

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS,

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

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TIMOTHY MACMILLAN

Appellant

v.

G 2-05-245

TOWN OF PLYMOUTH

Respondent

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, §2(b), the Appellant, Timothy MacMillan (hereafter "MacMillan" or "Appellant") seeks review of the Personnel Administrator's decision to accept the written statement of reasons of the Town of Plymouth (hereafter the "Town" or the "Appointing Authority") for bypassing him for promotional appointment to the position of Police Sergeant of the Plymouth Police Department (the

“Department”), pursuant to G.L. c.31, §27. The appeal was timely filed. A full hearing was held on September 19, 2007 at the offices of the Civil Service Commission. Two audiotapes were made of the hearing.

FINDINGS OF FACT:

Forty-five exhibits were entered into evidence. (Joint exhibits 1-26 and Appellant’s exhibits 27-45). Based upon the documents entered into evidence and the testimony of: Appellant and Robert Pomeroy, Chief of the Plymouth Police Department (“Chief Pomeroy”), and the reasonable inferences drawn there from, I make the following findings of fact:

1. Appellant was appointed as a full time Police Officer for the Department in June, 1998. He continues to hold the position of Patrolman for the Department. (Exhibit 25)
2. In June 2004 Appellant’s name appeared as number 3 on Certification No. 250386 for Police Sergeant. He was one of three candidates interviewed for the position by Chief Pomeroy and the Town Manager. The Town appointed the candidate whose name had been first, (McNamee), on the certification list. (Testimony of Appellant)
3. In January 2005 the Town appointed the next name on the list, then the first person, (Ferguson) on the certification list to a Sergeant position. No interviews were held for this appointment. (Testimony of Appellant)
4. The Appellant testified that following the January 2005 promotion, Chief Pomeroy told him that he was “up next on the list.” (Testimony of Appellant)

5. In the spring of 2005 the Department had an additional vacancy for Police Sergeant. A certified list of candidates for this position, Certification No.: 250386, dated April 27, 2005, was received by the Department from the state Human Resources Department ("HRD"). (Exhibit 1 and testimony of Chief Pomeroy)
6. There were three individuals on the list. Appellant was first name, scoring 86 on the Civil Service Exam. Another candidate and Martin Mason ("Mason") were tied for second, with scores of 85. The Appellant was the only veteran on the list, having served in the Army for over three years, (1991-1994) prior to working for the Department. (Exhibit 1 and testimony of Appellant)
7. Chief Pomeroy s established an interview panel for the purpose of interviewing the candidates for this promotion. He chose three Police Chiefs from contiguous towns to be on the panel. (Testimony of Chief Pomeroy)
8. Each candidate for the Sergeant Position was interviewed for approximately 30 minutes, on June 2, 2005 by the interview panel. The panel consisted of Chief Pomeroy, Chief John Ford of the Bourne Police Department, Chief Arthur Parker of the Carver Police Department, and Chief David Cusolito of the Falmouth Police Department. (Exhibit 2 and 45 and testimony of Chief Pomeroy)
9. Chief Pomeroy has participated numerous times as a panel member (assessment center) for promotional and initial appointments for other Police Chiefs, in other towns. However this is the first time he has employed an interview panel for promotional appointments in the Plymouth Police Department. (Testimony of Chief Pomeroy)
10. Appellant testified that he had not been notified prior to his interview that he was to

be interviewed by a panel. Chief Pomeroy disputed this, stating that he sent an email dated May 24, 2005 informing the candidates about the use of an interview panel. A review of the email appears to be referring to *future* selections for Sergeant and Lieutenant and supports Appellant's assertion that he was not aware he would be interviewed by a panel. (Exhibit 44)

11. Prior to the interviews, the members of the interview panel were given copies of each candidate's resume, Utilization of Sick Leave Report, Activity Records for 2003 and 2004, Arresting/Booking Officer Reports, Citation Issuing Officer Reports, and awards and commendations received by the candidates. (Exhibit 5-25 and testimony of Chief Pomeroy)

12. If you compare the number of arrests and motor vehicle citations for MacMillan, to McNamee and Ferguson the last two candidates previously selected for sergeant positions from this same examination and certification, you will find that MacMillan's arrest and citation records are very similar to McNamee and Ferguson. (Exhibits 19 through 26);

a) In 2003 Ferguson had 11 arrests, MacMillan 10 arrests. (Exhibit 19)

b) In 2004 Ferguson had 6 arrests MacMillan 7 arrests. (Exhibit 20)

c) In 2004 Ferguson had 22 citations, MacMillan had 26 and McNamee had 32. (Exhibit 22).

d) Bookings in 2004, Ferguson had 10, MacMillan 4 and McNamee 8. (Exhibit 21)

e) Bookings in 2005, MacMillan has 3 and McNamee had 2. (Exhibit 23).

13. The Town did not rely on the same criteria or panel interview for the selections of McNamee or Ferguson as it did when it bypassed MacMillan. The statistics relied on for the bypass of MacMillan, were clearly not considered significant in the prior selections of McNamee or Ferguson (Testimony of Pomeroy).
14. Both MacMillan and Mason were in the Plymouth Police Department Honor Guard. (Testimony of Pomeroy).
15. Both MacMillan and Mason had similar use of sick leave. (Exhibit 18)
16. At the outset of each interview, the candidates were introduced to the panel members and given three to five minutes to provide an overview of their background. (Testimony of Chief Pomeroy)
17. The candidates in this present bypass appeal were each asked the same question or series of questions by the interview panel. (Testimony of Chief Pomeroy)
18. The common questions which were asked by the interview panel, of each of the candidates were:

Question 1

What would you be able to contribute in the position of Sergeant? What do you bring to the Department? What have you done to help the Department?

Question 2

Scenario A - You have been handed a new policy to implement. You personally disagree with the policy. The policy may be unpopular. How do you handle this?

Scenario B- Officers under your command respond to a local restaurant for a past disturbance and you learn that two of the crowd causing the problem, are off duty police officers from another jurisdiction. What do you do?

Question 3

How do you measure officer activity level?

Everyone has strengths and weaknesses. What have you identified as your weaknesses and what have you done to correct them?

Question 4

Scenario A- A local contractor reports to you that for the last three weeks he has hired 6 detail officers on Fridays. One of the six officers, Officer XXXXX, has never showed up for the detail but he has submitted time slips for payment and has been paid for the details. What do you do with this information? If you were charged with investigating this incident, how would you go about it? If you determined that the contractor was correct, what would you recommend for punishment and how would you make that determination?

Scenario B- Officers under your command respond to a report of an armed robbery at a local restaurant that is part of a national chain of restaurants. Your officers capture the robbers and recover the stolen money. In appreciation, the manager of the restaurant gives you 20 Red Sox tickets to distribute how you see fit. The manger tells you that you should not worry about the cost as it part of the national chain's policy to reward police officers in such instances and that the costs are just written off as a business expense.

Question 5

What did you think of the questions and scenarios that you were just presented with?

Do you think that this process was fair?

(Exhibit 26)

19. The Town did not produce reliable and authoritative evidence on which to determine the accuracy and/or weight of the candidates' respective answers.

(Testimony and Exhibits)
20. At the end of each interview, the candidates were given the opportunity to tell the panel anything that they thought might help the panel decide whether to recommend the candidate for promotion. (Exhibit 26 and testimony of Chief Pomeroy)
21. Pomeroy testified that the interview panel formed a "consensus" that during his interview, Mason appeared relaxed, self-confident, and self-assured direct and positive. He stated that Mason gave specific answers and examples to questions and exhibited a strong command presence by virtue of his decisiveness and emphasis on problem solving. (Testimony of Chief Pomeroy)

22. Pomeroy testified that the “consensus” of the interview panel was that Appellant performed very poorly during his interview. He stated that the panel members formed a consensus that he appeared evasive, unsure, weak, immature, and lacking in command presence. Yet, Pomeroy did not provide any reliable examples of these alleged characteristics from the Appellant’s past performance in the Department. (Exhibit 2 and testimony of Chief Pomeroy)
23. Pomeroy testified that with regard to Question 2, Scenario A, relative to policy implementation, Appellant stated that it did not matter if he or other officers disagreed with the policy, it must be enforced and that it is not beneficial to create controversy or to cause dissention. Pomeroy stated that Appellant’s answer left the impression with the interview panel that he did not like to “rock the boat” or make waves in the department and was passive and was not a leader. (Testimony of Pomeroy)
24. Pomeroy testified that the interview panel unanimously recommended that Mason be promoted to the position of Sergeant. Chief Pomeroy testified that the panel based its decision or formed its consensus on a number of factors, including; Mason’s law enforcement experience in the Sheriff’s Department as a supervisor and teaching experience, Mason’s superior education, a number of letters of appreciation and commendation, superior performance during his interview, and personal characteristics, including leadership skills, decision-making abilities, and self confidence. (Exhibit 2 and testimony of Chief Pomeroy)
25. The Town did not produce sufficient evidence to objectively base a determination that the two candidates’ respective answers to interview question were right or

wrong or better or worse, comparatively. The answers were judged on impression and consensus, not clearly stated right and wrong answers as would be found on a civil service exam. The interview process seems to have been overly subjective in its design and scoring. It was closer to a personality contest or the hiring of a salesman. This interview process and candidate evaluation did not measure the knowledge, abilities and skills which are rationally related to the position of police sergeant. (Testimony and Exhibits)

26. Chief Pomeroy is the only member of the 4 member interview panel, to testify at this hearing. Chief Pomeroy chose those other members to participate as panel members. Pomeroy's testimony of the other member's statements, conclusions, opinions, impressions and assessments are clearly hearsay. Pomeroy's declaration of the panel's unanimous conclusion or "consensus" on answers given is taken with a grain of salt. The possibility exists that the other Police Chiefs on the panel deferred to Pomeroy to direct the panel's assessment, as a matter of professional courtesy, since it was Pomeroy's Department. The influence from Pomeroy could have been subtle and indirect but effective none the less. It is highly unlikely that Pomeroy would admit to any subtle influence over the panel, especially without the testimony and cross-examination of the other Police Chiefs. It is difficult if not impossible for this hearing officer to now assess the impartiality and accuracy of the panel interviews and assessments without an accurate and objective record of the interviews, such as an audio-video recording.(Exhibits, testimony and reasonable inferences, administrative notice)

27. On June 9, 2005, the Town notified HRD in writing, that it had selected Mason and bypassed the Appellant along with the reasons therefore. The Town stated, in part, that after reviewing the candidate's personnel records and after the panel interview, the interviewing panel unanimously recommended that Mason be promoted to Sergeant. (Exhibit 2)

28. On June 30, 2005, HRD sent a letter to the Town. It seems from that letter that HRD may have approved the Town's stated reasons for the selection of Mason, as a bypass of the Appellant and authorized Mason's promotional appointment, but this is only done indirectly, by reference to the Town's June 24, 2005 letter. However the bypass of the Appellant is not specifically stated in the letter, and there is no statement of the specific reasons for bypass, which were approved. There is no statement in HRD's June 30, 2005 letter, of the evidence relied upon or the rationale for the approval of the reasons by the personnel administrator. (Exhibits 2, 3 and 4)

29. No representative of the personnel administrator, (HRD) appeared at this hearing and no direct evidence was produced at this hearing by the personnel administrator. (Exhibits and testimony, Administrative notice.)

30. The Town's stated reasons for the bypass of the Appellant, besides interview performance, mostly involved the claim that the bypassing candidate Mason possessed past relevant training and experience which was superior to the Appellant's. The Town failed to produce any evidence to show that the Appellant lacked the ability, knowledge and skills to perform as a police sergeant. The Town also failed to introduce any evidence to show that there was even a single past

incident or circumstance, in which the Appellant failed to exhibit the proper ability, knowledge or skill required. (Exhibits and testimony)

31. The Appellant served in the United States Army from April, 1991 through July, 1994. He achieved the rank of Corporal and received an honorable discharge. While in the Army he achieved many awards, certifications and decorations, such as: Light Navigator Course, Superior Physical Fitness, Hurricane Andrew Relief Effort Appreciation, Meritorious Achievement, and Leadership Development, while “showing outstanding ability, enthusiasm and desire to excel” He also received the following: Good Conduct Medal, National Defense Service Medal, Humanitarian Service Medal, NCO Professional Development Ribbon, 4 Army Achievement Medals and 3 Certificates of Achievement. He also completed courses in Infantry Leadership, Cold Weather Survival and Urban Warfare. At Suffolk University he was selected for *Delta Alpha Pi* Society for excellence in academic achievement. The Appellant earned a Bachelor of Science Degree, *Cum Laude* in Criminology and Law from Suffolk University. (Testimony of Appellant and Exhibits 25 and 27 – 44))

32. The Appellant completed a Primary Leadership and Development course while in the Army. He received superior scores for demonstrated abilities in the following areas: Oral Communication, Leadership Skills and Contribution to Group Work. He also received the following comments and appraisals from his superior officers: “Selected to the Commandant’s List for his willingness to learn, desire to excel. And for maintaining a 92.50 % academic average. Demonstrated the ability to effectively communicate with peers and superiors in all situations. Contributed

positively to all group discussions and after action reviews. Performed well in leadership positions by utilizing effective supervision and a "Lead By Example" ethic. Accepted by peers as group leader, ethical standard bearer and NCO role model. Demonstrated excellent tactical skills, technical proficiency and the ability to lead in a field environment. Posses the necessary knowledge and skills to lead at the next higher level." (Exhibit 38)

33. During his tenure as a Patrolman for the Department, Appellant received one letter of commendation from Chief Jim Pierson of the Plymouth Fire Department relative to services he provided during a fire. This commendation erroneously was not forwarded to Chief Pomeroy from the Town's Human Resources Department. Therefore the panel was not aware of it during the interview process. (Testimony of Chief Pomeroy and Exhibit 40)

34. During 2003, while a Patrolman in Plymouth, Appellant made ten arrests and issued thirteen motor vehicle citations. In 2004, he made eleven arrests and issued 32 motor vehicle citations. The Appellant worked the midnight shift when considerably less police activity occurs. Pomeroy did not give any consideration to the fact that these two competing candidates worked different shifts and therefore had widely different opportunities to compile arrest and citation statistics and to deal with the public, thereby having greater opportunities for commendations. Mason, by working the day shift with Chief Pomeroy had a regular opportunity to interact with Pomeroy and to develop a friendly work relationship with him. Pomeroy did not give any consideration to the fact that these two competing candidates worked different shifts and therefore had widely different opportunities

to interact with him and form a friendly work relationship.(Exhibit 6-17 and testimony of Appellant and Pomeroy)

35. In May of 1999, Mason was appointed to the position of full time police officer in the Department. He is an adjunct faculty at Quincy College and an Instructor for the Sheriff's Department recruit academy. He earned a Bachelor of Science Degree in Criminal Justice, with a Minor in Mathematics from Westfield State College and a Master of Arts Degree in Criminal Justice from Anna Maria College. Prior to becoming a police officer, Mason was a Correctional Officer with Plymouth County Sheriff's Department (hereafter the "Sheriff's Department") from January, 1994 through July, 1996. (Exhibit 2, 5 and Testimony of Pomeroy)
36. In the Town's June 9, 2005 bypass letter to HRD, Mason's past experience in the Sheriff's Department and being an adjunct faculty at Quincy College is emphasized while the Appellant's US Army experience, training and numerous awards is entirely omitted. Chief Pomeroy provided the substance of this letter to the Town for the drafting of the letter. (Exhibit 2 and Testimony of Pomeroy)
37. Chief Pomeroy in his testimony seemed especially impressed with Mason's resume and past educational and employment experience. Mason's teaching experience at Quincy College and his supervisory experience at the Sherriff's Department drew glowing acknowledgment from Chief Pomeroy. He testified that "Nothing trumps proven supervisory experience" [in promotional determinations]. However there was no specific evidence presented to show Mason's employment activities and any correlation or relevancy of the duties of a Sherriff's Department employee with the duties of a police sergeant. (Testimony and demeanor of Pomeroy)

38. Chief Pomeroy was overly generous during his testimony concerning his assessment of Mason's past training and experience and interview performance. He repeatedly pointed to Mason's education, Sherriff's Department experience and teaching at Quincy College. Conversely, Pomeroy was especially severe in assessing the Appellant's interview performance and arrest/citation statistics. Pomeroy seemed to diminish the Appellant's educational achievements and ignored his past Army training, experience and awards altogether. Pomeroy exhibited a noticeably favorable attitude toward Mason throughout his testimony. I believe that Pomeroy favored Mason and Mason's out going and proactive personality type. Conversely, the Appellant's quiet, taciturn and humble personality type and presentation turned Pomeroy off. (Testimony and demeanor of Pomeroy)

39. Chief Pomeroy's influence over the other outside members of the panel is not discounted. Pomeroy also had the prior opportunity to review all of the Department's records, prior to his selection of the criteria and process he would employ for measuring the competing candidates. One factor in determining the unbiased nature of a selection process is continuity or consistency with past practice. Pomeroy chose a new process here, involving an interview panel of outsiders. It does not seem to be necessary or advisable to construct an interview panel of outsiders for promotional selection within a department, unless there are overt circumstances of potential bias to protect against. Otherwise, the use of an interview panel of outsiders might also be employed as a means of deferring responsibility while still maintaining indirect influence over the process. The chief of a department should be well aware of the ability, knowledge and skill of the

officers under him, and besides the civil service exam had already determined that.
(Testimony and exhibits, administrative notice)

40. Both Mason and the Appellant possessed all of the necessary qualifications that were established as prerequisites for taking this competitive promotional civil service examination. Each of these competing candidates also received from HRD, the appropriate credit for their respective past relevant training and experience. HRD determines the appropriate credit, which is weighted, calculated and then added to the exam score so that the candidates did each receive an augmented final score which included training and experience credit. The Appellant did receive a higher final civil service score than did Mason. (Administrative notice of G.L. c. 31 § 21 and §22, PAR.06 (1) (b))

41. As a Patrolman, Mason received ten letters of appreciation relative to various incidents and two commendations from the Department. The commendations were issued for his participation in the Department's Color Guard and his actions during a burglary investigation. Chief Pomeroy did testify that the Appellant was also a member of the Department's Color Guard. Pomeroy was not aware at the time, of the Appellant's letter of commendation from Plymouth's Fire Chief. Pomeroy did not cite the numerous awards and citations the Appellant received in the Army, in his request to HRD, for a bypass. (Exhibits 2, 6-17, Exhibit 40 and testimony of Pomeroy)

42. During 2003, while a Patrolman, Mason made 33 arrests and issued 54 motor vehicle citations. In 2004, he made 37 arrests and issued 204 motor vehicle citations. (Exhibit 19-24)

43. Martin Mason, the bypassing candidate here, did not testify at the Commission hearing and therefore this hearing officer did not have the opportunity to observe and attempt to determine his personality, character traits, presentation or credibility as a witness, either individually or relative to the Appellant.(Administrative notice)
44. The Appellant testified in a low key, shy and unassuming yet self-confident manner. He is certainly not a robust self- promoter. He did not seize any opportunity to augment, exaggerate or embellish to his advantage. He seemed almost honest to a fault, if that were possible. The Appellant's testimony at this hearing, although low key and at times flat in tone, conveyed honesty and humbleness. His presentation is that of a taciturn and humble person. I find him to be a reliable and credible witness. (Testimony and demeanor of Appellant)
45. On July 7, 2005, Appellant filed his appeal with the Commission.

CONCLUSION OF THE MINORITY (Henderson, Taylor):

In reviewing hiring and promotional decisions, The Commission seeks to ensure that basic merit principles prevail in the selection process. Chapter 31 defines "basic merit principles" as requiring that employees be selected and advanced on the basis of their relative ability, knowledge and skills, that they are assured fair and equal treatment in all aspects of the personnel administration, and that they are protected from arbitrary and capricious actions. The main method by which the Commission and the Human Resources Division (HRD) ensure the application of basic merit principles in the hiring and promotional process is through the use of civil service exams and eligibility lists.

The eligibility lists are compiled, except for preferences, mainly on the basis of civil service examination scores. However, the competing candidates must first “pass” the exam before they receive consideration. The personnel administrator, prior to the exam, determines the entry requirements for qualification to take the exam and the passing requirement for the exam. The candidates also receive credit for their relevant training and experience. This credit is calculated by HRD and added on to the candidate’s exam score for a final civil service score.

Both Mason, the bypassing candidate here and the Appellant possessed all of the necessary qualifications that were established by the administrator as prerequisites for taking this competitive promotional civil service examination. Each of these competing candidates also received from HRD, the appropriate credit for their respective past relevant training and experience. HRD determines the appropriate credit, which is weighted, calculated and then added to the exam score so that the candidates did each receive an augmented final score which included training and experience credit. The Appellant did receive a higher final civil service score than did Mason. See G.L. c. 31 § 21 and §22, PAR.06 (1) (b). The Town also twice mentions Mason’s “advanced degree” as a reason for his selection, however, educational attainment is not a valid basis for bypass since the education attainment has already been factored in applicant’s score and inappropriate double counting would result were it again cited to justify the bypass.” MacHenry v. Civil Service Commission, 40 Mass. App. Ct. 632 (1995).

In this case, the bypass of the Appellant was not based on adequate reasons or supported by credible evidence and violated basic merit principles since the Appellant was not treated equally and his bypass was arbitrary and capricious. See Thomas v. City

of Westfield. Case No. G-416S (1999) It is especially improper to have totally ignored the Appellant's military record and accomplishments. McGunagle v. North Attleborough Police Department. Case No. G-436S (1999). In McGunagle, the Commission explained that the Appellant was the only veteran interviewed and that the Town wrongly disregarded his training as a military policeman and his service in Saudia Arabia. In MacMillan's case here, it is even more egregious. In its letter to HRD, justifying its bypass, the Town of Plymouth describes Mason's prior experience in the Sheriff's Department and relies on this prior experience. However, as in McGunagle, the Town totally ignores MacMillan's military training and experience, awards and citations, as MacMillan's resume shows.

A "bypass" appeal to the Commission arises when an appointing authority appoints or promotes a person whose name is not at the top of the certified eligibility list. In effect the higher named person is bypassed for appointment or promotion by a person appearing lower on the list. The Commission adjudicates the appeal as a review of the personnel administrator's approval of the appointing authority's written statements of reasons for the bypass. See G. L. c. 31 § 27.

The personnel administrator, (HRD) is not merely a "ministerial depository" or rubber stamp in the bypass process. Chapter 31 charges HRD with the responsibility to evaluate the qualifications of applicants for civil service positions in accordance with basic merit principles and requires HRD to administer, enforce and comply with civil service law and rules. The court has plainly assumed that G.L.c.31§27 requires the personnel administrator, (HRD) to perform a review of the reasons as part of the "procedural scheme" which protects and furthers civil service merit principles. This

requirement in the procedural scheme indicates an affirmative duty on the part of personnel administrator, (HRD) to approve, accept or affirm the bypass reasons forwarded to it by the appointing authority, see Bielawski v. Personnel Administrator 422 Mass. 459, (1996) and MacHenry v. Civil Service Commission 40 Mass. App. Ct. 632, (1995). There are more specific responsibilities placed on the administrator, in this area by G.L. c.31 § 5 (a), (c) and (d).

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 vs. Civil Service Commission, 43 Mass.App.Ct.300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by 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 vs. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). Basic merit principles as defined in G.L. c. 31, §1 require that employees 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 are protected from arbitrary and capricious actions. See Tallman v. City of Holyoke, G-2134 and Cotter, et al v. City of Boston, et al., United States District Court of Massachusetts, Civil Action Number 99-1101, (Young, CJ).

In the situation of a promotional bypass, the appointing authority and thereby the personnel administrator is assigned the burden to prove by a preponderance of the credible evidence in the record, that there were “sound and sufficient reasons” for the

nonselection of the highest ranking candidate. Mayor of Revere v. Civil Service Commission, et al. 31 Mass. App. Ct. 315, 321 (1991). This burden is premised on the presumptive good faith and honesty that attaches to discretionary acts of public officials, see Foster from Gloucester Inc. v Department Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980).

The issue for the commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App.Ct. 331, 334 (1983). See Commissioners of Civil Ser. V. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App. Ct. 726, 727-728 (2003). However, 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.

The Commission is empowered to overturn an Appointing Authority’s bypass decision based on a finding that the reasons given for the bypass were vague, untrue, applied equally to the bypassed candidate, are incapable of substantiation or are a pretext for other impermissible reasons. Roberts v Lynn Fire Department, 10 MSCR 13 (1997)

Here, the Town did not have reasonable justification for bypassing Appellant. “A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.” Sabourin v. Town of Natick, Docket No. G-01-1517 (2005). Here, the Appellant’s score on the civil

service examination was higher than those of the other two candidates; he had more seniority than the one selected and he appeared to be in line for the next promotion to Sergeant. Rather than use the Appellant's score and placement on the certification list, the Town opted to use a selection process that involved using an interview panel of outsiders, a process for selection that had not been employed by the Town in the last two promotions to Sergeant in June 2004 and January 2005. Appellant was not notified that he would be interviewed by a panel. The interview panel bypassed Appellant in favor of Mason, relying on Mason's supervisory experience in the Sheriff's Department while disregarding Appellant's military training and experience that was clearly relevant to his skills and abilities to be a Sergeant. Moreover, the interview panel did not appear to take into account that Appellant worked the midnight shift, permitting him much fewer opportunities for: arrests/citations, interaction with the public and resulting commendations and developing a close personal and professional relationship with Chief Pomeroy.

Chief Pomeroy's influence over the other outside members of the panel is not discounted. Pomeroy also had the prior opportunity to review all of the Department's records, prior to his selection of the criteria and process he would employ for measuring the competing candidates. One factor in determining the unbiased nature of a selection process is continuity or consistency with past practice. Pomeroy chose a new process here, involving an interview panel of outsiders. It does not seem to be necessary or advisable to construct an interview panel of outsiders for promotional selection within a department, unless there are overt circumstances of potential bias to protect against. Otherwise, the use of an interview panel of outsiders might also be employed as a means

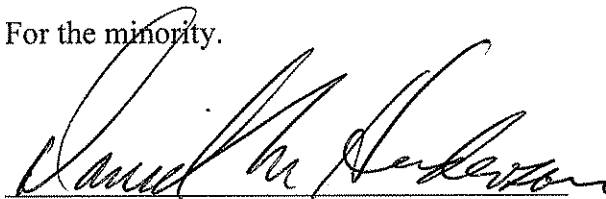
of deferring responsibility while still maintaining indirect influence over the process. The chief of a department should be well aware of the ability, knowledge and skill of the officers under him, and besides the civil service exam had already determined that. It is difficult if not impossible for this hearing officer to now assess the impartiality and accuracy of the panel interviews and assessments without an accurate and objective record of the interviews, such as an audio-video recording. See minority opinion of Daniel M. Henderson in Dufresne v. Town of Webster, (G1-04-492), dated February 25, 2008.

The interview panel did not provide sound and sufficient reasons supported by credible evidence for bypassing Appellant. The Appellant did not receive a fair opportunity for consideration. In adopting the panel's recommendation, the Town's bypassing of the Appellant for promotion was not reasonably justified.

The Commission's intervention is proper where, as here, the Appellant has presented credible evidence that the Respondent failed to comply with the basic merit principles under M.G.L. c. 31.

In this case there is direct evidence of disparate treatment of the Appellant. The Town has not met its burden of showing that there were adequate reasons supported by credible evidence or reasonable justification for the bypass of the Appellant.

For the minority.

A handwritten signature in black ink, appearing to read "Daniel M. Henderson", is written over a horizontal line.

Daniel M. Henderson,
Commissioner

CONCLUSION OF THE MAJORITY (Bowman, Stein, Marquis)

The instant appeal involves a promotional appointment to the position of sergeant in the Town of Plymouth (hereinafter “Town”). The Appellant and the candidate ultimately selected for the promotional appointment were separated by one point on the certification issued to the Town by the state’s Human Resources Division (hereinafter “HRD”); the Appellant had a score of 86 and the selected candidate had a score of 85.

In making its selection, the Town opted to conduct interviews and consider other factors beyond the civil service scores of the respective candidates. The authority to interview candidates is inherent in G.L. c. 31, § 25, fifth par. Flynn, 15 Mass. App. Ct. 206, 208 (1983).

The interviews were conducted on June 2, 2005 by a panel consisting of Plymouth Police Chief Robert Pomeroy and three other Massachusetts Police Chiefs: Chief John Ford of Bourne; Chief Arthur Parker of Carver; and Chief David Cusolito of Falmouth. The panelists were provided with background information regarding the candidates and each of the candidates was asked a set of standard questions during the 30-minute interviews.

As part of his detailed testimony before the Commission, Plymouth Police Chief Pomeroy compared and contrasted the answers given by each of the candidates, including the Appellant and the candidate who was ultimately selected. After reviewing the candidates’ personnel records and after conducting the interviews, the interviewing panel unanimously recommended that Officer Martin Mason, a candidate with a score of 85, be promoted to the position of sergeant. (Testimony of Chief Pomeroy and Exhibit 2)

Part of the reason for the above-referenced recommendation was the performance of the respective candidates before the interview panel, as described by Chief Pomeroy in his testimony before the Commission. The consensus of the panel was that the Appellant performed very poorly during the interview and that he appeared “evasive, unsure, weak, immature and lacking in any command presence.” In contrast, the candidate ultimately selected for appointment was found by the interview panel to be “direct, forthright, upbeat, positive, and exhibited a strong command presence by virtue of his decisiveness and emphasis on teaching others and problem solving.” (Exhibit 2 and Testimony of Chief Pomeroy)

In making its recommendation, the Panel also gave weight to other factors including the selected candidate’s experience as a supervisor, his advanced degree in criminal justice, his numerous letters of recommendation and commendations; and his productivity as a police officer.

The Town Manager accepted the recommendation of the interview panel and submitted a list of reasons for bypassing the Appellant. HRD accepted the reasons for bypass and the Appellant has now appealed to the Commission.

The majority respectfully disagrees with the minority’s conclusion that “it is not necessary or advisable to construct an interview panel of outsiders for promotional selection within a department, unless there are overt circumstances of potential bias to protect against.” Rather, we conclude that an outside panel, particularly given the caliber of the panel in this case, can serve as a useful tool in helping to make fair, objective hiring decisions that are consistent with basic merit principles.

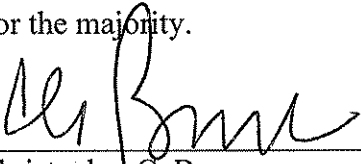
While the minority faults the subjective nature of the interview process, subjectivity is inherent in the evaluation of interviews. Flynn, supra. While we agree with the minority that it is preferable to keep a more permanent record of the interviews (i.e. – recorded and/or videotaped) so that a transcript of the proceeding is available to the Commission, we do not believe that was a fatal flaw to the promotional process in this case. As stated above, Chief Pomeroy testified before the Commission and offered a detailed account of the performance of the candidates at the interview and there is nothing in the record or this decision which undermines the credibility of Chief Pomeroy.

Finally, the minority discounts the weight that the panel gave to other factors including the selected candidate's experience as a supervisor, his advanced degree, his teaching experience, and his productivity. The minority then concludes that not enough weight was given to the Appellant's work history in the military. It was within the discretion of the Appointing Authority, not the Commission, to determine how much weight should be given to these factors in this case. The Commission may not assume the role of a "super-appointing agency." Burlington v. McCarthy, 60 Mass. App. Ct. at 915. The appointing authority is "invested with broad discretion" in the task of "selecting public employees of skill and integrity." Cambridge v. Civil Service Commission, 43 Mass. App. Ct., 304-05 (1997). It is not within the authority of the Commission "to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Cambridge, 43 Mass. App. Ct at 305.

In summary, the record in this case shows that the Town of Plymouth, after exercising its discretion to use an outside review panel and interview process and determining how

much weight to give to that interview and other factors, provided sound and sufficient reasons to justify the bypass of the Appellant based on merit and policy considerations.

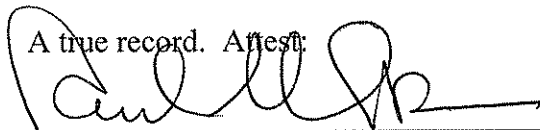
For the majority.



Christopher C. Bowman
Chairman
August 7, 2008

For all of the above reasons stated in the majority conclusion, the Appellant's appeal under Docket No. G2-05-245 is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; Taylor, Commissioner – No) on August 7, 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)(I), 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:
Susan F. Horwitz, Esq. (for Appellant)
Lorna M. Hebert, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)