

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

PAUL LOMBARDI,
Appellant

v.

G2-05-186

TOWN OF AUBURN,
Respondent

Appellant's Attorney:

James B. Triplett, Esq.
Triplett & Fleming
25 Camp Hill Drive
Oxford, MA 01540

Respondent's Attorney:

Marc L. Terry, Esq.
Mirick, O'Connell, DeMallie &
Lougee, LLP
1700 West Park Drive
Westborough, MA 01581

Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Paul Lombardi (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") claiming that the Respondent, Town of Auburn (hereinafter "Town") as Appointing Authority, lacked reasonable justification to bypass him on April 25, 2005 for promotional appointment to the position of Police Sergeant in the Auburn Police Department (hereinafter "Department"). The appeal was timely filed. A full hearing was held at the

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

offices of the Commission on September 7, 2007. Two (2) audiotapes and a written transcript were made of the hearing. Witnesses were not sequestered. On September 21, 2007, this hearing officer conducted a conference call with the parties to discuss the submission of two (2) affidavits by the Town as well as a potential settlement agreement. On October 17, 2007, the Town submitted the two (2) affidavits which signaled the absence of a settlement agreement, and the record was declared closed. The affidavits were marked by the Commission as Appointing Authority Exhibit 9 for identification purposes. The parties submitted Proposed Decisions.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Appointing Authority Exhibits 1 – 9 and Appellant Exhibits 1 – 4) and the testimony of Auburn Police Lieutenant Mark E. Maass (hereinafter “Lt. Maass”), Police Chief Andrew J. Sluckis (hereinafter “Chief Sluckis”), Town Counsel Marc L. Terry, Esq. (hereinafter “Attorney Terry”), the Appellant, Town Administrator Charles T. O’Connor, Jr. (hereinafter “Mr. O’Connor”) and by affidavit, Police Lieutenant Eileen Harrigan (hereinafter “Lt. Harrigan”), I make the following findings of fact:

1. The Appellant’s name appeared first on Certification List No. 250253 for promotion to the position of Police Sergeant with a score of 83. The other three candidates were tied for second with a score of 82. (Appointing Authority Exhibit 1)
2. Former Police Chief William Stone (hereinafter “Chief Stone”) held a command staff meeting in the fall of 2004 to discuss upcoming promotions. Both Lt. Maass (then a sergeant) and Lt. Harrigan (then a provisional lieutenant) were present at the meeting. Based upon the discussions at the command staff meeting, Chief Stone decided to

recommend Officer Kenneth Charlton (hereinafter “Officer Charlton”) for promotion to the sergeant’s position. (Testimony of Lt. Maass)

3. Lt. Maass testified that the command staff meeting lasted approximately two hours and the consensus among the commander staff to recommend Officer Charlton was not unanimous. Lt. Maass stated that Sergeant Lourie advocated for the promotion of the Appellant “on an emotional level, as a friend” of the Appellant’s. There was no actual vote by the command staff to reach a consensus and Chief Stone made the ultimate decision. (Id.)
4. Officer Charlton was ranked below the Appellant on Certification List No. 250253 for promotion to sergeant. (Appointing Authority Exhibit 1)
5. Lt. Maass was asked to prepare a letter substantiating the reasons for selecting Officer Charlton and bypassing the Appellant, pursuant to G.L. c. 31, § 27. The letter that he prepared, dated April 24, 2005, based on the discussions at the command staff meeting and his own research, was signed by then-Acting Chief Eileen Harrigan. (Testimony of Lt. Maass)
6. Chief Stone was on a medical leave of absence at the time a recommendation was requested. The Town requested an extension of the certification list from the Human Resources Division (hereinafter “HRD”), but was denied. Because the promotional process was due to expire, the Town Administrator asked Lt. Maass to prepare the letter containing the reasons for the selection of Officer Charlton and the bypass of the Appellant because Acting Chief Harrigan was out of the country on a scheduled vacation at the time. Acting Chief Harrigan then returned from vacation, reviewed

the letter, signed it and provided it to the Board of Selectmen. (Testimony of Lt. Maass and Affidavit of Lt. Harrigan)

7. The Town notified the state's HRD that it was bypassing the Appellant for promotion as sergeant, and enclosed the April 24, 2005 letter as its statement of reasons for selection and bypass. The letter stated the reasons for not selecting the Appellant, in pertinent part, as:

- (1) On November 24, 1997, Officer Lombardi was involved in a verbal altercation in which he shouted vulgarities at citizens. Chief Ronald Miller issued a reprimand and remanded Officer Lombardi to additional training. Officer Lombardi admittedly lost his composure and swore.

- (2) On July 28, 1998, Officer Lombardi was involved in a confrontation with a family at the scene of a motor vehicle accident. As a result, then Chief Ronald Miller issued Officer Lombardi a three-day suspension and instructed him to receive additional training. Again, Officer Lombardi lost his composure towards several civilians. His behavior resulted in a civil action being filed against the Town which was settled with the payment of damages by the Town to the complainants.

- (3) In December of 2001, Officer Lombardi submitted an application to the Auburn Police Department requesting assignment to the Detective Bureau. Within the application Officer Lombardi wrote, "I have been on call for my entire time as an Auburn Police Officer and have responded to each and every page I have received, responding to work when needed. I understand the responsibility and commitment inherent to being a police detective."

Chief of Police Andrew Sluckis of the Leicester Police Department was the Sergeant in Charge of the Auburn Detective Bureau during the time of Officer Lombardi's Detective assignment. He relayed the following account of Detective Lombardi's assignment.

According to Chief Sluckis, after several months in the Detective assignment, Officer Lombardi turned his pager in and told him he did not want to be on call all the time because it adversely affected his family life. Chief Stone and Sgt. Sluckis, agreed to allow him to carry a cell phone, but Detective Lombardi refused to be on call

on days he was not designated as the on call detective allowing for gaps in on-call coverage. Even with these unusual accommodations afforded to Detective Lombardi, on September 8, 2002 he announced he was withdrawing from the assignment of detective, and submitted a letter to that effect. Contained within that letter Officer Lombardi wrote, "Over the course of the last nine months, it has become apparent the requirements of the position are 'incongruous' with the perceived benefits of being a detective."

Command staff officers are all issued cell phones and several are on continuous on-call status. Sergeants are expected to respond to a summons from the SWAT Team or from the Department. They have been contacted while off duty and at home, to assist with decisions senior officers were unable or unwilling to make. If a sergeant needs to be on-call in order to fulfill the duties of the position and since Officer Lombardi did not want to be on-call for the Detective Bureau as stated, on the basis alone, I am unwilling to recommend him for the position of sergeant.

(4) On April 3, 2003, Officer Lombardi attended a Division of Employment and Training ("DET") Hearing relative to former Officer Lori Domelowicz. The hearing officer wrote in her decision regarding Officer Lombardi's participation at the hearing, "[Nor] was the testimony of an angry, hostile police officer who did not take the hearing process seriously and himself engaged in conduct unbecoming a police officer, for which he had to be removed from the hearing room, found to be more persuasive than the claimants testimony."

(5) As of this date, Officer Lombardi is on paid administrative leave; pending the outcome of an investigation into allegations of improper conduct by him.

(6) Officer Lombardi has used 41 sick days since January of 1999.

(Appointing Authority Exhibit 1)²

8. I found Lt. Maass to be a very credible witness who offered unhesitant and confident answers to questions regarding this matter. He demonstrated a professional demeanor and exhibited no ill-will towards the Appellant. In fact, he was complimentary of the

² The Town withdrew item 5 at the hearing.

Appellant when discussing the Appellant's handling of domestic violence and sexual assault investigations. He also referred to the Appellant as one of the most productive officers in the Department. Lt. Maass candidly explained that he did not expect to be charged with preparing the bypass letter following the command staff meeting and that it was the only such letter that he has ever written. He testified that his understanding of the requirements of G.L. c. 31, § 27 was to include positive reasons for promotion of the recommended candidate and negative reasons for the bypassed candidate. His testimony was detailed, unembellished and substantive. I found it to be reliable and informative. I fully credit his explanation that he prepared the bypass letter and that Lt. Harrigan reviewed it, changed none of the content, signed it and presented it to the Board of Selectmen. (Testimony and Demeanor of Lt. Maass)

9. On or about November 24, 1997, the Appellant received a written reprimand for using profanities towards a woman he was taking into protective custody and towards the neighbors of the woman. The Appellant also received, but never actually served, a three (3) day suspension. He was required to participate in anger management training as a result of an incident that occurred on or about July 28, 1998 for again using profanities towards members of the public. Although the Appellant never served the three (3) day suspension, it was included in his personnel file at the time of the bypass. (Testimony of Lt. Maass and Appellant and Appointing Authority Exhibit 5)
10. The Appellant acknowledged that he could have handled the 1997 and 1998 incidents better. He testified that these arguments occurred early in his career with the Department, and that he resolved not to use vulgarities at all in the performance of his

duties afterwards. He pointed out that in 1999, one year later, he was awarded the Trooper George L. Hanna Award, the Commonwealth's highest award for police officers. (Testimony of Appellant)

11. The Appellant applied and was granted the assignment of detective in December of 2001. In his letter of application, the Appellant acknowledged that he understood the availability and accessibility required of the position. Later the Appellant asked to be released, and resigned from the detective bureau after only nine (9) months because he did not like being on on-call status. Sergeants in the Department were expected to be available by pager or cell phone 24 hours a day, 7 days a week, even when they are not the "on-call" sergeant. The command officers also had a concern that the Appellant would not be able to handle the on-call requirements of a sergeant.

(Testimony of Chief Sluckis and Lt. Maass)

12. Chief Sluckis was a sergeant in the detective bureau during the time of the Appellant's assignment as a detective. He credibly testified at the Commission hearing that the detective bureau has a higher status within the Department and that there are several benefits to serving as a detective such as no uniform requirement, the operation of an unmarked vehicle and more frequent overtime opportunities.

(Testimony of Chief Sluckis)

13. Chief Sluckis also testified that then-Chief Stone accepted the Appellant for assignment to the detective bureau in order to take him off uniformed duty on the street and that the Chief "wanted to help Paul" after the Appellant's difficulties in dealing with the public in the 1997 and 1998 incidents. (Id.)

14. Chief Sluckis stated that he believed the Appellant was making a “big mistake” resigning from the detective bureau and that the Appellant was “crazy for giving up a plum job.” Chief Sluckis was unaware of any specific negative impacts that the detective bureau’s on-call status had on the Appellant’s family but acknowledged that the status can be a burden to one’s family life. He explained that a detective is, in a practical – if not official – sense, always on-call and that the Appellant did not wish to be on-call when not specifically assigned to on-call status. He believed that the Appellant’s wife objected to the on-call provision of the assignment but that the Department relies on an officer to discuss the commitment of the position with his/her spouse. (Id.)
15. I found Chief Sluckis to be credible in his testimony. He clearly harbored no animus towards the Appellant and was, like Lt. Maass, complimentary of the Appellant’s performance as a detective. In fact, he believed that the Appellant was “up front” about resigning from the detective bureau. Chief Sluckis related his own misgivings about the burdens of serving as a detective. Chief Sluckis offered professional and informative testimony. (Testimony and Demeanor of Chief Sluckis)
16. On or about April 3, 2003, the Appellant was ordered to appear as a witness at an unemployment compensation hearing involving the termination of a female police officer in the Department who was a friend of the Appellant. The Appellant credibly testified at the Commission hearing that, due to short notice of his required attendance at the then-Division of Employment and Training (“DET”) hearing, he had to take his young son along with him. During the hearing, his son was playing with a AThomas the Tank Engine® toy when the hearing officer for the DET yelled at his son. The

Appellant took exception with her action, a verbal altercation ensued and he was released for the day. (Testimony of Appellant and Appointing Authority Exhibit 1)

17. The Appellant testified later that month after making arrangements for his son.

Attorney Terry, who served as Counsel for the Town in the DET hearing, acknowledged that the hearing officer was out of line in verbally reprimanding the Appellant's son. However, the DET hearing officer referred in her decision to the Appellant's actual testimony as being that of "an angry, hostile police officer who did not take the hearing process seriously, and himself engaged in conduct unbecoming a police officer for which he had to be removed from the hearing room" and, as a result, his testimony was not "found to be more persuasive than the claimant's testimony."

(Testimony of Appellant, Attorney Terry and Appointing Authority Exhibit 1)

18. Under cross examination by Attorney Terry at the Commission hearing, the Appellant was combative, evasive and bordering on non-responsive when questioned about his behavior at the DET hearing. Under direct examination, the Appellant was perfectly willing to provide vivid detail that the DET hearing officer had been the aggressor. When Attorney Terry asked the Appellant why he was a reluctant witness at the DET, with uncooperative testimony that was adverse to the Town that it was a source of concern to the then-Chief, the Appellant had little recall of his testimony. He said only that he was unhappy testifying against a friend and fellow officer. He also said that the DET hearing officer wrote the negative comments about his testimony because "she didn't like me defending my five-year-old son" on the first day he appeared. (Testimony of Appellant)

19. I found the Appellant to be unnecessarily defensive of his demeanor and performance at the DET hearing. It is natural to be unhappy to have to provide testimony that could be adverse to a friend, and the Appellant's parrying with Attorney Terry in this regard was absurd. I found the Appellant to have an engaging style of testifying. He used direct eye contact with this hearing officer when speaking and his anecdotal references to certain events and details lent an air of relaxation and confidence. However, at times, the Appellant exhibited over-confidence by leaning back in his chair inappropriately and once opining that he is the best police officer the Town has ever had. The Appellant also lapsed into a distracted, almost disinterested state during cross examination. (Demeanor of Appellant)
20. For the period of March 1999 to June 2005, the Appellant used 41 sick days. Officer Charlton, the candidate selected for the sergeant's position, used none. (Testimony of Lt. Maass and Appointing Authority Exhibit 4)
21. The Appellant, through Counsel, proffered that his significant use of sick leave was due to a medical condition. No evidence was submitted to substantiate this claim. (Testimony of Appellant)
22. The Appellant testified that Lt. Harrigan allegedly grabbed his buttocks at a Christmas party in 2001, and since then had held a bias against him. He stated that he did not press sexual assault charges against her. I assign no weight to this claim since no evidence presented to demonstrate that Lt. Harrigan had any involvement in this bypass other than review the bypass letter, sign it and present it to the Board of Selectmen in her capacity as Acting Chief. The Appellant also testified that superior officers in the Department "are biased against [him]" because he is "the kind of

person who is a straight shooter, a straight talker, and I don't think . . . the supervisors like that." (Testimony of Appellant and Appointing Authority Exhibit 9)

23. To illustrate his belief that Department superior officers are biased towards him, the Appellant testified that his superiors say derisive things to him on a regular basis. He stated, ". . . you know, it's the Paul Lombardi rule or . . . they call me JoJo the Idiot Circus Boy and that kind of thing." Astoundingly, the Appellant's attempt to demonstrate demeaning behavior on the part of his superiors was destroyed in this later exchange with his own Counsel:

Q. (by Attorney Triplett) Who started the name JoJo the Idiot Circus Boy?

A. In all fairness, I made a joke about it once when I was goofing around in the police station.

Q. Okay. So it wasn't any supervisor that came up with that?

A. No.

Q. It wasn't another officer?

A. In all fairness to everybody involved, I was the one that initially said it but it was – I brought it up.

(Testimony of Appellant)

24. I found that under questioning the Appellant labored to arrive at straightforward answers, but frequently fell back on his unsubstantiated belief that the Town and the Department were biased against him to prevent him from ascending to the supervisory level. This stated belief was in direct contradiction to consistent testimony by his superiors that the Appellant was a good, productive, highly trained officer despite the issues that gave rise to his bypass. Further, no evidence suggested

that there existed any personal animus on the part of those who actually held the Appellant's fate in their hands.

25. There was no testimony refuting the Town's selection reasons stating that the successful candidate for promotion, Officer Charlton, had an exemplary record, with no prior incidents of discipline and zero use of sick leave since January 1999.

CONCLUSION

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. 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. 214 (1971).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or

objectives unrelated to merit standards or neutrally applied public policy”, then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that “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).

The Respondent did show, by a preponderance of the credible evidence presented at hearing, that the Appellant’s rights have not been abridged by the Town in that the Town sustained its burden of proving reasonable justification to bypass the Appellant for promotion to the rank of sergeant.

The circumstances leading to the Appellant’s bypass were not ideal. The command staff was in flux due to illness and vacation leave and the Department was faced with an extremely tight timeframe in which to make this important promotion. The four candidates for promotion were separated by one examination grade-point among them.

Despite all of this, the Town effectuated a proper selection and bypass process. The bypass letter complied with G.L. c. 31, § 27 and there was reasonable justification for the reasons stated therein.

The Town promoted Officer Charlton because he was more qualified than the Appellant. This case does not turn on a dispute of the qualifications of training, experience and education, but rather on the substantiation of the Appellant's record of engaging in conduct unbecoming an officer, his failure to maintain his commitment to an assignment with similarly demanding accessibility requirements to the position for which he applied and his sick leave usage. By comparison, the appointee had no record of discipline, had never resigned from an assignment and had not used any sick leave for the period surveyed by Lt. Maass.

The Appellant's contention that his previous disciplines in 1997 and 1998 were now stale may have resonated with the Commission had he not engaged in a similar loss of composure and civility at the DET hearing. Time may well be on the Appellant's side for a future promotional opportunity if he acts wisely. He is, by all accounts, a productive police officer with particular talents in complex areas of law enforcement. The many testimonials that he submitted from people who he has assisted were glowing. (Appellant Exhibit 3) Regrettably, he demonstrated at the Commission hearing the same propensity to shun responsibility for the negative aspects in his career as have been substantiated here by the Town. In the absence of political influence or objectives of the Town that unrelated to merit standards or neutrally applied public policy, the Commission cannot substitute its judgment in this selection process for that of the Town.

Therefore, for all the reasons stated herein, the appeal filed under Docket Number G2-05-186 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein, Marquis and Taylor, Commissioners) on July 31, 2008.

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. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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.

Notice to:

James B. Triplett, Esq. (for Appellant)

Marc L. Terry, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)