

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

MATTHEW KEANE,

Appellant

v.

SALEM FIRE DEPARTMENT,

Respondent

Docket Number:

G2-24-112

Appearance for Appellant:

Joseph Sulman, Esq.
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Appearance for Respondent:

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Commissioner:

Angela C. McConney

SUMMARY OF DECISION

The Commission overturned the decision of the Salem Fire Department to bypass a candidate for promotional appointment to fire lieutenant as the Department was unable to show that the candidate was medically unfit to perform the duties of the position at the time.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Matthew Keane (Mr. Keane or Appellant), appealed to the Civil Service Commission (Commission) the February 14, 2024 decision of the Salem Fire Department (Department) to bypass him for promotional appointment to the position

of Fire Lieutenant.

The Commission held a remote pre-hearing conference on August 27, 2024. On October 23, 2024, the Department filed a Motion to Dismiss the appeal due to untimeliness. On October 25, 2024, Mr. Keane filed an Opposition to the Motion to Dismiss, asserting that the Department's failure to provide him with a written bypass letter tolls the appeal timeline.

(Appellant's Opposition to the Respondent's Motion to Dismiss)

On December 5, 2024, I conducted an evidentiary hearing at the offices of the Commission, located at 100 Cambridge Street, Boston.¹ I audio/video recorded the hearing via the Webex platform, and forwarded a link to both parties. The parties filed proposed decisions on January 31, 2025.

FINDINGS OF FACT

Fifteen exhibits were received in evidence. I admitted six exhibits from the Appellant (A. Exhibits 1-6) and nine exhibits from the Respondent (R. Exhibits 1-9). Based upon the documents entered into evidence and the testimony of:

Called by the Department:

- Alan Dionne, Salem Fire Chief

Called by the Appellant:

- Matthew Keane, Appellant

and taking administrative notice of all pleadings filed in this case, plus pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence,

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. §§ 1.01 et seq. (Formal Rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

I make the following findings of fact:

Background Information

1. Mr. Keane is a Salem Firefighter who was first appointed to this position in 2012. He holds a Bachelor of Science degree in Biochemistry and is working toward a Master's in Business Administration. He has over 2,000 hours of service as an Acting Lieutenant for the Department. (Testimony of Keane)

2. The Salem Fire Department employs approximately 89 officers across four fire stations and one additional building. The Department also employs six or seven dispatchers, one mechanic, and one office manager, all of whom are civilians. (Testimony of Dionne)

3. Chief Alan Dionne has been the Fire Chief of the Salem Fire Department since approximately February 2021, and he is the Department's Appointing Authority. He previously served for approximately seven to eight years as Deputy Chief of the Department. He holds an Associate's Degree in Fire Science. (Testimony of Dionne)

Promotional Appointment to Fire Lieutenant and Bypass Decision

4. Mr. Keane took and passed the promotional examination for Fire Lieutenant on November 13, 2021 and ranked fourth on the eligible list for Salem Fire Lieutenant established on March 1, 2022, with two candidates ranked second. (R. Exhibit 1; Stipulation of Facts; Testimony of Keane)

5. After the eligible list was established, Mr. Keane served as Acting Lieutenant for numerous shifts, totaling approximately 2,000 hours of service. It is Department practice that whenever a Fire Lieutenant is out/unavailable for a shift, an individual who is on the Lieutenant eligible list is temporarily promoted to the position of either Temporary Acting Lieutenant (if

needed for less than 30 days) or Permanent Acting Lieutenant (if needed for 30 or more days).

(Testimony of Keane, Testimony of Dionne)

6. Effective October 17, 2023, Mr. Keane was promoted to Acting Lieutenant. (R. Exhibit 2; Testimony of Dionne, Testimony of Keane)

7. Also on October 17, 2023, Mr. Keane went to his general practitioner and then to the Emergency Room due to medical reasons. He was admitted to the hospital for approximately one week and then discharged. He was prescribed medication for a recommended six-month period. (Testimony of Keane)

8. While Mr. Keane was in the hospital, Chief Dionne and two deputies visited him. In Mr. Keane's recollection of the visit, Chief Dionne was "extremely supportive" of him, assured him not to worry about his job, and told him to come talk to him when he was out of the hospital. (Testimony of Keane)

9. Chief Dionne was aware of the reasons that Mr. Keane was in the hospital. (Testimony of Dionne)

10. Around this time, in accordance with Department practice, Firefighter Brad Sullivan was temporarily promoted to the Acting Fire Lieutenant position that Mr. Keane previously held. (Testimony of Dionne)

11. On October 19, 2023, a hospital physician, authored a "To Whom it May Concern" letter that states: "It is my medical opinion that Matthew Keane may return to work on 10-25-2023." Mr. Keane viewed this letter online on October 23, 2023. Mr. Keane did not provide this letter to the Department when he first accessed it, and does not recall when he gave it to the Department although he recalls giving it to the Department in June 2024. (A. Exhibit 3; Testimony of Keane)

12. Chief Dionne was aware that Mr. Keane was taking medication. (Testimony of Keane, Testimony of Dionne)

13. Mr. Keane was advised by his health care providers that it was up to him to determine when to return to work. (Testimony of Keane)

14. In November 2023, Mr. Keane met with Chief Dionne at Department Headquarters. (Testimony of Keane, Testimony of Dionne)

15. Mr. Keane believed that he was ready and able to return to work at the time of that November meeting, and he told this to Chief Dionne, but he did not push Chief Dionne to allow him to return to work at that time. Chief Dionne told Mr. Keane at the time that he could not return to work while he was taking his prescribed medication, that he would need to get a clearance letter from his personal physician, and that the Department also had a right to have him evaluated by its own doctor.² (A. Exhibit 4; Testimony of Keane, Testimony of Dionne)

16. Mr. Keane and the Department agree that Mr. Keane was taking approved sick leave from work, beginning with his hospitalization on October 17, 2023 and until June 14, 2024. (A. Exhibits 1 and 2; Testimony of Keane, Testimony of Dionne)

17. On January 22, 2024, the Department announced one vacancy for the position of Fire Lieutenant. At that time, Mr. Keane ranked highest among the six eligible candidates on the Departmental Promotional Certification list. All six candidates were invited to Department

² I credit Mr. Keane's testimony that Chief Dionne told him this, especially in light of the fact that Mr. Keane did stop taking the medication prior to his fitness for duty evaluation by the Department, and then resumed taking this medication after he was reassured by the City's contracted physician that taking the medication would not affect his fitness for duty. Further supporting evidence is that Chief Dionne acknowledged at hearing that he "may have" given Mr. Keane a copy of the *Commonwealth of Massachusetts 2018 Human Resources Division Physician's Guide: Initial-Hire Medical Standards* ("the Guide") prior to his fitness-for-duty evaluation. The Guide references a ban on the medication for new hires.

Headquarters to sign the certification indicating that they were willing to accept the position. (R. Exhibit 4; Testimony of Dionne)

18. Mr. Keane promptly signed the certification on January 22, 2024, indicating his willingness to accept the permanent promotion to Fire Lieutenant if offered to him. (R. Exhibit 4; Testimony of Keane, Testimony of Dionne)

19. Also on January 22, 2024, Mr. Keane spoke with Chief Dionne in his office. Chief Dionne informed Mr. Keane again that he would need to complete his treatment of medication before having a fitness-for-duty evaluation, and gave him a hard copy of the *Commonwealth of Massachusetts 2018 Human Resources Division Physician's Guide: Initial-Hire Medical Standards*, which include a ban on the medication for new hires.³ (R. Exhibit 4; Testimony of Keane, Testimony of Dionne)

20. The next day, January 23, 2024, Chief Dionne had an early morning email exchange with the state's Human Resource Division. Portions of the email exchange are excerpted below:

From Chief Dionne:

I have an officer retiring at the beginning of next month, which will free up a promotional position in my department. Presently, the person on the top of my lieutenant's list is an excellent candidate deserving of the promotion. The second person is also excellent. Currently my first candidate is on long-term sick leave. He is a young man, 43, who [medical reasons redacted] He has been out for three months and will be out for three to six more, if not indefinitely. My question: If I choose to promote the second candidate on the list and a new list is established, is the first candidate entitled to a promotion when/if he returns since I chose to pass him over because he was on long-term sick leave and questionable to return?

From HRD:

For an employee to be hired they will have to be permanent and able to work

³ I credit Mr. Keane's testimony about this conversation for the reasons as set forth in the Analysis.

on the day of the promotion. If the Department only has room for one promotion, then a temporary hire could be made at first, and before the new list is established a permanent full time hire could be made later. Each hire would require a round of certification. If the department can create two permanent positions, then the two hires could be made before the new list is established. The department could choose to make the hires temporary, and then permanent on the same day if the employee is able to return to work before the list is replaced. However, if the list expires/is replaced before the candidate can return to work, then the candidate would need to appear on a new list.

(R. Exhibit 3)

21. Mr. Keane never told Chief Dionne that he would be on sick leave indefinitely.

(Testimony of Keane, Testimony of Dionne)

22. On February 14, 2024, Chief Dionne issued General Order # 5, advising that the second-ranked candidate was promoted to the position of Fire Lieutenant. (R. Exhibits 4 and 7; Testimony of Dionne)

23. Chief Dionne was aware that he could have retained the second-ranked candidate in the temporary position of Acting Lieutenant, in accordance with the terms of Collective Bargaining Agreement. (Testimony of Dionne)

24. Chief Dionne did not confirm whether Mr. Keane was able to return to work before making the bypass decision. He noted, “I wasn’t looking to clear him because he was under the care of his own doctor,” and “... I didn’t feel the need to continually question him and send him to our doctor to verify that he was sick.” (Testimony of Dionne)

25. Mr. Keane’s February 14, 2024 bypass was Chief Dionne’s first bypass as Chief of the Salem Fire Department. (Testimony of Dionne)

26. Chief Dionne did not provide Mr. Keane with a written statement of the reasons to bypass him and instead promote the second-ranked candidate. (Testimony of Dionne, Testimony of Keane)

27. Instead, Chief Dionne called Mr. Keane from his car on February 14, 2024, while driving to Maine, and orally informed him that he promoted the second-ranked candidate to the Fire Lieutenant vacancy. (Testimony of Keane, Testimony of Dionne)

28. Mr. Keane was aware from this phone call that Chief Dionne's rationale for the bypass was that he was on sick leave. (Testimony of Keane)

29. Mr. Keane was surprised by this phone call based on his prior conversations with Chief Dionne. Temporary appointments to the Acting Fire Lieutenant position had been ongoing and were commonplace in the Department; and Chief Dionne had never bypassed anyone for a promotional appointment. Until the February 14, 2024 phone call, Mr. Keane expected that Chief Dionne would hold off on making a permanent appointment, and would permanently appoint him to the Fire Lieutenant position if he returned to work before the expiration of the eligible list. (Testimony of Keane)

30. Chief Dionne informed Mr. Keane during that February 14, 2024 phone call that there would be another promotion opportunity for Mr. Keane because another employee was expected to retire. (Testimony of Dionne, Testimony of Keane)

31. Chief Dionne did not provide Mr. Keane with written notice of his appeal rights. He also failed to provide Mr. Keane with oral notice of his appeal rights in the February 14, 2024 cell phone call. (Testimony of Keane)

32. On or around June 4, 2024, Mr. Keane provided Chief Dionne with a June 4, 2024 medical note from his physician, advising that Mr. Keane was a patient under his care, and "able

to return to active duty work without physical restrictions effective immediately.” (A. Exhibit 1; Testimony of Dionne, Testimony of Keane)

33. In the June 4, 2024 meeting, Chief Dionne told Mr. Keane that he would need to visit the City’s contracted physician for a fitness-for duty-evaluation, and that he would need to provide the City’s contracted physician with his medical records. (Testimony of Dionne, Testimony of Keane)

34. In a June 12, 2024 correspondence, Mr. Keane’s primary physician stated in part that: “[Mr. Keane] May return to work and regular duties as a firefighter without restriction.” (R. Exhibit 8)

35. The City’s contracted physician cleared Mr. Keane in a June 14, 2024 fitness for duty evaluation, without restrictions. In correspondence to Chief Dionne, the City’s contracted physician wrote, “Resolved medical problem. He feels well and has no medical complaints at this time. His treating physician has released him to return to work on full duty. He is cleared to return to work on full duty.” (A. Exhibit 2, R. Exhibit 9)

36. Mr. Keane stopped taking his medication shortly before the fitness for duty evaluation, but resumed taking them when the City’s contracted physician assured him that the medication would not affect his fitness-for-duty. (Testimony of Keane)

37. When Chief Dionne received the fitness-for-duty clearance letter, he promptly temporarily assigned Mr. Keane to an Acting Lieutenant position at Department Headquarters, the same status and position that he had held effective October 17, 2023, before he went out on extended sick leave. (A. Exhibit 2, R. Exhibit 9; Testimony of Dionne, Testimony of Keane)

38. Mr. Keane remained the top candidate on the Fire Lieutenant eligible list, with an expiration date of July 31, 2024. (R. Exhibit 4; Testimony of Keane)

39. Aware of the pending expiration date, Mr. Keane met with Chief Dionne in early July 2024 to discuss his promotional status. They discussed the fact that if a proposed retirement were not fully completed before the expiration of the current Fire Lieutenant eligible list, Mr. Keane would not be promoted. Mr. Keane and Chief Dionne were aware that the retirement processing would not be completed in time. Chief Dionne then told Mr. Keane that he could get an attorney. (Testimony of Dionne; Testimony of Keane)

40. On July 11, 2024, Mr. Keane appealed his promotional bypass to the Commission. (Stipulated Facts)

41. Because Mr. Keane had not taken the most recent lieutenant's examination, he was not included on the August 1, 2024 eligibility list. Mr. Keane was returned to the position of Permanent Firefighter. (Testimony of Keane, Testimony of Dionne)

Applicable Legal Standard

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 Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Basic merit principles in promotion call for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences. Promotional appointments are made, generally in rank order, from a “certification” of the top candidates 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.

A public employer's authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotion appointment from a certification of any qualified person other than the 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 ... a written statement of his reasons for appointing the person whose name was not highest.

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position is not absolute, and a bypassed candidate may appeal a decision under G.L. c. 31, § 2(b) for a de novo review by the Commission. *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997) rev. den., 428 Mass. 1102 (1997).

The Commission's role is to determine whether the appointing authority's reason(s) for bypassing a candidate higher on the list in favor of a lower ranked candidate are "reasonably justified", based on a "thorough review", and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. *See, e.g., Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 543 (2006) and cases cited. The burden of providing reasonable justification lies with the appointing authority. *Cambridge*, 43 Mass. App. Ct. at 304. The preponderance of the evidence standard "require[s] the Commission to determine whether, on the basis of the evidence before it, the [appointing authority has] established that [its] reasons ... for the nonselection of [a bypassed candidate] were, more probably than not, sound and sufficient." *Mayor of Revere v. Civil Serv. Comm'n*, 31 Mass. App. Ct. 315, 321 (1991).

The governing statute, G.L. c. 31, § 2(b), 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 an appointing authority acted "arbitrarily and capriciously."

Cambridge, 43 Mass. App. Ct. at 303-305. It is the role of the hearing officer to determine the credibility of witnesses. *Covell v. Department of Social Svcs.*, 439 Mass. 766, 787 (2003).

In reviewing a bypass decision, "[t]he commission's primary concern is to ensure that the appointing authority's action comports with 'basic merit principles,' as defined in G.L. c. 31, § 1." *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012), citing *Massachusetts Ass'n of Minority Law Enforcement Officers*, 434 Mass. at 259.

Analysis

There are both procedural and substantive issues to be resolved, and I address each in turn below.

Procedural Issue

It is undisputed that the Department did not provide Mr. Keane with written notice of its decision and reasons to bypass him or written notice of Mr. Keane's appeal rights. Before reaching a decision on the substantive issue on Mr. Keane's bypass, I must first analyze the impact, if any, of this undisputed procedural error.

The process of making a promotional bypass decision is governed by G.L. c. 31, § 27 and PAR.08(4) of the Personnel Administration Rules. According to the statute:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not the highest. Such an appointment shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such

statement available for public inspection at the office of the department.

G.L. c. 31, § 27.

The Personnel Administration Rules expand on this requirement as follows:

Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are not known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission.

Personnel Administration Rule, PAR.08(4).

Given the lawful delegation of the Personnel Administrator's administrative functions to appointing authorities under G.L. c. 31, § 27, Chief Dionne had the responsibility to "send the written statement to the affected job applicant ... and keep a copy of the written reasons in case of an audit." *Malloch v. Hanover*, 472 Mass. 783, 795 (2015). Although Mr. Keane did not receive written notice of his right to appeal the bypass decision, it is apparent that Mr. Keane did, at some point, become aware of this appeal right as he obtained counsel and filed this appeal. Any potential prejudice to Mr. Keane of not receiving timely written notice of his right to appeal is remedied by my denial of the City's Motion to Dismiss the appeal on the basis of untimeliness.

In regard to not receiving written notice of the reasons for the bypass, I note that Mr. Keane was aware, from his February 14, 2024 phone call from Chief Dionne, that Chief Dionne's proffered reason was that he was bypassed because he was out on long-term sick leave, and therefore unable to fulfill the duties of the position at the time the promotion was being

made. This is evidenced by Mr. Keane's own testimony that he was surprised by the Chief's February 14, 2024 permanent promotional appointment of the second-ranked candidate – because it was his expectation that Chief Dionne would hold that permanent vacancy open until he returned to work from sick leave. It is also relevant to the analysis that the evidence includes email correspondence from Chief Dionne to HRD about the potential bypass, on a date prior to the bypass decision being made/announced on February 14, 2024. Chief Dionne's January 23, 2024 email states: "If I choose to promote the second candidate on the list and a new list is established, is the first candidate entitled to a promotion when/if he returns since I chose to pass him over because he was on long-term sick leave and questionable to return?"

Therefore, in the present matter, the record includes testimonial evidence that Mr. Keane was provided with a contemporaneous oral reason for the bypass, as well as documentary evidence in the form of an email demonstrating that this reason was in fact the reason proffered by Chief Dionne at the time that he made the decision. This matter is thus distinguishable from *Otero v. Lowell, et al.*, No. SUCV 2016-3429-L1 (Middlesex Sup. Ct, Mar. 18, 2019). In *Otero*, the bypassed candidate received neither a timely written nor oral reason for the decision. The only documentation of reasons presented at hearing post-dated the bypass decision by one month, and which was authored by a third party not privy to the bypass discussions. Additionally, the *Otero* decision emphasized that the Personnel Administrator's "controlling concern" underlying the requirement for immediate written notice is that "there is too much room for manipulation and rationalizing when appointing authorities offer after-the-fact rationales, not committed to writing contemporaneously." *Id.* at 11. That concern is not present or applicable in this matter in regard to Chief Dionne's proffered reason that he bypassed Mr. Keane because he was out on long-term sick leave and therefore unable to fulfill the duties of the

position on February 14, 2024.

The Department introduced two additional reasons for bypassing Mr. Keane at hearing: (1) the union allegedly exerted pressure on Chief Dionne to fill the vacancy promptly; and (2) Chief Dionne allegedly sought continuity in the position. These two additional reasons were neither relayed to Mr. Keane at the time of his bypass nor contemporaneously documented by Chief Dionne when he made the bypass decision.

In accordance with G.L. c. 30A, § 27, Personnel Administration Rule, PAR.08(4), and the public policy underlying their notice requirements, I exclude these two additional reasons from evidence: “No reasons that are not known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission.” Personnel Administration Rule, PAR.08(4).

Substantive Issue

The Department has not met its burden to prove, by a preponderance of credible evidence, that its decision to bypass Mr. Keane was made after a thorough review and upon sound and sufficient reasons. The Department’s admissible proffered reason for bypassing Mr. Keane for its February 14, 2024 permanent promotion to Fire Lieutenant was that he was out on long-term sick leave and therefore unable to fulfill the duties of the position. A candidate’s status of being medically unavailable to fulfill the duties of a position can indeed be a reasonable justification for a bypass. *See McCarthy v. Haley*, 4 MCSR 236, *aff’d* No. 90-5027 (Suff. Sup. Ct., Jun. 28, 1991) (affirming promotional bypass based on medical unavailability when officer’s treating physician submitted documentation stating it was unknown when, if ever, the officer would be able to return to his duties); *Walker v. Department of Correction*, 20 MCSR 79 (2007)

(affirming promotional bypass based on medical unavailability when officer testified that he was medically unable to fulfill the duties and medical documentation stated that officer was unable to perform his duties with an unknown return date).

In this matter, it is undisputed that Mr. Keane was on approved sick leave from October 17, 2023 to June 14, 2024. In contrast to the above cited cases, there is no corroborating evidence of Mr. Keane's actual medical unavailability to fulfill the job duties of the position of Fire Lieutenant as of February 14, 2024.

Instead, Mr. Keane's position is that the only reason that he was out on long-term sick leave at the time of the promotional bypass was because Chief Dionne told him in November 2023 that he could not be cleared to return to work while taking his prescribed medication, which he had been recommended to take for six months, and that he relied upon Chief Dionne's representation about this return-to-work restriction. Mr. Keane asserts that he was ready and able to return to work in November 2023, and that he informed Chief Dionne of this. At the hearing, Chief Dionne could not recall much of his November 2023 meeting with Mr. Keane, but he denied that he ever said to Mr. Keane that taking his medication precluded him from returning to work.

The cumulative evidence demonstrates that it is more likely than not that Mr. Keane informed Chief Dionne that he was ready to return to work when they met in November 2023, that Chief Dionne informed him that he could not be cleared to work while taking his prescribed medication, and that Mr. Keane relied (to his detriment) on Chief Dionne's representation by thereafter continuing his sick leave. One evidentiary basis for this conclusion derives from events before that November 2023 meeting. Mr. Keane credibly testified that when Chief Dionne visited him in the hospital in October 2023, he told him to come see him when he was out of the

hospital. Documentary evidence in the form of an October 19, 2023 “To Whom It May Concern” letter demonstrates that Mr. Keane’s physician cleared Mr. Keane to return to work on October 25, 2023. It further demonstrated that Mr. Keane had viewed this letter online on October 23, 2023. The letter states, “It is my medical opinion that Matthew Keane may return to work on 10-25-2023.” Neither the authenticity of the letter nor its content was challenged by the Department. Thus, it makes sense that when Mr. Keane and Chief Dionne met in November 2023, he did so because he was out of the hospital and had been cleared by his physician to return to work. Mr. Keane’s testimony that he informed Chief Dionne at that meeting that he was ready to return to work is therefore credible, and Chief Dionne’s lack of recall about the November 2023 meeting does nothing to temper this.

The Guide provides additional support for Mr. Keane’s description of the November 2023 meeting. The Guide “provides examining physicians with Massachusetts Human Resource Division’s medical standards for initial-hire evaluations of applicants for municipal police and fire fighter positions.” Within the Guide, certain medical conditions are labeled as Category A conditions, and potential *new hires* with Category A medical conditions will not be cleared for *initial* appointments to fire fighter positions. According to the Guide, “Category A medical conditions shall include those that require chronic or frequent treatment with...[reference to medication prescribed to Appellant at the time].”

At hearing, Mr. Keane testified that he began taking the prescribed medication upon medical advice following his diagnosis, and that his medical provider recommended a six-month regimen. It is clear that the two men discussed the medication: Chief Dionne acknowledged at hearing that he knew that Mr. Keane was taking this medication. Mr. Keane further testified that Chief Dionne referenced the Guide and its bar on this medication in their November 2023

meeting, and gave him a paper copy of the Guide when they met on January 22, 2023.

Chief Dionne's testimony about the Guide was somewhat equivocal. He could not initially recall having a November 2023 meeting, but then he did. When asked if he ever gave Mr. Keane a copy of the Guide, his answer included both "I don't recall" and "I may have." Although at hearing Chief Dionne did not recall telling Mr. Keane that he could not be cleared to return to work while taking his medication, the evidence shows that the two men discussed Mr. Keane's prescription. This, along with the uncertain testimony from Chief Dionne about giving a copy of the Guide to Mr. Keane, renders Mr. Keane's testimony more credible than that of the Chief.

Mr. Keane's medication prescription and its expected duration, more likely than not, was of interest to Chief Dionne only because he did, in fact, believe that the medication bar for initial hires as dictated in the Guide applied to Mr. Keane's return to work. Acting upon this belief, Chief Dionne told Mr. Keane that the medical standards precluded Mr. Keane from being cleared to return while he was taking this medication.

A third evidentiary basis supporting Mr. Keane's testimony about what took place in their November 2023 meeting derives from what did, and what did not, occur after that meeting. After the meeting, Mr. Keane continued to take sick leave. What did not transpire after the November 2023 meeting is that the Department did not push Mr. Keane to return to work or question his ongoing sick leave, and Mr. Keane did not push the Department further to allow him to return to work while he was taking his prescribed medication. It appears based on the evidence submitted at hearing, that Mr. Keane took this extended sick leave without ever submitting medical documentation noting his inability to work.⁴

⁴ If there was medical documentation justifying the extended sick leave, neither party

Both parties' general contentment with the "status quo" of Mr. Keane remaining out on long-term sick leave, although without medical documentation justifying it, is a critical piece of evidence. It seems implausible that a public employer would allow a public employee to take months of sick leave without once requesting or receiving any medical documentation justifying said leave. Significantly, based on the evidence before me, Mr. Keane did not in November 2023, or at any time thereafter based on evidence in the record, submit to the Department any medical documentation stating that he could not return to work, a distinct contrast to the facts in *McCarthy* and *Walker*. Indeed, medical documentation that was submitted into evidence, although not submitted by Mr. Keane to the Department in November 2023, *specifically cleared Mr. Keane to return to work*.

The likely explanation for this "inexplicable" absence of probing or inquiry by the Department, is that Chief Dionne did inform Mr. Keane that he must remain on sick leave while taking his medication. For Mr. Keane's part, as a parent of young children at the time of his hospitalization, and with plenty of accrued sick leave, he likely had ample incentive to accept Chief Dionne's directive and be home with family at this time. However, it was also clear from the evidence submitted at hearing that Mr. Keane was motivated to obtain the promotion to Fire Lieutenant, having already served as an Acting Fire Lieutenant for 2,000 hours, having taken the promotional examination, and having promptly signed the certification on January 22, 2024.

offered it as evidence at this hearing. While both Chief Dionne and Mr. Keane provided some testimony about having a conversation about G.L. c. 41, § 111F benefits, this testimony was not developed. I note that, depending on its content and timing, Mr. Keane's application for and/or receipt of c. 41, § 111F benefits could potentially undermine his position that he was able to work at the time of the promotion. *See Mahoney v. City of Boston Fire Department*, 19 MCSR 70 (2006) (affirming promotional bypass based on medical unavailability when appellant, out of work and receiving G.L. c. 41, § 111F benefits, also had a pending application for accidental disability retirement benefits).

Based on his lengthy career to date and his career ambitions, I do not believe that he would have malingered at the risk of missing this promotional opportunity, or at the risk of being accused of sick time abuse. Instead, his ongoing use of sick leave (again, which was never questioned by the Department) was more likely than not due to his reliance on Chief Dionne's directive that taking the prescribed medication barred his return, coupled with some sort of assurance from Chief Dionne that the promotion would remain open through the duration of the eligible list.⁵

In addition to the above evidence supporting Mr. Keane's description of the November 2023 meeting, all of which undermines the Department's position that Mr. Keane was in fact medically unavailable to fulfill the duties of the position when the promotion was made, other facts undermine the justification for this particular promotional decision. Significantly, Chief Dionne seems to have relied on his personal opinion about Mr. Keane's medical status as opposed to medical evidence.

Finally, although the Department offered two after-the-fact justifications related to the timing of its bypass, these have been appropriately excluded from evidence for the very reason that they were "after-the-fact." Admissible evidence indicates that this was the first time that Chief Dionne bypassed the highest ranked candidate, and further, throughout Chief Dionne's tenure as Fire Chief, *temporary appointments* to Acting Fire Lieutenant were commonplace. Indeed, at the time of hearing, Mr. Keane had served, through temporary appointments, as an

⁵ It is worth noting that Mr. Keane bears some responsibility for his misplaced reliance on Chief Dionne's representations. With his educational background and resources of the union, he could have performed his own research and challenged the Chief's directive about the medication barring his return. He instead chose a passive path most likely because he thought it would give him all that he sought: family time; compensation during leave; and a promotion upon his return. This does not, however, alter the ultimate outcome of this case, given the Department's burden to prove by a preponderance of credible evidence that it had reasonable justification for its bypass decision.

Acting Fire Lieutenant for over 2,000 hours, which is just shy of one year of service. Also, Mr. Keane was temporarily appointed, just prior to his hospitalization, to permanent Acting Fire Lieutenant. Additionally, HRD had advised Chief Dionne that in lieu of bypassing the first ranked candidate out on sick leave, he had the authority to make a temporary appointment to the Fire Lieutenant vacancy in February 2024, and then later make a permanent appointment, prior to the expiration of the eligible list, which was August 1, 2024. At hearing, Chief Dionne acknowledged that he could have effectuated the plan proposed by HRD.

Armed with knowledge of his choices through this advice from HRD, Chief Dionne chose to bypass Mr. Keane and to permanently promote the second candidate to Fire Lieutenant on February 14, 2024. And he did so without even reaching out to Mr. Keane just to inquire about his current status and likely return date. This lack of communication with the first ranked candidate about his current medical status suggests that the Department did not conduct much of a “thorough review,” prior to making its decision. Again, the Department had no medical documentation or verbal representation from Mr. Keane stating that he was then medically unable to fulfill his duties.

For all of the above reasons, the Department has not established, by a preponderance of credible evidence, that it had reasonable justification for its bypass decision.

CONCLUSION

Accordingly, the appeal filed under Docket No. G2-24-112 is hereby *allowed*. Pursuant to Chapter 310 of the Acts of 1993, the state’s Human Resources Division or the Department in its delegated capacity shall place the name of Matthew Keane at the top of any current or future certification for promotional appointment to permanent fire lieutenant until he has been promoted or bypassed. The Department may not rely on the Appellant’s prior medical leave at

the time of the prior promotion as a reason for any future bypass.

CIVIL SERVICE COMMISSION

Angela McConney

Angela C. McConney
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein, Commissioners) on August 21, 2025.

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 C.M.R. § 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:

Joseph Sulman, Esq. (for Appellant)

James F. Wellock, Esq. (for Respondent)

Stephanie Andino (HRD)

Regina Caggiano (HRD)