

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503

Boston, MA 02108

(617) 979-1900

JAMES LEAVITT,

Appellant

G2-20-157

v.

SALISBURY POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

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Danvers, MA 01923

Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

On October 23, 2020, the Appellant, James Leavitt, currently a Sergeant in the Town of Salisbury (Salisbury) Police Department (SPD), appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b), from his bypass by the SPD for promotional appointment to the position of full-time permanent Police Lieutenant.¹ The Commission held a pre-hearing conference on January 26, 2021, via remote videoconference (Webex). A full hearing was held, also by remote videoconference (Webex), on March 30, 2021, which was recorded via Webex.² Twenty-four (24) exhibits (*App.Exhs.1 through 11; Resp.Exhs.1 through 13*) were

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 A link to the Webex audio/video recording of the full hearing was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the 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.

received in evidence. Each party filed a Proposed Decision on May 27, 2021. For reasons stated below, the Appellant's appeal is denied.

FINDINGS OF FACT

Based on the exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Salisbury Town Manager, Neil Harrington
- Salisbury Finance Director/Town Accountant Karen Snow
- SPD Chief of Police, Thomas W. Fowler

Called by the Appellant:

- James Leavitt, SPD Sergeant, Appellant

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:

The Appellant

1. The Appellant, James Leavitt, began his employment with the SPD in 2000. He was appointed to the position of full-time Police Officer in 2006 and was promoted to Police Sergeant in 2015. He had no prior record of discipline during his tenure with the SPD. (*Testimony of Appellant*)

2. Prior to his employment with the SPD, Sgt. Leavitt served on active duty with the U.S. Air Force, achieving the rank of Staff Sergeant (E-5). He later served with the New Hampshire Air National Guard, where he was deployed to Iraq and achieved the rank of Master Sergeant (E-7) prior to his honorable discharge in 2011. During the course of his military career, (USAF Sergeant) Leavitt had responsibility to supervise a staff of four to seven personnel and manage a \$3.6 million dollar budget. (*App.Exh.10; Testimony of Appellant*)

3. Sgt. Leavitt attended and graduated in December 2018 from the Endicott College Police Chief Command Academy. He is working toward a Bachelor of Science degree in Criminal Justice

– Police Administration & Operations, expected in 2022. (*App.Exh.10; Testimony of Appellant*)

4. Sgt. Leavitt’s duties with the SPD include regular supervision of two (2) patrol officers and, until, recently, he also supervised nine (9) civilian SPD dispatchers. He serves as the SPD’s training manager and has been the primary sergeant involved with sexual assault and domestic violence investigations. (*Testimony of Appellant*)

The SPD’s Organizational History and Structure

5. The Salisbury Town Manager (TM) is the Appointing Authority for civil service appointments and promotions within the SPD, upon the recommendation of the (non-civil service) SPD Police Chief. (*Testimony of TM Harrington & Chief Fowler*)

6. Neil Harrington has been the Salisbury TM since 2003. (*Testimony of TM Harrington*)

7. Thomas Fowler has been the SPD Police Chief since July 2012. Before his appointment as SPD Police Chief, he most recently served as the Deputy Chief of the Branford, Connecticut Police Department, where he had been employed for approximately 25 years. (*Testimony of Chief Fowler*)

8. The SPD currently employs a Police Chief, one Lieutenant, five Sergeants, 9 Full-Time Patrol Officers and eight Part-Time/Reserve Officers. (*Testimony of Chief Fowler*)

9. Before Chief Fowler joined the SPD in 2012, the department did not have a Lieutenant’s position. Chief Fowler identified the need to create that position for the purpose of taking on responsibility to provide direct supervision over the SPD’s five sergeants. In 2014, Anthony King became the first SPD patrol officer to be promoted to the newly created position of SPD Police Lieutenant. (*Testimony of Chief Fowler*)

10. The position of SPD Lieutenant evolved over time. As the “second-in-command” in the SPD’s organizational structure (what might be called the Executive Officer in a larger department), in addition to supervision of the sergeants and the detective, the Lieutenant was assigned to serve

as the department's Accreditation Manager and took on responsibility for budget development, management and reporting, as well as policy research, development and implementation. *(Testimony of Chief Fowler)*

11. In 2018, Lt. King left the SPD to take a position as Police Chief in New Hampshire. Sgt. Roy was selected as the second officer to hold the Lieutenant's position. He was promoted provisionally as it was known that he was due to retire within a year or two. No interviews were conducted. *(Testimony of Chief Fowler & TM Harrington)*³

The 2020 Lieutenant's Assessment Center

12. In January 2020, in anticipation of Lieutenant Roy's retirement in September 2020, TM Harrington, on behalf of the SPD, entered into a Delegation Agreement with the Massachusetts Human Resources Division (HRD) which authorized the SPD to conduct an "Assessment Center" (with an Education and Experience [E&E] component) for the selection of the next Police Lieutenant, which "will be used as the sole basis for scoring and ranking candidates" on the eligible list. *(App.Exh.4; Resp.Exh.11; Testimony of TM Harrington & Chief Fowler)*

13. Pursuant to the Delegation Agreement, the final scoring of the candidates will be weighted 80% Assessment Center component, as determined and scored by the assessment center panel selected in accordance with the requirements specified in the Delegation Agreement, and 20% E&E component as determined and scored by HRD. *(Resp.Exh.11)*

14. Salisbury hired an outside vendor, Badgequest, to administer the Assessment Center component. Chief Fowler was familiar with Badgequest and had served as a Badgequest Assessor. He provided Badgequest with the title of the position, overview of the duties of an SPD Lieutenant, and background information about the size and operations of the SPD. He did not discuss any individual candidates with Badgequest. *(Testimony of Chief Fowler)*

³ The evidence does not indicate whether there was a "short" eligible list or the list had expired.

15. Salisbury incurred a cost of approximately \$6,000 for the Assessment Center. (*Testimony of Chief Fowler*)

16. Pursuant to notice dated April 9, 2020, the Salisbury Police Lieutenant Sole Assessment Center was conducted on June 6, 2020. All five SPD Sergeants participated in the Assessment Center. (*App.Exhs.1 & 4; Resp.Exh.3*)

17. By email to the candidates on June 6, 2020, Chief Fowler announced that he would conduct candidates' interviews for the Lieutenant's position. This was the first notice that interviews would be included as part of the promotional process. (*App.Exh.5; Testimony of Appellant*)

18. Two days later, on June 8, 2020, Chief Fowler emailed the candidates that he "decided to wait until a ranked list is released" and then would schedule interviews with the "top three candidates." (*App.Exh.6*)

19. By email dated June 30, 2020, HRD informed Sgt. Leavitt that he had passed the Assessment Center with a final score of 83. I infer that all other candidates also received similar email notices at that time. (*App.Exhs.2 & 3*)

20. On July 9, 2020, Chief Fowler and TM Harrington exchanged emails concerning the date to conduct interviews of the candidates for Lieutenant. Their final email exchange targeted Monday, July 20, 2020, but the interviews were not immediately scheduled. (*Resp.Exh.4*)

21. On August 3, 2020, HRD established the eligible list for Salisbury Police Lieutenant. Sgt. Leavitt was ranked first on the list. (*App.Exh.4; Resp.Exh.3*)

22. The day the Lieutenant's Eligible List was issued, Chief Fowler emailed the top three candidates to congratulate them on "how well each of you did on the Assessment Center."⁴ He

⁴ About a month after the Assessment Center scores were released, Chief Fowler and TM Harrington came to learn that Sgt. Leavitt has scored 83 and the next two ranked candidates has scored 82 and 81 respectively. Since Sgt. Leavitt's final score reflected a 2-point preference for veteran's status which the second-ranked (eventually selected candidate did not. Chief Fowler considered all the candidate's Assessment Center scores 'very close.'" (*Resp.Exh.2; Testimony of Chief Fowler*)

informed then that interviews with him and the Town Manager would be held on August 13, 2020, listing the time each of the three candidates was to appear for his interview. (*App.Exh.7*)

The Interview Process

23. Chief Fowler and TM Harrington conducted the candidates' interviews on August 3, 2020, as scheduled. Except for logistics (scheduling time, place and location) they had no contact with any of the candidates and did not discuss the merits of any candidate amongst themselves. (*Testimony of Chief Fowler & TM Harrington*)⁵

24. The candidates were interviewed in the order that their names appeared on the Certification. Sgt. Leavitt was interviewed first, followed by the second ranked candidate and then the third ranked candidate. Interviews lasted approximately 30 to 40 minutes. They were not audio or video recorded. (*Testimony of Chief Fowler*)

25. Candidates were asked a set of twelve (12) questions prepared by Chief Fowler, with input from TM Harrington. The candidates' responses to the interview questions were not scored individually and the candidates were not given an overall rating. There was no scoring matrix or other instructions prepared in advance to guide interviewers on how to score candidates or what criteria should be utilized to assess the candidate's interview performance. (*Resp.Exh.1; Testimony of Chief Fowler & TM Harrington*)

26. Both Chief Fowler and TM Harrington took notes during the interviews. Chief Fowler discarded his notes. TM Harrington's handwritten notes were introduced in evidence. (*Resp.Exh.2; Testimony of Chief Fowler & TM Harrington*)

⁵ TM Harrington had known both Sgt. Leavitt and the third ranked candidate based on their longevity with the SPD and the fact that both of them held positions in their union and he had "sat at the table" with both of them on more than one occasion dealing with collective bargaining issues. He was not as thoroughly familiar with the second-ranked (and ultimately selected) candidate who was "relatively junior compared to the other two", having approximately nine (9) years of service with the SPD. (*App.Ext.10; Testimony of TM Harrington*)

27. After completing all the interviews, Chief Fowler and TM Harrington arrived at a “consensus” about the “overall performance” of three candidates: The second ranked (selected) candidate on the Certification was considered “better prepared” and superior in the “depth and breadth of his answers” and his interview performance was rated highest; Sgt. Leavitt “did fairly well” and was rated second; the interview performance of the third ranked candidate on the Certification was rated lowest. (*Testimony of Chief Fowler & TM Harrington*)

28. By letter dated August 27, 2020, TM Harrington informed Sgt. Leavitt that he had been bypassed for promotion in favor of the third-ranked candidate on the Certification, for the following reasons:

Interview: You ranked second in the interview process that was conducted on August 13, 2020. The selected candidate ranked first. The selected candidate demonstrated a stronger understanding of the position and how to utilize his leadership experience in the role. Additionally, the selected candidate came prepared to discuss a long-term plan for the Department and was able to articulate a vision for its future.

Formal Education: The Town of Salisbury places an importance on higher education, as we have continuously rewarded officers who attain higher education degrees with education incentive pay. The selected candidate currently possesses a Master's degree in Criminal Justice. While you have been encouraged to attain a degree in the past, you do not possess a degree.

Performance in Rank of Sergeant: While you have been and continue to be a tremendous asset to the Department during your tenure in the rank of sergeant, you agreed with the Police Chief's assessment that you have had challenges simultaneously completing complex tasks in a timely manner. Instances of this issue include the MOU [sic] with medical authority and 911 Grants. Additionally, in the past you have faced difficulty recommending appropriate discipline against other members of the Department. As a lieutenant, you would be second in command, and faced with even more challenging disciplinary matters. The selected candidate, in contrast, has a track record of holding others accountable and recognizing good performance in appropriate circumstances.

Despite these issues, you will continue to play a major leadership role within the Salisbury Police Department. The Town is confident that you can learn from this experience and be a strong candidate for promotion in the future.

(*App.Exh.8*)

29. Sgt. Leavitt's timely appeal to the Commission duly ensued. (*Claim of Appeal*)

Interview Performance

30. As noted above, Chief Fowler and TM Harrington reached a consensus that Sgt. Leavitt did “fairly well” at his interview. TM Harrington’s notes mentioned his “good, honest take on [the Department]” and noted he was “well-spoken” had the “right temperament, good relationships, very organized”. During the interview, Chief Fowler raised a concern about his inability to reach Sgt. Leavitt while off-duty to which Sgt. Leavitt responded that he took his family responsibilities seriously but understood that he would need to be responsive to the Chief as his Lieutenant. When asked what he could do better, he mentioned “time management” and “needs to learn budget.” (*Resp.Exh.2; Testimony of Appellant, Chief Fowler & TM Harrington*)

31. The selected candidate came to the interview with an unsolicited, written six-point “Strategic Planning Proposal” which described, in detail, his ideas for initiatives that could be implemented over the next three years, including amending the use of force policy to include a duty to intervene when an officer observes an excessive use of force, a long-term plan for training, addition of a civilian records clerk to relieve some of the administrative burdens on sergeants, and use of body worn cameras. He stated his biggest challenge was that he “lets things bother him and holds inside”. (*Resp.Exh.12: Testimony of TM Harrington*)

Formal Education

32. As stated below, at the time of the Lieutenant’s promotion, Sgt. Leavitt had completed numerous military schools and professional law enforcement continuing education courses and certificate programs, but he did not hold a formal college degree. He was working toward a bachelor’s degree in Criminal Justice, which he was expected to complete in 2022. He was awarded a score of 81.7 by HRD on the E&E component of the Assessment Center. (*App.Exhs.2, 10; Testimony of Appellant*)

33. The selected candidate held a master's degree in Criminal Justice. It was also noted that he was the SPD's K-9 officer. He had been with the SPD for approximately nine (9) years. *(Testimony of Chief Fowler)*

34. The level of a candidate's formal education was not identified as an additional component of the promotional decision-making until after the interviews with the three finalists. The posting for the SPD Lieutenant's Assessment Center (with E&E) did not include anything that indicated that an undergraduate or advanced degree was a desired or preferred qualifying criterion for the position. College and university degrees are factors that are included as part of the E&E score as determined by HRD, along with credit for actual on-the-job experience. *(App.Exh.1; Testimony of Chief Fowler & TM Harrington)*

Performance as a Sergeant

35. In 2016 (Chief Fowler believed it was in 2014 or 2015), an SPD civilian dispatcher was terminated for inappropriate behavior, i.e., circulating a short video clip taken by an SPD camera of a detainee sitting in his cell on a toilet. The dispatcher had been disciplined for other performance issues in 2014 and Sgt. Leavitt had seen the employee "do a major turnaround". Thereafter, the employee was promoted to a full-time position with additional administrative duties and was performing well. In a To/From memorandum to his supervisor, Lt. King, Sgt. Leavitt recognized the seriousness of the incident but believed that the employee was capable of rehabilitation, recommended that the employee be severely disciplined and given a long-term suspension, but should not be terminated. Lt. King concurred with Sgt. Leavitt's recommendation, but Chief Fowler overruled them both and the dispatcher was terminated. *(App.Exh.11; Testimony of Appellant & Chief Fowler)*

36. The SPD receives approximately \$50,000 in two annual grants from the Commonwealth Executive Office of Public Safety & Security (EOPSS) which are used to support the cost of

staffing, training and operating the SPD dispatch (911) center. These grants are so-called “reimbursable” grants, which means the SPD applies for and is approved each fiscal year for specific grant amounts, incurs expenses that are internally charged to the grants, and then submits claims for reimbursement of the expenditures. (*Testimony of Chief Fowler & Snow*)

37. The overall responsibility to account for the expenditures incurred and the revenues received under these grants come within the duties of the Salisbury Town Accountant, while the SPD has primary responsibility to manage the expenditures under the grants and to process reimbursement requests in a timely manner. Sgt. Leavitt was delegated as the SPD officer responsible for managing the SPD dispatch (911) center grants. (*Exhs.5 through 8 & 13; Testimony of Appellant, Chief Fowler & Snow*)

38. During the four-year period from FY ending June 30, 2017 to FY ending June 30, 2020, the “State 911 Support and Incentive Grant”, involved grant awards ranging from approximately \$20,000 to approximately \$33,000. The SPD incurred expenses within several hundred dollars of the maximum amount of the grant awards in each year, substantially all of which were reimbursed, save for FY2019, when the SPD incurred approximately \$1,300 in expenses that had not (at least as of August 2020) been reimbursed and had approximately \$1,600 in unspent grant money. (*Exhs 6 & 8; Testimony of Snow*)

39. During the four-year period from FY2017 through FY2020, the SPD also received a “911 Training Grant” for use in training the department’s dispatchers. The four-year history of this grant, as of August 2020, is as follows:

<u>FY Grant</u>	<u>Expenses</u>	<u>Reimbursements</u>	<u>Disallowed Costs</u>	<u>Deficit</u>	<u>Unspent Grant</u>
\$29,460	\$18,982	\$ 8,824	\$ 8,091	\$ 2,068	\$18,568
\$30,421	\$15,093	\$10,488	\$ 0	\$ 4,604	\$15,328
\$10,000	\$10,630	\$ 5,090	\$ 0	\$ 5,540	\$ (629)
<u>\$16,862</u>	<u>\$ 8,730</u>	<u>\$ 7,986</u>	<u>\$ 744</u>	<u>\$ 0</u>	<u>\$ 8,876</u>
<u>\$86,923</u>	<u>\$53,435</u>	<u>\$32,388</u>	<u>\$ 8,835</u>	<u>\$12,212</u>	<u>\$42,143</u>

(Exhs.6 & 8; Testimony of Snow)

40. As the deficit in the “911 Training Grant” had accumulated to more than \$12,000, there was insufficient money in the SPD annual budget to absorb that deficit. It required an additional Town Meeting appropriation of free cash to clear that account. *(Exhs.6, 8 & 13; Testimony of Snow)*

41. According to Sgt. Leavitt, some of the grant deficit was due to “unavoidable” bureaucratic issues. He pointed out that some of the disallowed expenses was attributable to one of the dispatchers misunderstanding his instructions and taking courses that were not reimbursable. Other disallowed expenses were associated with “in house” training which were initially included in the approved grant, but later rejected by EOPSS. He did acknowledge that a “good chunk” of the FY2019 disallowed expenses was due to missing the deadline for submission of reimbursement requests. *(Testimony of Appellant)*

42. At some point in or before 2016, the SPD entered into a Memorandum of Agreement (MOA) with Anna Jaques Hospital to provide authorization to order and dispense certain controlled substances, specifically Narcan and Epinephrine. When the MOA came up for renewal in 2018, Sgt. Leavitt assisted Lt. Roy in processing the renewal paperwork. *(Testimony of Appellant)*

43. On June 23, 2020, Chief Fowler received an email from the newly appointed EMS Coordinator at Anna Jaques Hospital informing him that the SPD’s current MOA would expire on June 30, 2020. A new MOA was enclosed covering the next two years, which the EMS Coordinator requested be signed and scanned back for signature by the Medical Director. Upon receipt of this email, Chief Fowler asked Sgt. Leavitt to look this over and, at a staff meeting on June 25, 2020, specifically directed Sgt. Leavitt to follow-up with the hospital. *(Exh.9; Testimony of Appellant & Chief Fowler)*

44. With only a few days before the current MOA expired, Sgt. Leavitt contacted the hospital's EMS Director and forwarded the requested paperwork for signature by the Medical Director. *(Testimony of Appellant)*

45. No further follow-up was made by Sgt. Leavitt or anyone else at the SPD until July 17, 2020, when Chief Fowler received another email from the hospital's EMS Director, informing him that the MOA had expired and enclosed another copy of the new MOA for signature and submission. *(Exh.10; Testimony of Chief Fowler)*

46. Sgt. Leavitt immediately contacted the EMS Director. It turned out that the new MOA paperwork had sat on the Medical Director's desk without attention. The MOA was executed by the Medical Director on July 22, 2020. *(Exh.10; Testimony of Appellant)*

47. Technically, the SPD was not authorized to order or dispense Narcan between the time the old MOA expired and the approval of the new MOA. The evidence did not indicate whether or not, in fact, there was any actual impact on SPD operations. As Chief Fowler did not know until he received the July 17, 2020 email that the old MOA had expired, I infer that there was no interruption in the SPD operations in the interim between June 30, 2020 and July 22, 2020. *(Testimony of Appellant & Chief Fowler)*

APPLICABLE CIVIL SERVICE LAW

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

Original and promotional appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09.

An Assessment Center is one form of competitive examination, often used by appointing authorities (sometimes in conjunction with an E&E component and/or the more traditional form of written examination as well) to establish lists for promotional appointments. The Assessment Center component usually involves a day-long examination process designed by an expert in public safety testing approved by HRD, during which candidates are required to prepare written and/or oral responses to hypothetical scenarios that test their technical competence and management abilities, which are observed and scored by a panel of expert evaluators in an anonymous fashion, applying pre-determined objective criteria. See, e.g., Wilbanks v. Human Resources Div., 30 MCSR 316 (2017); Clarke v. Human Resources Div., 29 MCSR 1 (2016); Daley v. Town of Wilmington, 28 MCSR 460 (2015), aff’d sub nom. Town of Wilmington v. Civil Service Comm’n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one on the eligible list. G.L. c. 31, § 27; PAR.08(4). A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil

Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

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

The governing statute, G.L. c. 31, § 2(b), gives the Commission “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*) See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

Salisbury’s promotion of an SPD Sergeant to the rank of Lieutenant from an eligible list created after an Assessment Center (with an Education & Experience component) included the problematic use of a highly subjective, unrecorded interview process and special (unannounced) weight given to the selected candidate’s university education. Despite these flaws, however, in the

absence of any evidence of political influence or bias, the bypass of Sgt. Leavitt, a veteran, in favor of the selected non-veteran candidate, who ranked just one point below him on the eligible list, was reasonably justified based on other objective criteria that favored the selected candidate for the position of second-in-command of this relatively small police department, including the selected candidate's presentation of a documented long-term vision for the department and perceived shortcomings in Sgt. Leavitt's performance of his administrative duties.

Interview Process

Police departments and other public safety agencies are properly entitled to, and often do, conduct interviews of potential candidates as part of the hiring process, especially, in promotional appointments of superior officers. In an appropriate case, a properly documented poor interview may justify bypassing a candidate for a more qualified one. See, e.g., Dorney v. Wakefield Police Dep't, 29 MCSR 405 (2016); Cardona v. City of Holyoke, 28 MCSR 365 (2015).

Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of civil service law. E.g., Flynn v. Civil Service Comm'n, 15 Mass. App. Ct. 206, 208, rev. den., 388 Mass. 1105 (1983). The Commission gives particularly heightened scrutiny to subjective interviews when it appears they became a means to nullify the results of a duly administered, objective Assessment Center form of examination. See Connor v. Town of Andover, 30 MCSR 439 (2017); Daley v. Town of Wilmington, 28 MCSR 460 (2015), aff'd sub nom., Town of Wilmington v. Civil Service Comm'n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

Here, Salisbury's interview process lacked any of the safeguards that insured a "level playing field" with a reasonable degree of transparency and objectivity to assure that the decision-making process is the product of the legitimate use of professional judgment rather than an unduly

subjective decision-making process that is insufficient to be fairly reviewed on appeal to the Commission. The interview panel consisted of two men – the Town Administrator and the Police Chief. Although each candidate was asked the same set of questions, the interviews were not recorded, the Chief took only a few notes and did not retain them, objective scoring or ranking of the candidates' answers or overall performance was not used, and the interviewers reached a "consensus" ranking of the candidates after a general, unrecorded discussion. Moreover, this appeal is distinguishable from other cases in which one candidate was disqualified based on a "poor" interview. Here, the "consensus" was that the selected candidate's interview was "superior" or "exceptional" and Sgt. Leavitt was ranked lower because he only performed "well." Accordingly, the subjectively determined relative interview performance of the selected candidate and Sgt. Leavitt is not a factor that may properly be used to justify Sgt. Leavitt's bypass.

Had some weight been given to the assessment center performance and/or had a more objective method been used to assess the candidate's interview performance (*i.e.*, one fairly capable of de novo review by the Commission), the process here might well have been accepted as one leading, in and of itself, to a reasonably justified decision. Hopefully, Salisbury will adjust its process going forward and eliminate the problematic concerns that arose in this case.

That said, the interview panel was warranted in considering that the selected candidate came to the interview armed with an unsolicited, written long-term "Strategic Plan" for the SPD. This document contains the precise sort of evidence that is reviewable by the Commission, and which, after such review, I find justifies the conclusion that the selected candidate demonstrated an objectively determined higher degree of motivation and preparation to be ready on "day one" to assume the duties of the SPD lieutenant, who serves as the Police Chief's second-in-command.

Formal Education

A record of formal education capped by successfully obtaining a college or advanced degree in Criminal Justice is an indicator of achievement worthy of consideration in appointing and promoting a law enforcement officer to a command level position. Relevant educational achievement, together with equivalent achievement through actual on-the-job experience and training, are both recognized and awarded using carefully calibrated relative credits established by HRD's calculation of a candidate's E&E score (which, here, was specifically included as part of the Salisbury Lieutenant's Assessment Center). Thus, the selected candidate's relative education and experience was embedded in their Assessment Center final score, which ranked Sgt. Leavitt ahead of the selected candidate. Salisbury may have good reason to place special emphasis on formal education versus on-the-job experience but, if it chooses to do so, it must provide specific reasons in advance for deviating from the established mechanism for assessing a candidate's relative education and experience. In the absence of such an explanation, the Commission cannot allow such a factor to be used as a distinguishing characteristic that justifies bypassing Sgt. Leavitt in favor of a candidate with more formal education but less practical experience.

Job Performance

Chief Fowler and TM Harrington showed no sign that their personal, as opposed to professional, opinions about any candidate influenced their decisions. As to the latter, the Commission views a superior officer's professional judgment, formed by observation of on-the-job experience with a subordinate, when supported by the preponderance of the evidence, to be a legitimate basis on which to form an opinion about the suitability of a candidate for appointment or promotion. Connor v. Town of Andover, 30 MCSR 439 (2017). Thus, the Commission reviews de novo the factual basis for a professional judgment but will not second guess an appointing authority's judgment that is reasonably justified by a preponderance of credible evidence. If that

judgment is to be changed, the responsibility to educate the command staff lies with the Appellant, not the Commission.

Here, Salisbury established that it had legitimate concerns about Sgt. Leavitt's failure to properly process expenses and reimbursement for the 911 Training Grant. He acknowledged that, in FY 2019, he missed at least one deadline, causing the SPD to lose out on reimbursement for thousands of dollars in grant money, some of which had to be paid for by a special town meeting appropriation. In addition, the fact that, for most years, the SPD left thousands of dollars of grant money unspent and had significant expenses disallowed for reimbursement raise equally troubling concerns about whether Sgt. Leavitt had done all he could have done to manage this grant efficiently and maximize the return to the SPD. While Sgt. Leavitt's due diligence, or lack thereof, may not have been the only reason that costs were disallowed or grant funds unspent, as the SPD officer responsible for managing the grant, he does fairly bear responsibility for these outcomes.

I also agree that Salisbury demonstrated legitimate concerns for how Sgt. Leavitt handled his administrative assignment to process the MOA renewal with Anna Jaques Hospital, needed to enable the SPD to lawfully continue to order and dispense Narcan and Epinephrine, life-saving medication to those who need it. Although Sgt. Leavitt was not assigned this responsibility until days before the existing MOA expired and he did promptly submit the necessary paperwork to the hospital's EMS Director, he assumed (erroneously) that his superior officer Lt. Roy would be following up, rather than himself. As a result, Chief Fowler did not learn that the prior MOA had expired without a new one in place for weeks after the expiration. I believe Sgt. Leavitt had honestly believed that he had done what he was assigned to do, and the reason for the lapse of coverage was primarily the hospital's fault. Given the high importance of the renewal of the MOA to the SPD, however, Sgt. Leavitt, fairly must bear a share of the responsibility for not ensuring that the submitted paperwork was returned in a timely fashion.

Third, I find unpersuasive, however, the claims that Sgt. Leavitt showed poor judgment in how he handled the 2016 incident involving discipline of an SPD dispatcher who committed a serious infraction involving an SPD detainee. He recommended discipline short of termination, believing that the employee was capable of learning acceptable behavior through remedial discipline and counseling. Sgt. Leavitt's immediate superior – Lt. King – concurred in the recommendation, but they were both overruled by Chief Foster. The evidence demonstrated no more than a difference of opinion that did not rise to the level of poor judgment.

Thus, Salisbury established by a preponderance of the evidence two examples that provided reasonable justification for the concerns about Sgt. Leavitt's ability to meet the challenges of a second-in-command position that required excellent management and administrative skills. Sgt. Leavitt, himself, agreed that "time management" was an area in which he needed to improve.

In sum, not all of the reasons stated for bypassing Sgt. Leavitt are sustained by a preponderance of the evidence. Salisbury certainly can improve its selection process to eliminate the flaws I have noted above. Nevertheless, Salisbury did establish a legitimate positive reason to favor the selected candidate (his documented Strategic Plan), and legitimate concerns for Sgt. Leavitt's management and administrative skills (based on observation of his performance on the 911 Training Grant and the MOA renewal). I find that these factors are sufficient to satisfy Salisbury's burden of proof by a preponderance of the evidence that the decision to bypass Sgt. Leavitt for the position of second-in-command of the SPD, was reasonably justified.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, James Leavitt, CSC Docket No. G2-20-157, is ***denied***.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 21, 2021.

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

Nicole Reilly, Esq. (for Appellant)

Timothy D. Zessin, Esq. (for Respondent)