

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

100 Cambridge Street, Suite 200  
Boston, MA 02114

**ROBERT GALLO,**

*Appellant,*

v.

**CITY OF PEABODY,**

*Respondent.*

G2-22-040

Appearance for Appellant:

Leah M. Barrault, Esq.  
3 Boulevard Street  
Milton, MA 02186

Appearance for Respondent:

Donald L. Conn, Esq.  
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Commissioner:

Paul M. Stein

Summary of Decision

The Commission upheld the promotional bypass of a police sergeant who had a consistent history of discipline over the course of his career as compared to the lower ranked candidate who had no disciplinary history, finding just cause to bypass him for promotion.

**DECISION**

On March 14, 2022, the Appellant, Robert Gallo, acting pursuant to G.L. c. 31, §2(b), appealed to the Civil Service Commission (Commission) from the decision of the City of Peabody (City) to bypass him for promotion to the position of Police Lieutenant with the Peabody Police Department (PPD).<sup>1</sup> A pre-hearing conference was held via videoconference (Webex) on April 12, 2022. A full hearing was held at the Commission's offices on September 13, 2022, and was digitally recorded.<sup>2</sup> On November 14, 2022, each party submitted proposed decisions. For the reasons stated below, the Appellant's appeal is denied.

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.01, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a

## **FINDINGS OF FACT**

The Appellant entered fourteen (14) exhibits (numbered 1-14, Bates Stamp A001-A0372) and the City entered two (2) exhibits (numbered 1-2, Bates Stamp R001-R-072) into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

*For the City of Peabody:*

- Thomas Griffin, Chief, Peabody Police PPD

*For Robert Gallo:*

- Robert Gallo, Sergeant, Peabody Police PPD

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. The Mayor of Peabody is the Appointing Authority for the City. Edward A. Bettencourt, Jr. was the Mayor of Peabody during the pendency of the Appellant's candidacy for promotion to Police Lieutenant, the subject of this appeal. (*Testimony of Griffin*)
2. The PPD consists of a Chief, two Deputy Chiefs, five Captains, six Lieutenants, fifteen Sergeants, and seventy Police Officers. (*Testimony of Griffin*)
3. Thomas Griffin is the Chief of the PPD and has served in that capacity for eight years. Prior to that position, Chief Griffin was a police officer in Salem, MA for 27 years, rising to the rank of Captain. In the latter capacity, Griffin served as supervisor of investigations, which included Internal Affairs investigations, at the Salem Police Department. (*Testimony of Griffin*)
4. The PPD Chief is charged with maintaining order in the Department, approving its policies

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transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

and procedures, overseeing the budget, expenditures, and hiring, and any disciplinary matters.

*(Testimony of Griffin)*

PPD Promotional Process

5. On or about September 21, 2019, the PPD held an Assessment Center (written examination) for Police Lieutenant. This Assessment Center was conducted by a third-party contractor, Integrity Testing. The PPD plays no role in determining the rank of the promotional candidates or in the scoring of the Assessment Center promotional examination.<sup>3</sup> Neither the PPD nor the Mayor is made aware of the candidates' individual scores on the Assessment Center, just simply who passed. *(Testimony of Griffin)*

6. On or about September 1, 2020, the Human Resource Division of the Commonwealth (HRD) established an eligible list containing the names and rank of the two PPD Sergeants who passed the September 2019 promotional Assessment Center for the Police Lieutenant position. The Appellant's name appeared first and Sergeant David Bonfanti's name appeared second. *(App. Ex. 3, A0019)*

7. In or around January of 2022, Beth O'Donnell, the City's Director of Human Resources, created a promotional certification for the Police Lieutenant position. There were two vacant positions for Police Lieutenant in the PPD at that time. *(Testimony of Griffin; App. Ex. 3, A0019)*

8. The City's promotional process for the Police Lieutenant position not only involved consideration of the candidates' Assessment Center rank, but also a review by the Mayor and the Chief of Police of the candidates' personnel files, their prior disciplinary history, various other

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<sup>3</sup> The vendor for the Assessment Center requested that officers of higher rank fill out a survey of what they believe the qualities of someone in a lower rank should possess. The Chief submitted those surveys to the vendor. Four PPD Captains completed the surveys. *(Testimony of Griffin)*

files throughout the building, their formal education, any additional training they have received, and any commendations that have been awarded.<sup>4</sup> (*Testimony of Griffin*)

9. Officer disciplinary records are kept in the officer's personnel file.<sup>5</sup> If there is an agreement with the Union, certain disciplinary records may be removed from the officer's personnel file. Disciplinary records are not solely kept in an officer's personnel file. (*App. Ex. 9, A0315-317*)

10. In addition to an officer's personnel file, the PPD's five Captains maintain documents of disciplinary issues and investigations that are undertaken more informally by/for the Captains. Additionally, the PPD maintains disciplinary documents in Internal Affairs if a more formal investigation had been conducted. Lastly, the PPD maintains files throughout its particular Divisions, since each Division keep files regarding disciplinary issues or misconduct within their own Division. Chief Griffin also has institutional knowledge/recall of past incidents, as well. (*Testimony of Griffin*)

11. The PPD Manual, Admin 5.0 provides guidance as it relates to disciplinary actions and appeals. The manual states that the PPD utilizes the process of progressive discipline. The first step in that progressive discipline can be found in Rule 5.2.2, entitled Counseling. Counseling can be as simple as on-the-spot admonishment of an officer and is utilized for minor infractions. (*App. Ex. 9, A0315-317*)

12. The second step in progressive discipline at the PPD, as found in Rule 5.2.3, relates to Written Counseling. Repeat violations or more serious infractions shall be documented in the form of written counseling. The rule provides that, "A copy of the written counseling shall be forwarded to the office of the Chief of Police. This record shall be used as a tracking mechanism for other

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<sup>4</sup> The Chief did not review the candidates' training files at any time during their candidacy for promotion. Those files are kept in the Training Division. (*Testimony of Griffin*)

<sup>5</sup> Personnel files are stored in the Chief's administrative secretary's office. (*Testimony of Griffin*)

supervisory personnel should the employee be transferred and require additional counseling. The written counseling shall be retained for a maximum of 12 months in the officer's personnel file." (*App. Ex. 9, A0315-317*)

13. The third step in the progressive discipline process, as found in Rule 5.2.4, relates to Written Reprimand. This is for repeat violations or serious infractions. "A written reprimand shall be forwarded to the office of the Chief of Police, and shall be retained in the Officer's personnel file for 12 months." (*App. Ex. 9, A0315-317*)

14. This PPD disciplinary policy also lists Alternatives to Discipline as an option the Chief may utilize, at his discretion, and is found at section 5.2.5. An officer may be ordered to participate in a remedial training program that relates to an area of concern. (*App. Ex. 9, A0315-317*)

15. If a disciplinary action involves Suspension, Rule 5.2.8 states that the Chief shall follow the requirements of G.L. c. 31, § 43<sup>6</sup> and further notes that records of all disciplinary actions shall be placed in the officer's file and "[i]n the case of a written reprimand, a copy of the reprimand will be retained in the Officer's record and may be removed after 12 months, after a careful review of the officer's record and after a petition by the officer to have it removed."<sup>7</sup> (*App. Ex. 9, A0315-317*)

16. The PPD considers prior disciplinary matters in two instances: (1) when meting out progressive discipline; and (2) during promotional opportunities. Chief Griffin made it clear that

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<sup>6</sup> Rule 5.2.8 also applies to discharge, transfer, or lowering of rank, in addition to suspensions of an officer. (*App. Ex. 9, A0315-317*)

<sup>7</sup> Rule 5.2.11 of the disciplinary policy states that "[i]n the event that there is any conflict of interpretation between this policy, and the Rules and Regulations chapter 6.0, the rules and regulations shall apply." Rule 6.0 is not part of the documentary evidence in this case, so the Commission is unaware of what that 6.0 states or whether there is any conflict between the policy and the rules as it pertains to the facts of this case. (*App. Ex. 9, A0315-317*)

the PPD must look historically at events that have happened in the past to make an informed decision about both discipline and promotion. (*Testimony of Griffin*)

17. Chief Griffin has known both the Appellant and Sergeant Bonfanti since he first became Chief in 2014, has worked continuously with both, and is aware of their work. As part of his duties, Chief Griffin personally reviews all police reports and police logs on a consistent basis to be aware of the nature of the calls that have come into the PPD, how they were handled by the officers, and whether reports were written. Chief Griffin has never been the shift supervisor for either Sergeant Gallo or Bonfanti, however. (*Testimony of Griffin*)

18. The Appellant is a graduate of Peabody Veteran's Memorial High School and thereafter became a member of the US Marine Corps, serving four (4) years of active duty with a six (6) month deployment overseas in the Mediterranean. He was honorably discharged from the military and went on to earn a Bachelor of Arts degree from UMass Amherst and a Masters degree from UMass Lowell in Criminal Justice. He became a fulltime Patrol Officer with the PPD in April 2005 and was promoted to the position of Sergeant in 2014. (*Testimony of Griffin and Appellant*)

19. Sergeant Bonfanti is also a graduate of the Peabody Memorial Veteran's High School and earned an Associate degree and a Bachelor of Arts degree from Western New England College. Prior to becoming a police officer, Bonfanti was a firefighter and a dispatcher. Bonfanti became a fulltime Patrol Officer with the PPD in April 2005, having been sworn in on the same day as the Appellant. He was promoted to Sergeant in 2012, two years before the Appellant. (*Testimony of Griffin; App. Ex. 14, A0368-370*)

#### Promotional Interview

20. As part of the promotional process, both the Appellant and Sergeant Bonfanti underwent an interview with the Mayor and Chief Griffin on January 13, 2022. (*Testimony of Griffin*)

21. The interview for each candidate lasted twenty to twenty-five minutes. Each candidate was asked a series of eight (8) pre-determined questions, the same questions for each candidate. The candidates do not know the questions prior to the interview. Each answer was ranked with a score of one through five (1-5), a five (5) being the best score. (*Testimony of Griffin*)

22. The interviews were not recorded, although the Chief took detailed notes on each question and recorded his ranking. Chief Griffin recalls that the Mayor took notes, as well. (*Testimony of Griffin*)

23. The Appellant and Sergeant Bonfanti received identical scores on seven of the eight pre-determined questions. On question #2, the Appellant received a ranking of three (3) while Bonfanti received a ranking of four (4). Specifically, question #2 was as follows: “Please tell us about your education and training, and how that education and training make you qualified for this promotion.” (*App. Ex. 14; A0368-372*)<sup>8</sup>

24. Chief Griffin had no problems with the Appellant’s interview performance. He thought that both the Appellant and Sgt. Bonfanti “did fine” in their respective interviews. (*Testimony of Griffin*)

25. Generally, the Chief believed that the Appellant and Bonfanti had “roughly the same” amount of training, which he termed “an average amount.” (*Testimony of Griffin*)

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<sup>8</sup> The Appellant responded to question #2 by citing his military service and his BA and Master degrees. As for specific training, the Appellant said that he was trying to take courses. The Appellant had actually taken one of the three courses in the FBI trilogy, the Supervisory course, as a part of prior discipline, but he did not mention this to the interview panel. Chief Griffin later learned that the Appellant had taken that course when he saw it mentioned in the disciplinary record. (*Testimony of Griffin; App. Ex. 14; A0368-372*) Sergeant Bonfanti responded to question #2 by noting his Associate and BA degrees relative to education, and as for training, he noted his completion of a three-course series given by the FBI – the LEEDA Trilogy – and completion of another leadership course, the MMA Suffolk University Government and Leadership course. (*Testimony of Griffin; App. Ex. 14; A0368-372*)

26. Following the interviews, the Chief and the Mayor discussed the candidates for twenty to thirty minutes. They focused on the Appellant's multiple disciplinary transgressions throughout his career, especially those within the most recent five years after being promoted to Sergeant. No questions during the interview related to past discipline and the Appellant did not bring it up in his responses. (*Testimony of Griffin*)

27. Chief Griffin told the Mayor that the Appellant should not be promoted to Lieutenant due to his "very concerning" disciplinary history. The Chief explained that the PPD had been trying to correct the Appellant's behavior over time and it had not worked. The PPD used progressive discipline, beginning with verbal reprimands, progressing to written reprimands, then suspensions, and leadership training; yet the PPD was still having difficulty with him. The Chief believed the Appellant "does very well in a controlled environment but when asked to be out on his own, it becomes very concerning the decisions he makes." Even with counseling from supervising officers, the Appellant's behavior still did not change. (*Testimony of Griffin*)<sup>9</sup>

28. The Mayor agreed with the Chief and decided that Sergeant Bonfanti would be better suited for the promotion based on his tenure as a Sergeant and his unblemished employment history with the PPD. (*Testimony of Griffin; App. Ex. 4, A0020-0023; Resp. Ex. 1, R0001-0004*)

29. By letter and email on or about April 11, 2022, the Mayor notified the Appellant that he was bypassed for promotion to Police Lieutenant, having found that he did not meet the requirements for the position due to "significant concerns regarding a pattern of well-documented disciplinary actions taken against [you] in [your] roles of Patrol Officer and Police Sergeant." Specifically, the Mayor cited to policy violations and failures to use good judgment in 2006, 2010,

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<sup>9</sup> The Chief's goal in imposing discipline is to change behavior and not to punish people. (*Testimony of Griffin*)



2016 (twice), 2017, 2020, and 2021. Additionally, the Mayor cited to discipline imposed on January 22, 2022, which was under appeal. The Mayor noted that the Appellant’s “ability to use good judgment and enforce police PPD policies is undermined by [your] being disciplined” on so many occasions. The Mayor also noted: “[D]espite numerous opportunities provided to [you] by the Peabody Police PPD educating [you] in police policies, seeking to assist [you] in correcting job performance and despite [you] attending several trainings . . . .” (*App. Ex. 4, A0020-0023; Resp. Ex. 1, R0001-0004*)<sup>10</sup>

*Appellant’s Past Discipline*

30. In or about September 2006, the Appellant received a verbal reprimand and counseling/retraining by Captain Carrier on Rule 6.4.1.7 – Use of Official Position. The Appellant had improperly utilized City library employees to send personal faxes for him, to provide him with paper, and to proofread his own personal documents. Captain Carrier retained a copy of this verbal reprimand with counseling and also forwarded a copy to the Chief. (*Resp. Ex. 2; 0072*)

31. On or about September 2010, Sergeant Yeo was traveling west on Lowell Street with his lights and sirens activated to respond to a radio call for service when he saw the then-Officer Gallo on-duty, unaware of what was going on, travelling in the opposite direction (east) on Lowell Street. Sergeant Yeo confronted Officer Gallo about his lack of involvement in that call and the Appellant stated that he only heard bits and pieces of the call because he was giving directions to someone. Sergeant Yeo found his response to be unacceptable and recommended to Lieutenant Callahan that

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<sup>10</sup> Prior to the formal bypass letter being sent, the Mayor spoke with the Appellant via telephone to inform him of the bypass decision. (*Testimony of Appellant; Resp. Ex. 1, R002-003; App. Ex 4, A0020-0023*) The Appellant filed an appeal of the bypass with the Commission on or about March 14, 2022 (*Stipulated Fact*), one month before the April 11, 2022 bypass letter. Given that timeline, the Appellant apparently relied on the earlier phone call as notification of the bypass, which triggered his filing of an appeal here.

the Appellant be reassigned to Operations.<sup>11</sup> (*Resp. Ex. 2; R0071*)

32. On or about September 12, 2016, Lieutenant Yeo counseled the Appellant, a Sergeant for two years by this time, about two issues: (1) properly assigning an incident number to a call relative to a 16 oz. bag of marijuana sent out for destruction; and (2) about scheduling his own time off, since time off should be entered by the Lieutenant. The Appellant was issued a verbal counseling reduced to writing. A copy of this discipline was forwarded to the Appellant and to Captain DeRosa. (*Resp. Ex. 2, R0070*)

33. On or about November 23, 2016, the Appellant (a Sergeant) was notified by Officer Aiello of an event that was scheduled to take place at the VFW called Battle Rap, where a possible shooting might take place. Officer Aiello provided the Appellant with specific information, including the threat of a shooting and the date it was possibly going to happen, November 27th. Officer Aiello even called in from vacation on the 27<sup>th</sup> to further warn the PPD. There was no indication that the Appellant passed the information about the threat along to his supervisor, the Watch Commander, or anyone at the PPD. Once he received information of a possible serious nature, such as a potential violent event or shooting, especially from another officer, Captain Wlasuk noted that it was incumbent upon the Appellant to ensure that this information was properly documented by a call log entry and incident report since plans could have been made in advance to ensure the safety of the officers and the public. (*Resp. Ex. 2, R0067-68; App. Ex. 5, A0028*)

34. As a result of the Appellant's inaction in November 2016, the Appellant received formal written counseling by Captain Wlasuk on or about March 3, 2017, for failing to properly perform

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<sup>11</sup> There is no indication that Officer Gallo was reassigned or further disciplined as a result of Sergeant Yeo's September 2010 request. Chief Griffin has no personal knowledge of this incident given that he did not work at the PPD in 2010. (*Testimony of Griffin*)

his duties as Patrol Supervisor—more specifically, violating PPD rules relative to Attention to Duty and PPD Communications. A copy of the disciplinary letter was forwarded to Chief Griffin to be reviewed and retained in the Appellant’s personnel file for a maximum of 12 months. Captain Wlasuk further warned the Appellant that, “as you are aware, all discipline is progressive in nature and continued violations of PPD rules and regulations can result in further disciplinary action.” (*Resp. Ex. 2, R0067-68; App. Ex. 5, A0028*)

35. On or about February 22, 2017, the Appellant received a verbal counseling from Lieutenant Yeo for insubordination relating to the manner in which the Appellant (a Sergeant) spoke to the Lieutenant, his supervisor, regarding a shoplifting arrest. In his written statement, the Appellant admitted that he was frustrated with how he has been treated by the Lieutenant and “that may have come out with my direct response to him.” Lieutenant Yeo notified both Captain DeRosa and the Chief about this discipline in writing. (*Resp. Ex. 2, R0069; App. Ex. 5, A0026*)

36. On or about November 30, 2020, by agreement with the Appellant, Chief Griffin issued a one-day unpaid suspension and ordered him to attend a five-day Intensive Supervisor Leadership Program.<sup>12</sup> The Appellant (a Sergeant) was given the one-day suspension and training because there were a number of decisions or actions he should have taken to properly supervise a September 6, 2020 call prior to leaving for the evening, which he failed to do. (*Resp. Ex. 2, R0061; App. Ex. 5, A0032-41*)

37. Specifically, on the evening of September 6, 2020, the Appellant was the Patrol Supervisor and a call came in regarding a motor vehicle accident where the operator fled the scene, was ultimately found, and became highly combative, requiring the assistance of multiple Peabody police officers. Many of the Appellant’s fellow officers, both patrolmen and superior officers,

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<sup>12</sup> After investigation, Captain Eric Zawacki had recommended to the Chief that the Appellant be suspended for a period of three days. (*Testimony of Griffin; App. Ex. 5, A0038-41*)

made complaints to the PPD about how the Appellant handled this call, claiming their safety was put in danger as a result of the Appellant's decisions, actions, and inaction while he was at the scene and after he left. (*Resp. Ex. 2, R0061; App. Ex. 5, A0032-41*)

38. The Appellant was found to have violated Chapter 6.6.8 of the PPD Rules: Required Conduct – Attention to Duty, which requires all officers to “be alert and vigilant in the performance of their duties and respond prudently but decisively when police action is required[.]” The November 30, 2020 discipline was to be removed from the Appellant's file one year from the date of issuance. (*Resp. Ex. 2, R0061; App. Ex. 5, A0032-41*) Chief Griffin considered the Appellant's prior disciplinary history when he issued this one-day suspension in 2020, in keeping with the PPD's progressive discipline philosophy. The Appellant did not appeal this suspension. (*Testimony of Griffin*)

39. On various occasions, the Appellant was suspended from the detail list. Specifically:

- In July 2018, the Appellant was suspended from the detail list for 20 days for showing up late to assigned details and leaving the details for long periods.
- On September 25, 2020, the Appellant was suspended from the detail list for 14 days for leaving details early.
- In September 2021, the Appellant was suspended from the detail list for 45 days for leaving a detail during the day and leaving early, without permission, or arranging for relief, and for claiming he worked eight hours when he actually had only worked six hours.

(*Resp. Ex. 2, R0056-0060; App. Ex. 5, A0042-0045*)

40. The PPD Captain who issued the September 2021 suspension for “Neglect of Duty” and providing “False Information on Records” forwarded his letter to Chief's Griffin's office. The Chief personally recalls this information being forwarded to him by the Captain. The Chief took

no further action beyond the suspension from details. (*Resp. Ex. 2, R0056-0060; App. Ex. 5, A0042-0045*) (*Testimony of Griffin*)

41. The Appellant had no right of appeal from the detail suspensions under PPD Rules. Details are not a *right*, they are a *privilege* under the Rules. However, the Chief did meet with the Appellant, his Union representative, and Captain Richards in order to give the Appellant the opportunity to tell his side of the story. (*Testimony of Griffin*)

42. At the time of the Appellant's candidacy for promotion to Lieutenant, the Chief was personally aware of the Appellant's 2021 detail misconduct and made the Mayor aware of it, as well. The September 2021 detail suspension was part of the reason for the Appellant's bypass. (*Testimony of Griffin*)

#### *Appellant's January 2021 Discipline*

43. On December 11, 2021, the Appellant was on duty at the North Shore Mall. He was expected be in full uniform during his shift, yet he was observed walking/exercising in the mall without his required patrolman uniform or duty gear. (*Resp. Ex. 2, R005-0016*)

44. During a formal interview with Internal Affairs (IA), documents in evidence indicate that the Appellant admitted he removed his sweater and his duty belt and secured them in the Mall Outreach Center. He kept his blue uniform pants on and a black shirt but could not be identified as a police officer. He stated that he still had handcuffs, a cell phone, and his duty weapon in an ankle holster, which is not an issued piece of equipment or one he had been trained on. (*Resp. Ex. 2, R005-0016*)

45. During that formal IA interview, the Appellant admitted that he has "walked" on-duty on weekends when the mall stores are closed (although the Mall is open for walkers). He admitted, according to the report, that he has "walked" the mall like this a half dozen times prior, but in full uniform. He said that on two to three occasions, he removed his identifying uniforms and duty

gear, but never told his supervisor that he was removing any part of his uniform to walk. IA also interviewed two PPD officers identified by the Appellant as persons who saw him walking the mall on December 11, 2021. Those witnesses were interviewed and corroborate the Appellant's admissions, according to reports in evidence. (*Resp. Ex. 2, R005-0016*)

46. On January 29, 2022, the Chief notified the Appellant that he was to be suspended for five days without pay as a result of the December 2021 incident. The Appellant appealed to the Mayor for an appointing authority hearing. No hearing had been held prior to the decision to bypass the Appellant and it had not yet been held at the time of the Commission's hearing of this promotional bypass appeal.<sup>13</sup> (*Testimony of Griffin*)

*Disciplinary History of Past Promotions Made by Chief Griffin*

47. Chief Griffin, in his tenure with the PPD, has promoted a number of Patrolmen to Sergeant, and promoted four Sergeants to Lieutenant. None of these officers had a pending disciplinary action at the time of their candidacy or any past disciplinary history. (*Testimony of Griffin*)

48. The Chief has promoted five Lieutenants to Captain. None of those promoted to Captain have had a pending disciplinary action at the time of their candidacy nor did they have a past disciplinary history. (*Testimony of Griffin*)

49. At the time of the Appellant's Commission hearing, there was still one open position for Lieutenant at the PPD. The Chief has not filled that position given that the Appellant is the only

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<sup>13</sup> The Appellant was out of work for five weeks just after the incident, so no hearing could be held/scheduled and, thereafter, the original date for the hearing in March 2022 was rescheduled by the Appellant's own attorney. The Appellant was bypassed for promotion on April 11, 2022. It appears that the Appellant's attorney then was actively trying to get a new date for the 2022 appeal, but the evidence does not make clear why a hearing was not scheduled in or around that time. On or about August 30, 2022, the City tried to schedule a hearing date but then the Appellant's attorney was not actually available for another month to a month-and-a-half (not until late September or early October 2022). At the time of the Commission hearing, the disciplinary hearing was scheduled to be held on September 22, 2022. (*App. Ex. 10, A0318-328; Testimony of Appellant & Griffin*)

other name on the certification list since he does not believe the Appellant is qualified for the position. A captain and a sergeant (not the Appellant) from the Records Division share responsibility to cover the open lieutenant's position administratively. (*Testimony of Griffin*)

### **APPLICABLE CIVIL SERVICE LAW**

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Service Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Promotional appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both – consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4). An appointing authority is not required, however, to prove every reason stated for the bypass decision. Porter v. Town of Reading, 21 MCSR 43 (2008); Driscoll v. Boston Police PPD, 30 MSCR 477 (2007).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing

on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission's de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm'n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-



305, rev. den., 428 Mass. 1102 (1997); Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, rev. den., 398 Mass. 1103 (1986).

## **ANALYSIS**

The City established reasonable justification for its decision to bypass the Appellant for appointment to the position of PPD Police Sergeant in favor of a qualified, lower-ranked candidate who had two years more experience as a Police Sergeant than the Appellant and, who, unlike the Appellant, had no history of prior discipline.

The Appellant began his career as a fulltime patrolman in 2005 and his disciplinary history began just a year later, in 2006, wherein he was issued a verbal reprimand with counseling because he misused his official position by having City library employees send personal faxes and proofread personal documents for him. Thereafter, in 2010, the Appellant was counseled by a superior officer for his lack of awareness and involvement in a call on the road.

The Appellant was promoted to sergeant in 2014. After his promotion, the Appellant repeatedly found himself counseled, disciplined, and retrained by a number of his superior officers. Chief Griffin put a lot more emphasis on the discipline that occurred from 2016 onward, rather than the 2006 and 2010 discipline, since the Appellant had been a sergeant for a couple years by then and because the Chief had personal knowledge of that discipline.

In September 2016, two years after becoming a sergeant, the Appellant was given a verbal counseling reduced to writing for two infractions: (1) not properly assigning a call number to a call relative to a 16 oz. bag of marijuana; and (2) for scheduling his own time off (rather than his supervisor). That same year, just two months later in November 2016, the Appellant failed to properly report a threat of a possible shooting at a “Rap Battle” at the local VFW Post.<sup>14</sup> The

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<sup>14</sup> The bypass letter refers to these two incidents as discipline imposed in 2016, although the second incident in November 2016 did not actually result in discipline until March 2017. This

Appellant was warned of the possible shooting by a fellow officer, providing the Appellant with the date, event, and location the shooting was possibly going to take place. As a result, the Appellant was issued formal written counselling for failing to properly perform his duties as patrol supervisor. He was warned that “continued violations of PPD rules and regulations can result in further disciplinary action.”

The Appellant was disciplined again in February 2017, when he received a verbal counselling by a Lieutenant for insubordination. The Appellant admitted that he was frustrated with the Lieutenant and that “that may have come out in my direct response to him.” I find this to be an acknowledgement of his improper tone. The Lieutenant noted in his report that he notified Captain DeRosa and the Chief about this discipline in writing – thereby reducing the verbal counseling to writing. Both the Chief and the Captain had personal knowledge of this discipline and they both obtained individual copies of the written discipline from the Lieutenant. These were maintained in files separate from the Appellant’s personnel file.

The Appellant argues that because the PPD Disciplinary Policy indicates that a written counseling should be removed from an officer’s personnel file after 12 months, this discipline should not be considered during a promotional evaluation. I disagree. Rule 5.2.3 states that a copy of the written counseling shall be forwarded to the Chief of Police and may be used thereafter as a “tracking mechanism for other supervisory personnel should the employee be transferred and require additional counseling.” Nothing in the PPD rules preclude the Chief from considering performance deficiencies when making promotional decisions, especially documented discipline of which the Chief has personal knowledge.

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scrivener’s error does not detract from the substance of the Appellant’s misconduct as demonstrated by his repeated failure to properly perform his duties.

The Appellant was disciplined again in November 2020 and given a one-day unpaid suspension and ordered to attend a five-day Intensive Supervisor Leadership Program. The Appellant agreed to this suspension and training and did not appeal the discipline. This was the second major leadership course he was ordered to take as a result of his misconduct, the first being in 2018. By now the Appellant's discipline had progressed beyond verbal and written reprimands to an actual suspension. The Appellant had taken the Lieutenant's promotional written examination in 2019; yet even with ambitions of being promoted to Lieutenant, the Appellant continued to falter as a supervisor. This particular incident involved the Appellant's actions, inactions, and decision making while he was patrol supervisor at the scene of a hit and run, wherein the driver was ultimately found in a nearby apartment and became highly combative. Multiple officers at the scene that day, under the Appellant's supervision, made formal complaints to the PPD about the Appellant's actions, believing the Appellant's decisions put them all at risk.

Thereafter, in September 2021, one year later, the Appellant was suspended from the detail list for forty-five (45) days by Captain Richards for leaving an assigned detail for over an hour mid-shift, for leaving early from that same detail, for not seeking relief from another officer for both instances when he left for long periods of time, and for putting an inaccurate departure time on his detail slip submitted to National Grid. The Appellant was paid for eight hours of work, yet he only worked hours on that detail shift. The Appellant's actions that day were, in an understatement, deemed to be "ill-advised and irresponsible", especially for a police officer in a supervisory role, such as sergeant. This was the third time the Appellant had been suspended from the detail list.

A suspension from the list is not appealable since it is considered a privilege and not a right under the PPD Rules and Regulations. The Appellant contends that this is not formal discipline since it cannot be appealed, so the City should not have considered it at all or even called it

“discipline” in the bypass letter when it referenced the Appellant’s 2021 discipline. Again, I disagree. The Chief testified that he and the Mayor considered this incident to be relevant to the Appellant’s suitability and qualifications to become a Lieutenant. The Chief considered it “discipline” – at least when considering the Appellant’s suitability for promotion, even though it does not follow the same protocol as other infractions, since details are considered under their own section of the Rules and Regulations. The fact that the Chief chose not to pursue any additional formal discipline but still refer to the suspension from the list as “discipline” in the bypass letter does not nullify the substance of misconduct or detract from the City’s right to consider the substance of the infractions when making promotional appointments.

The Appellant also contends that his most recent suspension for removing his uniform while on duty should not be used against him in evaluating his suitability for promotion, when he had appealed his discipline to an appointing authority hearing which has not yet been held. This claim lacks merit. The Appellant does not dispute that, with his promotional appointment in process, he was spotted, while on-duty, in a public mall without his proper uniform and carrying his duty weapon in an unauthorized manner just before Christmas in December 2021. The Appellant also admitted that was not the first time he had done so.<sup>15</sup>

The Appellant’s other contention, that the Appellant did not receive credit for the full extent of his training history, needs only brief discussion. The Appellant asserts that the PPD and Mayor failed to consider the full extent of his training history in their evaluation of him, and the interview panel rated him one point below the selected candidate in his response to the question about his

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<sup>15</sup> The Appellant contends that the City has failed to provide him a timely appeal hearing on this pending discipline and should, therefore, be precluded from referencing or considering the pending disciplinary action. The evidence is inconclusive as to why the hearing was delayed and I am unable to find, by a preponderance of the evidence, that the PPD delay in holding the appointing authority hearing is solely due to any ulterior motive on the part of the PPD.

training and experience. The evidence showed that the bypass decision was not based on the two candidates' relative training history or on their interview performances. Both candidates gave "fine" interviews and were considered to have "roughly the same" training experience. The Appellant's poor disciplinary history and documented incidents of poor judgment were the factors that distinguished him from the selected candidate. Those factors furnished the Respondent with sound and sufficient reasons for depriving the Appellant of a promotion at this time.

### **CONCLUSION**

For all of the above reasons, the promotional bypass appeal of the Appellant, Robert Gallo, under Docket No. G2-22-040 is hereby ***denied***.

Civil Service Commission,

*/s/ Paul M. Stein*

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair [Absent]; Dooley, McConney, Stein and Tivnan, Commissioners on April 6, 2023.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 this commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his/her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Leah M. Barrault, Esq. (for Appellant)

Donald L. Conn, Esq. (for Respondent)