

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

100 Cambridge St., Suite 200
Boston, MA 02114
(617) 979-1900

JAMES HANNON III,
Appellant

v.

CITY OF GLOUCESTER,
Respondent

Case No.: G2-22-127

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA) was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate released the attached Tentative Decision to the Commission and the parties had thirty days to provide written objections to the Commission. The Appellant submitted an objection on March 7, 2023.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate, thus making the attached the Final Decision of the Commission.

For the reasons stated in the Magistrate's Tentative Decision, the Commission concurs that the City of Gloucester had reasonable justification to bypass the Appellant for the position of Fire Lieutenant. The Commission also concurs with the Magistrate's conclusion that the Appellant's prospects for future promotion to Fire Lieutenant are good and that this bypass decision should not discourage the Appellant from pursuing such a promotional opportunity in the future.

Finally, the Commission concurs with the Magistrate's conclusion that the preponderance of the evidence established that the interview panel's decision to promote Mr. Gambale was not preordained prior to the interview process. Nevertheless, the Commission emphasizes the point stated in the Tentative Decision's footnote 4. Although in this case the written notes and records from the interview process sufficiently corroborated the City's decision to bypass the Appellant, appointing authorities should always audio or video record interviews for hiring and promotions. The Commission has previously stressed the importance of reliable records for purposes of

bypass appeals. Failing to record interviews may undermine the Commission’s ability to validate an appointing authority’s decision to bypass a candidate. See *Moses v. Town of Winthrop*, 21 MCSR 420, 426 (2008) (finding that appointing authorities that fail to record interviews for promotional appointments “may do so at [their] peril”); *Hurst v. City of Brockton*, 34, MCSR 41, 43 (2021) (encouraging fire departments to maintain stronger records of interviews “to avoid the risk that, upon review, the Commission may find the process overly subjective and insufficient to establish a basis for bypass”). The Commission expects and encourages the Respondent – as well as all other appointing authorities in the state – to follow through on this obligation to record all interviews of original and promotional candidates.

The decision of the City of Gloucester to bypass the Appellant is affirmed and the Appellant’s appeal under Docket No. G2-22-127 is hereby **denied**.

By vote of the Civil Service Commission (Bowman, Chair; McConney, Tivnan, and Stein, Commissioners [Dooley, Commissioner – Absent]) on April 20, 2023.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

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)(l), the motion must identify a clerical or mechanical error in this order or 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:

Christopher DeCarlo, Esq. (for Appellant)
Suzanne Egan, Esq. (for Respondent)
James P. Rooney (acting Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

James Hannon III,
Appellant

No. CS-22-0455 (G2-22-127)

v.

Dated: February 15, 2023

City of Gloucester,
Respondent

Appearance for Appellant:
Christopher DeCarlo, Esq.
Lynnfield, MA 01940

Appearance for Respondent:
Suzanne Egan, Esq.
General Counsel, City of Gloucester Law Dept.
Gloucester, MA 01930

Magistrate:
Eric Tennen

SUMMARY OF TENTATIVE DECISION

The City of Gloucester had reasonable justification for bypassing Mr. Hannon for the position of Fire Lieutenant. He was bypassed for someone who had specialized training and performed better on the interview. There was no evidence the decision was based on bias or favoritism. Accordingly, I recommend his appeal be dismissed.

TENTATIVE DECISION

On September 1, 2022, the Appellant, James Hannon III, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Gloucester (City or Respondent) to bypass him for promotional appointment to the position of Fire Lieutenant in the Gloucester Fire Department. The Commission held a pre-hearing conference on November 1, 2022. I held an evidentiary hearing at the Commission on

February 2, 2023.¹ The full hearing was video recorded and both parties received a copy of the proceedings.²

FINDINGS OF FACT

The City submitted nine (9) exhibits (Res. 1-9) and the Appellant submitted eight (8) exhibits (App. 1-8), all of which I entered into evidence.³ The following witnesses testified:

For the City:

- Chief Eric Smith, Gloucester Fire Dept.
- Holly Dougwillo, City of Gloucester Personnel Director
- Assistant Chief Robert Rivas, Gloucester Fire Dept.

For the Appellant:

- James Hannon III, Appellant

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

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes 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 official recording should be used to transcribe the hearing.

³ The city objected to three of the Appellant's exhibits on relevancy grounds: Exhibits 4, 5 and 6. I admitted them *de bene*. The Appellant's testimony included references to facts contained in Exhibits 4 and 5. Exhibit 6 is an e-mail from the Chief to prospective Lieutenant candidates from May 2021. Counsel for Appellant argued it was relevant to show that the Chief knew the Appellant's exam score going into the interview and there was also testimony about this. I find it is relevant for an additional reason. Appellant testified that Mr. Gambale, the person for whom he was bypassed, was not interviewed in a prior cycle. This e-mail corroborates that evidence because Mr. Gambale is not included on it. In any event, these exhibits are all relevant, at least minimally so, and they were properly admitted. The City's objection to these documents goes more towards weight, not admissibility.

Based on the documents submitted, the witness testimony, and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. Appellant is presently a temporary fire lieutenant for the City of Gloucester. He began working as a firefighter in Gloucester in September, 2017. (Appellant Testimony.)

Appellant's Background

2. Before that, he was a firefighter and paramedic for the Town of Middleton (from 2014-2017). (Appellant Testimony.)
3. He also worked at the Oracle Corporation (from 2013-2017). He was in a customer-facing position. He had direct training and knowledge of their software systems. (Appellant Testimony).
4. As a firefighter, he has worked significantly with the Computer Aided Dispatch (“CAD”) system. (Appellant Testimony.)
5. In 2020, Appellant took the civil service exam for fire lieutenant. His score placed him second on the civil service list for future openings. (Appellant Testimony; stipulation of fact.)
6. In March 2021, Appellant was appointed to be an acting lieutenant. As an acting lieutenant, he would fill in for lieutenants any time the need arose—such as when someone was out sick or on vacation. (Appellant Testimony; Chief Smith Testimony.)
7. There can be “acting” officers at every rank. In order to perform those duties, the officer needs to meet the minimum training requirements for that position—*i.e.*, a firefighter can only be an acting lieutenant if he meets the requirements to be a lieutenant. (Chief Smith

Testimony.)

8. The Appellant meets all the minimum requirements to be a lieutenant; in fact, he even meets the minimum requirements for the next officer position: captain. (Chief Smith Testimony; Appellant Testimony; App. Exhibit 9.)
9. No one is required to be an “acting” officer; it is entirely voluntary. (Chief Smith Testimony.)
10. The Appellant logged approximately 2000 hours as an acting lieutenant. (Appellant Testimony; App. Exhibit 7.)
11. As acting lieutenant, he worked with the records software more than as a line firefighter. (Appellant Testimony.)
12. He also monitored and managed the CAD system. (Chief Smith Testimony.)
13. Following his bypass, the Appellant was promoted to temporary fire lieutenant. Unlike an acting officer, who only substitutes on a shift-by-shift basis, a temporary officer substitutes when a permanent officer is absent for more than 30 days—*e.g.*, because of extended injury leave. (Appellant Testimony.)

Hiring Process: Generally

14. Between March 2021 and September 2022, four lieutenant positions became available; there were three rounds of interviews. (Chief Smith Testimony.)
15. When a position becomes available, Chief Smith asks the Human Resources department to start the hiring process. This involves identifying the potential candidates based on their rankings. The rankings, in turn, are based on a formula that considers the

candidate's civil service exam score, education, training and experience. (Chief Smith Testimony.)

16. Those categories include, for example, how many hours someone has worked in an “acting” capacity, what level of education they have, and more. Because those facts are folded into someone's ranking, they are not supposed to be considered in the interview process. (Chief Smith Testimony.)
17. Once ranked, the potential candidates are asked if they want to interview. If they do, they are typically asked to forward a resume, and the hiring committee schedules the interview. (Chief Smith Testimony.)
18. The interview panel considers things outside of the ranking formula, such as specialty training, attendance, discipline, and how they perform in the interview process. (Chief Smith Testimony.)
19. The panel has a list of questions they establish prior to the interviews. Each candidate is asked the same question by the same panelist. (Chief Smith Testimony.)
20. The panel asked the same questions in the first two rounds of interviews and was prepared to ask the same questions in the last round. However, because many of these candidates had previously interviewed and answered the same questions, the panel tried to adjust them. (Chief Smith Testimony; Dougwillo Testimony.)
21. For example, Domenic Gambale was the first person interviewed in the last round (2022). After his interview, the panel could see the process was becoming a little repetitive. Candidates knew the questions that were going to be asked. Thus, the panel decided to strike the first question and ask two different ones to the remaining candidates. (Chief

Smith Testimony.)

22. Additionally, because many of these candidates had recently been interviewed, the current interviews were shorter than the prior ones. (Assistant Chief Rivas Testimony.)
23. Interviews are not recorded. In fact, interviews have never been recorded. (Chief Smith Testimony.)⁴
24. There is also no standardized scoring sheet to evaluate the interview performances. (Chief Smith Testimony.)

Hiring Process: Lieutenant

25. The interview committee for the lieutenant position consisted of Gloucester Fire Chief Eric Smith, Assistant Fire Chief Robert Rivas, and Personnel Director Holly Dougwillo. (Chief Smith Testimony.)
26. The Appellant interviewed in all three rounds. (Appellant Testimony.)
27. Mr. Gambale only interviewed in the last two rounds. (Chief Smith Testimony.)
28. In the last round, because there were two vacancies, five candidates were interviewed. (Dougwillo Testimony.)
29. Ultimately, one person was promoted off the list in the first round, one in the second round, and two in the last round. (App Exhibit 2.)
30. All but one of the promoted candidates were either ahead of, or tied with, the Appellant in the rankings. (App. Exhibit 2.)

⁴ At the pre-hearing conference, the City was advised that interviews must be recorded moving forward, without exception. I take this opportunity to remind the City of this obligation.

31. Mr. Gambale, the person for whom the Appellant was bypassed, was the only candidate ranked lower than the Appellant. (App. Exhibit 2.)
32. The City sent the Appellant a bypass letter on September 8, 2022. It listed two main reasons for his bypass. (App. Exhibit 1.)
33. First, the letter explained that the other candidate (Mr. Gambale) had additional expertise with the software that he helped set up and administer:

The candidate chosen for the position has worked many hours on and off duty to gain expertise with the City of Gloucester Fire Department's Computer Aided Dispatch (CAD) and Records Management Systems (RMS) software/system. Since 2013, he has worked to implement the system, manage it, and solve problems which arise, coordinate with the City of Gloucester IT Department and Police Department, and train officers and firefighters on the CAD and RMS systems. His expertise with the programs and the assistance he has provided to the Department in the implementation and operation of the systems has demonstrated skills and abilities that are instrumental for the success of an officer in the Fire Department.

(App. Exhibit 1.)

34. Chief Smith testified this was the kind of specialty training the panel takes into consideration. (Chief Smith Testimony.)
35. In 2012, the department began using new software for its records management and CAD system. Mr. Gambale volunteered to receive training to administer and implement the new software. The level of commitment was at "captain's level work." He performed tasks that he would not otherwise have done in his role as a firefighter. (Chief Smith Testimony.)
36. Mr. Gambale initially worked with the vendor for many hours over the course of weeks. Then, after that initial training, he continued to work setting the program up and was

trained to administer the software beyond the user training every other firefighter received. (Chief Smith Testimony.)

37. Mr. Gambale's efforts saved the department money because the department did not need to outsource this work. (Chief Smith Testimony.)

38. This was helpful training for lieutenants, who commonly deal with technology related problems on a day-to-day basis. (Chief Smith Testimony.)

39. Moreover, it is the assistant chief's responsibilities to implement and maintain CAD and records software programs with "department personnel." (App. Exhibit 8.)

40. In this capacity, the assistant chief thus works with lower ranking firefighters, such as Mr. Gambale, who had this specialized training. (Chief Smith Testimony.)

41. The bypass letter also explained that "during the interview, [Mr. Gambale] demonstrated his knowledge of the responsibilities of a Fire Lieutenant and of the command structure of the Department." (App. Exhibit 1)

42. The interview panel all felt that Mr. Gambale's interview was impressive. Chief Smith said Mr. Gambale's interview was excellent, perhaps one of the best interviews he has conducted. (Chief Smith Testimony.)

43. Ms. Dougwillo was equally impressed and believed Mr. Gambale gave the best interview of all the candidates. (Dougwillow Testimony.)

44. Mr. Gambale exhibited a better understanding of the command structure than the other candidates. (Chief Smith Testimony; Dougwillo Testimony.)

45. He also exhibited a command presence at the interview that the Chief believed would

carry over into the job. This is important because an officer needs a strong command presence. (Chief Smith Testimony.)

46. Nevertheless, Chief Smith admitted that the interview results did not weigh as heavily as Mr. Gambale's specialized training. (Chief Smith Testimony.)

47. After making their decision, the Chief spoke to the Appellant. He told him he wished he had five positions so he could promote everyone. (Chief Smith Testimony.)

48. The Appellant timely filed an appeal on September 15, 2022. (Stipulated Facts.)

Was the process predetermined?

49. The Appellant testified to a few things that he implied showed the decision in this case was predetermined.

50. For example, on August 24, 2022, he was scheduled for a software training. This was the day after Mr. Gambale's interview and the day before his. The Appellant claims the Chief told him he did not need to worry about the training because it was only for persons performing the captain's job, which would be captains or acting captains (and only permanent lieutenants could be acting captains). The Appellant implies that the Chief did not require him to do the training because the Chief had already decided to give Mr. Gambale the permanent lieutenant position. (Appellant Testimony.)

51. The Appellant also testified that in every interview, he printed out resumes and handed them to the panel. At the last interview, the panel declined his resume because they said they already had it. Nevertheless, the Appellant did not see them reference his during that interview. (Appellant Testimony.)

52. Lastly, the Appellant testified that his Deputy Chief pulled him aside after he was bypassed to give him some advice. The Deputy understood how frustrating the process could be since he too had been bypassed. He suggested the Appellant file an appeal. (Appellant Testimony.)
53. According to the Appellant, the Deputy also said he had hand-selected Mr. Gambale to assist in the software implementation in 2012 because he thought it would help Mr. Gambale if he later sought a promotion for lieutenant. (Appellant Testimony.)

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,” assuring fair treatment of all . . . employees in all aspects of personnel administration,” 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 Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995).

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.” *See* G.L. c. 31, §§ 6-11, 16-27; Personnel Administration Rules, PAR.09. To deviate from the rank order of preferred hiring and appoint a person “other than the qualified person whose name appears highest,” an appointing authority must provide written reasons—positive, negative, or both—consistent with basic merit principles. *See* G.L. c. 31, § 27; PAR.08(4). This is commonly referred to as a “bypass.” “In addition to bypassing a candidate for appropriate negative reasons, an appointing authority may bypass a candidate

for positive reasons, as when one police candidate obtains specialty training and assumes specialty responsibilities that another candidate has not.” *Carnes v. Norwell*, 34 MCSR 91 (2021).

A person may appeal a bypass decision under G.L. c. 31, § 2(b), and obtain *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, “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). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 332 (1983).

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*; 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). Yet, even if the appointing authority did not meet the burden of proof for bypass on every reason given, its discretion must

be upheld if any reason is sufficient, standing alone, to justify the bypass. *See Porter v. Town of Reading*, 21 MCSR 43, 44-45 (2008); *Driscoll v. Boston Police Dept.*, 30 MSCR 477, 482 (2007).

ANALYSIS

To begin with, I find no evidence that the hiring committee showed any favoritism or bias. Everyone involved in this process knew each other well. Chief Smith and Assistant Chief Rivas work with all the firefighters who applied for the promotion. Their familiarity should not be misinterpreted for bias. Indeed, the panel sincerely tried to eliminate bias and make the process as objective as possible.

The Appellant criticizes the interview process because it was not recorded and because he was asked questions Mr. Gambale was not. The interview should have been recorded and the City has been warned about that moving forward. But the witnesses all testified credibly about the interviews. There were no substantive inconsistencies in their memories. Therefore, the failure to record the interviews in this case does not raise doubts about the evidence presented.

As for the different questions, I find the panel made an earnest effort to have the candidates address new questions they had not previously answered multiple times. I agree there is little value in hearing a candidate explain something for the third time. I credit the witnesses' testimony that they made the decision to switch the questions after the first interview with Mr. Gambale because it was not apparent until then. The fact that the candidates were asked different questions is inconsequential. In actuality, the Appellant was asked two questions Mr. Gambale was not, giving him a chance to distinguish himself.

Next, the Appellant implies the Chief had made up his mind prior to the interview because, on the day before his interview, the Chief told him he did not have to participate in the

software training. However, I do not credit this testimony primarily because the Appellant had the chance to explore this line of questioning with Chief Smith, who testified, but he did not ask him any questions about it. The Chief may have characterized or interpreted that conversation differently. The Appellant also claims that the panelists did not look at his resume in the last round. Even if this were true, given that this was the third time the Appellant interviewed with the same persons in less than a year, I understand why the panel would not need to review the Appellant's resume in the moment.

There is nothing to suggest anyone on the hiring panel went into this process with their minds made up. They knew the candidates were all similarly qualified. Nevertheless, they focused on objectively appropriate things: skills not captured by the ranking system and performance in the interview.

The reasons given in the bypass letter were both valid. Mr. Gambale clearly had more training and experience with the software systems than the Appellant. I understand the Appellant never had the same opportunities to acquire that training—since he was not even a firefighter when the software changed. However, the fact remains that Mr. Gambale has specialized training the Appellant does not.⁵ *See Carnes v. Norwell, supra* (“an appointing authority may bypass a candidate for positive reasons, as when one police candidate obtains specialty training and assumes specialty responsibilities that another candidate has not.”).

⁵ The Appellant's testimony regarding his conversation with the Deputy Chief—that the Deputy told Mr. Gambale to “volunteer” for the training—is irrelevant. This testimony implies that Mr. Gambale should not get credit for volunteering since he was recruited to the training. The Deputy was on the Appellant's witness list, but he did not call him to testify. I do not know the full extent of this conversation and how accurate the Appellant's memory is of it. Moreover, even if true, it does not eliminate the fact that Mr. Gambale still received that specialized training, a skill that differentiated him from the Appellant. Even if he was recruited to the training, he took on a lot of responsibility which greatly benefited the department.

According to the panelists, Mr. Gambale also performed better in the interview. While there is some subjectivity to this determination, I do not find the panel's evaluation biased. *See O'Toole v. City of Lynn*, 35 MCSR 417 (2022) ("interviews have an inherently subjective nature, that characteristic is insufficient to delegitimize the promotional process."). For example, the panelists were all impressed with Mr. Gambale's answer regarding the command structure. Performance on an interview should account for something, otherwise there would be no point to an interview. In this case, it was not the primary reason for the bypass; but it was something that differentiated the candidates.

Ultimately, Mr. Gambale and the Appellant were similarly qualified. The Appellant was ranked higher, which means he had an edge when taking into account his score, experience, and training. On the other hand, Mr. Gambale had more specialized training and experience with integral department software; he volunteered a lot of time learning and setting up the system; and he made a better presentation at the interview. If there was any hint of favoritism at play, these reasons might be too thin to survive scrutiny. But in a case like this, small advantages can be a legitimate reason to bypass close candidates.

By all accounts, the Appellant is well-liked and respected within the department. The Chief had nothing but positive things to say about him. He wished he had more open positions so he could have promoted the Appellant. And immediately after this process, he did make the Appellant a temporary lieutenant, which carries more responsibility and better pay. The Appellant seems poised to take the next step to permanent lieutenant—he is undoubtedly qualified. Unfortunately, his competition in this promotional cycle was just stiff enough that he missed out.

CONCLUSION

For all of the above reasons, the City had reasonable justification to bypass the Appellant. Accordingly, subject to review by the commission, the city's decision is AFFIRMED and Mr. Hannon's appeal is DENIED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate