was never disciplined for the alleged sick time abuse..." Id at 24.)

C. There Was No Evidence That The Bypass was to Select More Qualified Officers

As the Commission explained in the cases of Reilly and McCarthy v. Lawrence Police Department G-4363 and G-4394 (2000) a selection process is flawed where the applicants are not properly interviewed for the position and their qualifications are not properly considered. Also in that case there was no evidence presented that the selected individual was more qualified, experienced or trained for the sergeant's position than the Appellants.

Similarly, in Gallo's case there was no evaluation of Gallo's qualifications, experience or training as compared to those selected for the 3 sergeant positions. There was no established criteria for the selection process therefore the selection process was inadequate and unfair. None of Gallo's positive characteristics were considered at all. His long experience as a police officer, his excellent performance as a police officer, his education and training and his military service were all totally ignored. As the Commission explained, although candidates highest on certification lists are not statutorily guaranteed appointments or promotions.... the Commission has always held that these candidates do have an

expectation that they will be adequately and fairly considered for a position...” *Id* at 5. That did not occur in Gallo’s case.

D. The Chief’s Unsupported Claims In The Bypass Letter Should Be Stricken

In the bypass letter Chief Suslak makes claims which are unsupported by the record and which the City refused to provide relevant information in a written response to the Appellant’s written request for documents and information, on which to base a challenge. The Appellant raised the preliminary matter of his written request, dated October 23, 2008 to the City for documents and information, (Exhibit 25) to which the City failed to respond in writing and argued that the request was “onerous”; yet it had the witnesses available for this hearing to testify and be cross-examined regarding the requested documents and information. The issue and the Appellant’s proposed remedy were taken *de bene*. The Appellant’s requested remedy is that since the City refused to provide the requested disciplinary records, or other response, in writing prior to the hearing; the City’s claims about Gallo’s discipline as compared to other promoted officers and other officers disciplined for untruthfulness should be disregarded.

The City in argument and in testimony was never quite clear as to whether a diligent search had been made for the requested documents and information. It was suggested by this hearing officer, at the hearing that a search of the relevant records should have been made and an appropriate affidavit prepared and sworn to by the keeper of such records. Relying entirely on the memories of the testifying witnesses was insufficient to establish their existence and content and denied the Appellant the opportunity to properly prepare for the hearing. In this case, based upon the claims made in the bypass letter, Appellant requested a listing of all officers promoted since 1978 and any discipline records for these individuals.

Appellant also requested all disciplinary records concerning Lynn Police officers disciplined for being untruthful. (Exhibit 25 # 6 and 8) The City refused to respond or to provide the requested information in writing and merely had the Chief and Deputies testify as to their personal memories. It is unreasonable for the City to be able to rely exclusively on the Chief's and Deputies memories as to 30 years of promotions. Without the requested information Appellant was unable to prepare for and attempt to rebut such claims. Therefore, the City's testimonial evidence on the records: existence and content is attributed less weight than if supported by a diligent keeper search, and evidenced by a written response or affidavit.

In addition, the Appellant argued that Exhibit 22 which are the documents underlying Officer Gallo's conduct and discipline in 1995 and 1996 should not be considered since the City decided in 1996 upon the proper discipline after a statutory civil service appointing authority hearing and the City should not now be able to relitigate those matters. The City offered Exhibit 22 in to evidence to which the Appellant objected. This document has numerous subsections. The proposed Exhibit was taken *de bene* with the oral instruction from this hearing officer that the events preceding the disciplinary event of the altered hospital report would not be considered. Therefore the bulk of Exhibit 22 is excluded as being prior to the disciplinary event, prejudicial and confusing. Exhibit 16, Attorney Michael Marks disciplinary decision, other exhibits and testimony address the circumstances of and the disciplinary charges, hearing, findings, conclusions and recommendations in sufficient detail and clarity.

For all of the above explained reasons the City's bypass of Gallo was arbitrary and capricious. The Appointing Authority has not demonstrated by a preponderance of the

credible evidence that there was reasonable justification for the promotional bypass of the Appellant for the position of police sergeant. Therefore I would allow the Appellant's appeal.



Daniel M. Henderson,  
Commissioner

For all of the reasons stated in the Conclusion of the Majority, the Appellant's appeal is hereby *dismissed*.

By 3-1 vote of the Civil Service Commission (Bowman, Chairman [YES], McDowell [YES], Stein [YES], Marquis [ABSENT] and Henderson [NO], Commissioners), on June 17, 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:  
Susan F. Horwitz, Atty.  
David f. Grunebaum, Atty.  
John Marra, Atty. (HRD)