Decision mailed: 11/8/10
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place
Boston, MA. 02108

EDWARD KUSSER
Appellant
v.
CITY OF QUINCY
Respodent

G2-05-318

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Commissioner:

John E. Taylor

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Edward Kusser (hereinafter "Appellant"), is appealing the decision of the state's Human Resources Division (HRD) to accept the reasons of the Respondent, City of Quincy (hereinafter "City" or "Appointing Authority"), to bypass him for promotion to the position of police lieutenant. The appeal was timely filed. A full hearing was held on April 2, 2008, at the offices of the Civil Service Commission. One audio tape was made of the hearing. The Appellant submitted a post-hearing brief and the City failed to submit a brief. Eleven (11) exhibits were entered into evidence at the hearing.

FINDINGS OF FACT:

Based on the documents entered into evidence as Exhibits 1 through 11, and the testimony of the Appellant and Robert F. Crowley, Chief, Quincy Police Department, I find the following:

1. The Mayor is the Appointing Authority for the Quincy Police Department. (Ex. 1).
2. In the spring of 2005, the City sought a certified list of promotional candidates from HRD seeking to promote seven (7) Quincy police sergeants to the position of police lieutenant. (Ex. 1).
3. On or about April 4, 2005, the City received Certification Number 250300 from HRD. The certification contained the names of fifteen (15) Quincy police sergeants. (Ex. 1).
4. The Appellant's name appeared in the fifth position with a score of 84, tied with Kevin Tobin. (Ex. 2).
5. Sergeants Minton, Tobin (Brian), Glynn, and Santoro appeared sequentially in positions below the Appellant on the same certification with scores lower than the Appellant's. (Ex. 2).
6. The Appellant began working as a patrol officer in Quincy in 1978 and was promoted to sergeant in 1991. (Appellant Testimony; Ex. 2).
7. On April 27, 2005, the Appellant was interviewed by Chief Crowley and then-Mayor William Phelan for the promotional position. All other candidates were similarly interviewed on or about that day. (Crowley Testimony; Appellant Testimony).

8. Three relatives of Mayor Phelan were among those interviewed, including Brian Tobin (Mayor's brother-in-law), Kevin Tobin, and Donald Greenwood. (Crowley Testimony).
9. During the Appellant's interview, he was asked by Chief Crowley why he disliked fire fighters. Never having previously been asked about any alleged antipathy towards fire fighters, the Appellant was surprised by the question. He responded that he did not dislike fire fighters, that members of his family had honorably served as fire fighters in Quincy, but that he had earlier in his career made several vehicle stops of fire fighters and apparently garnered an unwarranted reputation for dislike of fire fighters, which was completely untrue. (Appellant Testimony).
10. After that interview, Chief Crowley told the Appellant that he and the Mayor had decided not to promote him. (Appellant Testimony).
11. After receiving an opinion from the State Ethics Commission that Mayor Phelan's involvement in the interview process was problematic, it was decided to re-do the interviews using a panel composed of Chief Crowley, Braintree Chief Paul Frazier, and Wellesley Chief Terrence Cunningham. (Crowley Testimony, Ex. 3).
12. On June 14, 2005, the new panel composed of the three police chiefs interviewed the Appellant. All of the other candidates were also interviewed by the same panel on either June 14 or June 20, 2005. (Crowley Testimony; Kusser Testimony; Ex. 3).

13. The Appellant's interview with the chiefs' panel lasted 10-15 minutes. He was again asked about his alleged dislike of fire fighters as supposedly exemplified by his writing tickets of fire fighters; and he again responded that it was untrue. He was asked about supposedly not speaking with Capt. DiBona, to which he explained that he was on speaking terms with Capt. DiBona, but they worked different shifts and he did not work under that captain. He was also asked about an incident involving Officer Nancy Coletta, for which he had received a letter of reprimand. During the interview, Chief Crowley left the room and returned with paperwork regarding this reprimand. (Appellant Testimony; Ex. 3).
14. The interview panel had no set of questions prepared which it asked of each candidate. The panel had no answers prepared which it expected from the questions asked of the interviewees. There was no numerical or grading system used by the panel in assessing candidates. (Crowley Testimony).
15. By letter dated July 15, 2005, Chiefs Frazier and Cunningham recommended that the Appellant be bypassed. Their proffered reasons included: lack of basic communication skills and difficulty accepting responsibility for past disciplinary history. (Ex. 3).
16. The Appellant's discipline for the incident involving Officer Coletta was then on appeal and, on March 25, 2006, was overruled and the reprimand was ordered removed from his file. (Ex. 8).

17. On July 29, 2005, Chief Crowley recommended to Mayor Phelan that the Appellant be bypassed for lieutenant. He enclosed the bypass recommendation of the other chiefs and added his own reasons for bypass. These reasons included prior discipline for the Coletta matter, a five day suspension in 2002, and two disciplinary incidents from 1983. Chief Crowley also claimed a discrepancy between the Appellant's answer to the interview panel about how he deals with being upset with someone and a statement supposedly made by the Appellant at a workplace harassment class. The alleged statement was not brought up in the interview. Chief Crowley also cited the Appellant's refusal to speak with him following being requested to wear his hat and tie to roll call as an example of his "lack of communication skills." This allegation was not raised in the interview. The Appellant's past failure to deny an alleged dislike of fire fighters was also raised by Chief Crowley as "not the mark of a good communicator." Chief Crowley also mentioned seeing the Appellant on June 20, 2005, in the Communication Center "leaning back in his chair with no gun belt and his shirt not tucked into his pants." Chief Crowley cited this incident as failing to lead by example. Chief Crowley opined that he, along with the other two chiefs, did not recommend the Appellant for the position of lieutenant. (Ex. 4).
18. Also on July 29, 2005, Chief Crowley recommended for promotion to lieutenant Greenwood, Steele, Burrell, Kevin Tobin, Minton, Brian Tobin,

Glynn, and Santoro. (Ex. 5). Of these, Minton, Brian Tobin, Glynn, and Santoro ranked below the Appellant on the Certification. (Ex. 2).

19. The City then notified HRD of its selection of these seven candidates to fill the lieutenants' positions. (Ex. 6). HRD accepted the proffered bypass reasons for the Appellant. (Ex. 7).

20. For the prior four years, the Appellant had been serving as the sergeant in charge of the Communications Center during the busy night shift. In that capacity, he supervised 3-4 civilian call-takers and one police dispatcher, oversaw all 911 calls to ensure they were properly handled, oversaw and monitored all police chases, and fielded all citizen complaints. He performed these functions without any complaints from the public or his supervisors. He was never asked about any of these functions during either of his interviews. (Appellant Testimony).

21. The Appellant denied that he had been requested to wear a hat and tie several years prior to 2005 and denied that he had refused to speak to Chief Crowley during that period. He also did not believe that his shirt had been not tucked in on June 20, 2005 and explained that officers in the Communication Center often do not wear their gun belts and had never been notified that this was a violation of protocol. (Appellant Testimony).

22. The Appellant received two instances of discipline in 1983, eight years prior to his 1991 promotion to sergeant. In 2002, he was suspended for five days for failing to timely submit a report regarding his involvement in the so-called Marina Bay incident, during which he had not been on duty

and in which he had had no involvement. The 2004 Coletta reprimand was later overturned. (Ex. 10; Ex. 8; Appellant Testimony; Crowley Testimony).

23. The Marina Bay incident in 2002 had caused a number of Quincy police officers to be disciplined for offenses including alcohol consumption while on duty and in uniform, driving cruisers after drinking, allowing off-duty officers to operate a cruiser, discharging a firearm without reporting it, and failing to report misuse of department equipment. (Ex. 9; Crowley Testimony).

24. Two patrol officers who had been assessed, respectively, 90 and 45 day suspensions for their involvement in Marina Bay in 2002, were subsequently promoted to sergeant in 2004 and 2005. An officer who received a 90 day suspension for that incident was appointed by Chief Crowley on March 23, 2005, as the school resource officer. Another officer who was also assessed a 90 day suspension for that incident was appointed by Chief Crowley on February 1, 2005, to the Juvenile Unit. (Ex. 9; Crowley Testimony).

25. On December 22, 2004, Sgt. Tom Corliss was promoted to lieutenant. Approximately one year prior to his promotion, Corliss had served a five-day suspension for violating the department's rule against working more than 16 consecutive hours. (Ex. 9; Crowley Testimony).

26. On April 12, 2007, Tim Sorgi was promoted to lieutenant, despite having served a ten day suspension in January, 1995. (Ex. 9; Crowley Testimony).

27. The Appellant received ten commendations during the course of his career with the Quincy Police Department. (Ex. 11).

CONCLUSION

In the context of reviewing a bypass decision by an Appointing Authority, the role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997); T*own of Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983); *McIsaac v. Civil Service Commission*, 38 Mass. App. Ct. 473, 477 (1995): *Police Department of Boston v. Collins*, 48 Mass. App. Ct. 411 (2000); *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "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." *City of Cambridge* at 304, quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 359 Mass. 211, 214 (1971). The Appointing Authority's burden of proof is one of a preponderance of the evidence, which is established, "... if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of

the tribunal notwithstanding any doubts that may still linger there." *Tucker v. Pearlstein*, 343 Mass. 33, 35-6 (1956).

Basic merit principles, as defined in G. L. c. 31, §1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious action. *Tallman v. City of Holyoke, et al.*, G-2134; cf *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983). Nevertheless, it is recognized that an appellant's "expectation of [selection] based on 'his position on a civil service list' does not rise to the level of a 'property interest' entitled to constitutional protection." *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991). Candidates simply have certain expectations that are substantially diminished by the ability of the appointing authority under state law to consider subjective factors in addition to the written examination score. *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980). Those factors must adhere to the intent of the civil service system. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300 (1997). "Appointing Authorities are expected to exercise sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The Appointing Authority may also decline to make any appointment." See *Commissioner of the Metropolitan District Commission v. Director of Civil Service*, 348 Mass. 184, 187-193 (1964). See also *Corliss v. Civil Serv. Commrs.* 242 Mass. 61, 65; (1922) *Seskevich v. City Clerk of Worcester,* 353 Mass. 354, 356 (1967); *Starr v. Board of health of Clinton,* 356 Mass. 426, 430-431 (1969).

Cf. *Younie v. Director of Div. of Unemployment Compensation*, 306 Mass. 567, 571-572 (1940).

In order to show that an Appointing Authority's decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. *MacPhail v. Montague Police Department*, 11 MCSR 308 (1998), citing *Borelli v. MBTA*, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, appointing authorities are invested with broad discretion. *City of Cambridge* at 304-5; *Goldblatt*, supra. This tribunal cannot "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *City of Cambridge* at 304. In light of these standards and the evidence in this case, the appeal must be granted.

The City has not met its burden of proving that there was a reasonable justification for bypassing Appellant for the position of Lieutenant. Specifically, the evidence proffered by the Respondent, taken together with that offered by the Appellant, fails to demonstrate that "there was reasonable justification for the action taken by the appointing authority." Rather, those reasons instead "were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons."

The Appellant points to a combination of three factors which compel the conclusion that this bypass cannot be sustained: impermissible bias, an indefensible promotional system by the City, and the selective use of discipline.

The unacceptable bias that contaminated the process involved the fact that three of the candidates for Lieutenant were relatives of the sitting Mayor. Despite this fact, Mayor Phelan initially interviewed all candidates for the position. Following that interview, Chief Crowley specifically told the Appellant that he and the Mayor had decided not to promote him. The subsequent interview with the two outside chiefs merely camouflaged the stated intent of the appointing authority.

This bias could have been overcome if the appointing authority had put in place a legitimate, nondiscriminatory, selection process. Instead, the selection process, composed of a panel which included Chief Crowley, lacked the requisite structure to eliminate bias and ensure fairness. In *Maynard V. MBTA Police Department*, (G2-05-12 and G2-05-177) (3/20/07), the Commission discussed the attributes of such a selection process:

> [W]hile nothing in Chapter 31 specifically requires a strictly structured selection process, decisions of the Commission and the courts certainly "indicate a preference for one." *Bannish* v. *Westfield Fire Dept.*, 11 MCSR 157 (1998), *citing Flynn* v. *Civil Service Commission*, 15 Mass. App. Ct. 206 (1983). Both the Appeals Court and the Commission cited with approval the testimony of an expert witness in the *Flynn* case noting that a numerical grading system in interviews could be preferable because such a procedure would more likely be clear and explicit. *Bannish*, 11 MCSR at 158, *Flynn*, 15 Mass. App. Ct. at 208. In general, the Commission applies the reasonable justification standard to any weighted grading system and to the reasons the appointing authority puts forward to substantiate such a system. *See Mawn* v. *Norwood Police Dept.*, 11 MCSR 74 (1998).

The process used here lacked any semblance of a numerical grading system.

In *Brown v. Town of Duxbury*, (G2-04-264) (12/1/06), the Commission commended the appointing authority for the interview process it had constructed. There, three independent police experts who did not know the candidates and had no information about them prior to the interviews, asked the same set of

questions to each and numerically scored each answer. "Not only is an interview process, which includes questions upon which each panelist uses a common scoring method permissible, it should be encouraged." *Id.* at 11.

By contrast, here, one of the panelists, Chief Crowley, knew the Appellant and infused the interview process with bias. He took it upon himself to leave the interview and return to it with a folder of a disciplinary incident involving the Appellant that was later overturned. There was no standard set of questions asked of all candidates. There was no scoring system of any kind. Indeed, there is no evidence that any of the same questions were asked of all the candidates.

Similar to the Commission, the federal courts have also explicitly condemned the use of interview panels for hiring decisions without safeguards against "subjective determinations of the panel interviewers." *Howell v. Michigan Dept. of Corrections*, Slip Copy, 2007 WL 2651443 (E.D.Mich. September 07, 2007) (copy attached).

The absence of basic merit principles becomes particularly glaring when comparing how stale, minor, and overturned discipline was used by the Appointing Authority to bypass the Appellant while major, recent discipline was overlooked to promote others to Lieutenant and Sergeant.

The only discipline of the Appellant with any relevance was the five-day suspension incurred in 2002 for filing a late report regarding the Marina Bay incident, in which the Appellant was completely uninvolved. Yet, cited in the bypass reasons, were discipline from 1983 and a reprimand from 2004. The 1983 incidents had occurred eight years ***before*** the Appellant was promoted to

Sergeant. While an appointing authority may have discretion to consider discipline in promotional decisions, it strains credulity to believe that discipline that had occurred 22 years earlier and which had not prevented an officer from being promoted to sergeant could possibly be a legitimate basis for bypassing the same officer for lieutenant. As for the reprimand for the Coletta incident, it was subsequently overturned and therefore impermissibly considered in the process.

While stale and overturned discipline of the Appellant was used to justify his bypass, recent and far more egregious discipline was overlooked to promote two officers to sergeant and appoint two others to special assignments. The Appellant was home sleeping the night of the Marina Bay incident. Four of the officers who committed significant infractions from the same incident were either promoted or given special assignments. Two other lieutenants were also promoted within the same time frame, yet each had received discipline at least as significant as the Appellant's.

Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. *City of Cambridge*, 43 Mass. App. Ct. at 304. All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons" *Borelli v. MBTA*, 1 MCSR 6 (1988).

For all of the above-stated reasons, it is found that the Respondent has not established by a preponderance of the reliable and credible evidence in the record that it had just cause to bypass Appellant for the position of Lieutenant. Therefore, this appeal on Docket No. G2-05-318 is ***allowed***.

In light of the foregoing, the Commission, pursuant to the powers of relief inherent in Chapter 534 of the acts of 1976, as amended by Chapter 310 of the acts of 1993, hereby directs the Human Resources Division to place the name of Appellant, Edward Kusser, at the top of the next certification list for Lieutenant with the Quincy Police Department. Further, Appellant's seniority date, should he be promoted to lieutenant, shall be made retroactive to the date of the original bypass.

Civil Service Commission

John E. Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Taylor, Marquis,[absent] and Stein, Commissoners) on January 7, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A s. 14(1) for the purpose of tolling the time of appeal. Pursuant to G.L. c. 31 s. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial

review under G.L. c. 30A s. 14 in the Superior Court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

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