

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 7/19/10  
Civil Service Commission  
CB

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 727-2293

KEVIN McGRAIL,  
Appellant

v.

Docket No: G1-08-149

TOWN OF MARSHFIELD,  
Respondent

Attorney for Appellant:

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Commissioner:

Daniel M. Henderson<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Kevin McGrail (hereinafter "McGrail" or "Appellant") seeks review of the decision of the personnel administrator or Human Resources Division (hereinafter "HRD") to accept the reasons proffered by the Town of Marshfield (hereinafter "Town" or "Marshfield" or "Appointing

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<sup>1</sup> The Commission acknowledges the assistance of legal intern Josiah Weiss in the preparation of this decision.

Authority”), for bypassing him for original appointment to the position of permanent full-time police officer. The Appellant filed a timely appeal. A full hearing was held on October 1, 2008 at the offices of the Civil Service Commission. Two tapes were made of the hearing. The parties filed post-hearing recommended decisions.

## **FINDINGS OF FACT**

It is noted that the HRD document packet was not contained in the Commission’s case file and that no HRD representative appeared at the hearing. 8 exhibits and a stipulation of facts, (Except fact # 4 which is excluded) were entered into evidence. Based on these and the testimony of the **following witnesses**:

### *For Appellant*

- Kevin McGrail, Appellant.
- Frank Pederson, Director, Boston Municipal Protective Services Department and Former Civilian Director of the Boston Municipal Police Department. (hereinafter “BMPD”)
- Michael Stearns, Sgt., Boston Municipal Protective Services Department. (hereinafter “BMPS”)

### *For Respondent*

- Captain Phillip Tavares, Marshfield Police Department
- Detective Jeff Brennan, Marshfield Police Department

### **I make the following findings of fact:**

1. Kevin McGrail was placed on the rehire or reemployment list and thereby placed on the certified eligibility list Certification #80296, dated 4/11/2008 after his position as a police officer for the Boston Municipal Police Department, (hereinafter “BMPD”) was abolished in December 31, 2006. (Exhibit 1, testimony of Captain Tavares))

2. The Town of Marshfield made a requisition to HRD for a certified eligibility list for the appointment of two (2) permanent full-time police officers. That certified eligibility list Certification #80296, dated 4/11/2008 was issued by HRD with the instruction that the “selection must be of 2 of the first 5 highest who will accept.” (Exhibit 1)
3. The name of the Appellant was placed on the commonwealth’s reemployment list for permanent full-time police officer, in the order of his seniority. “The administrator[HRD], upon receipt of a requisition shall certify names from such requisition, shall certify names from such reemployment list prior to certifying names from any other list or register ...” G.L. c. 31 § 40. ( Administrative notice)
4. The Appellant was bypassed by the Town, for appointment to the two positions by two candidates, not from the reemployment list, who appeared lower on the certification. The Appellant was bypassed by Cristin Caulfield (hereinafter “Caulfield”) and Liam Rooney, (hereinafter “Rooney”), who were both serving as permanent intermittent police officers(PI) in the Town of Marshfield at the time of their selection. (Testimony of Capt. Taveres, Exhibits 1 & 2)
5. In Marshfield, no candidate in recent memory has been selected as a permanent full-time police officer without first being hired as a permanent intermittent, (“PI”). (Testimony of Capt. Tavares).
6. Captain Tavares claimed that the Town or the Department did not have any preference for choosing a “**PI**” over other candidates. However he referred to the Marshfield PIs as “**Our farm team**”. Both Caulfield and Rooney, the selected candidates were on the farm team as PIs. He observed Caulfield as a PI. The usual

process of selection in Marshfield, only involved the pool of PIs. This is the only time that he is aware of that a reemployment list was also involved. In his 9 years, only McGrail was on the reemployment list. Tavares himself was selected off of the PI list, when he was hired. (Testimony of Capt. Tavares).

7. On June 6, 2008 the Human Resources Division, (HRD) acting through its Civil Service Unit, notified McGrail that it had accepted the reasons as given by the Marshfield Police Department, thereby allowing Marshfield to appoint an individual who appeared below McGrail on Certification #80296 (Exhibit 8).
8. The **reasons for bypass** given by the Town of Marshfield through its Police Department are as contained in its letter to **HRD** include the assertion that McGrail is **not proactive, is a poor decision maker, and has some discipline issues with absenteeism. It also noted that he had failed the psychological examination as administered by the Boston Police Department** (Exhibit 8).
9. McGrail is a resident of the Town of Marshfield and was a resident at the time of his application and bypass. (Testimony of the Appellant)
10. McGrail is 49 years-old and is presently employed by the Boston Municipal Protective Services Department (BMPS) as a site officer. He assumed his current position upon the abolition of his prior police officer position with the BMPD, on December 31, 2006 (Testimony of Appellant).
11. McGrail has been employed by the City of Boston since 1987. He is a 1989 graduate of the Boston Police Academy. (Testimony of Appellant and Exhibit 5)
12. In order to develop his skills as a police officer, the Appellant has participated in numerous in-service training sessions with the BMPD. He has completed all of the

annual “in-service” training He also has certificates in: firearms, HAZMAT, FEMA and COBWEB training. He patrolled city owned property, making approximately 50-60 arrests. He was assigned to the Boston Housing Authority from 1996-1999.

(Testimony of Appellant)

13. McGrail in addition to being a police officer of 18 years experience is also a US military veteran with an honorable discharge. He holds a license to carry a firearm and FID card. He is a City of Boston licensed constable. He has been specially trained and qualified in the public safety field for COBWEB and HAZMAT, in addition to being a Boston Police Academy graduate and having other specialized training.

(Appellant, Exhibits 5 &7)

14. The Appellant has been injured on the job approximately 5 times over his approximately eighteen year career as a police officer. Due to the worker’s compensation laws and his employer’s requirements; each time he was injured on the job, he had to take sick leave for five (5) days until the worker’s comp kicked in, and then he would be later reimbursed for 60 % of the sick time taken, after he was cleared medically to return to work. The time taken for sick leave due to the on the job injury was designated as sick leave on the books for a period until it was later reclassified. That time taken and not reimbursed, remained in the sick leave category.

This accounts for a good part of his sick leave use.(Appellant)

15. The Appellant submitted his completed **lengthy application with attachments** to the Department. **He also submitted as required, a signed release of information-waiver of rights and discharge of liability form attached to that application, dated March 4, 2007.** This permitted the Department to gather any information or

documentation and speak with any person, regarding the Appellant without legal repercussion for otherwise possible violations. (Testimony of Appellant, Exhibit 5)

16. Marshfield Police Detective Jeffrey Brennan (hereinafter “Brennan”) is a twelve year veteran of the Department. For 9 years he has been responsible for background investigations of the candidates for permanent intermittent and full time officer positions. He claims that he contacted the Appellant’s employment references. (Testimony of Brennan)

17. Although candidate Rooney had previous experience as a permanent intermittent police officer for the Town of Marshfield; Rooney worked for only one summer as a police officer on Nantucket, in addition to sporadic work as a security officer. He had only approximately three total years experience. (Exhibit 3)

18. Although candidate Caulfield had 1.5 years experience as a permanent intermittent officer in Marshfield; she had a prior work history of only one year as a pre-school teacher’s assistant and approximately one year as a laborer and bookkeeper for a construction company (Exhibit 4)

19. Captain Philip A. Tavares (hereinafter “Tavares”) is a 15 year veteran of the Department. He is responsible for the police officer hiring process. He recommends to the Department which candidates should be hired based on their background check, application and interview. He testified that during his tenure as Captain, the Appellant is the only candidate from the rehire or reemployment list to ever apply to the Department. (Testimony of Tavares)

20. Captain Tavares admitted the fact that McGrail as a Police Academy graduate, with other specialized training and experience would be an advantage and a cost savings for the Town. (Testimony of Tavares)
21. Tavares testified that a psychological examination is not a requirement of the Marshfield Police Department's background review process for hiring police officers. He testified that such a program would have to be reviewed and approved by HRD, something Marshfield has chosen not to do. (Testimony of Tavares and stipulated)
22. The Town of Marshfield did not introduce any evidence to authenticate, define and substantiate the nature and circumstances of the Appellant supposedly **"had failed the psychological examination as administered by the Boston Police Department."** The Appellant specifically disagreed with Stipulation of fact # 4 which referred to the BPD psychological exam. Stipulation of fact # 4 is not part of the evidence in this matter, as it has been excluded from evidence. It is noted that the area of psychological examinations is complex and relies ultimately on expert opinion and therefore the testimony of an appropriate expert witness or some other acceptable evidence to authenticate, interpret, and assess that opinion; so that it may be qualified and weighed as evidence. The Appellant as a layperson, non-expert would be unable to fulfill this role. The Town has failed to meet its burden of production, persuasion and proof, by a preponderance of the credible evidence in the record to support the above stated reason for bypass. (exhibits, testimony, stipulation minus fact # 4, administrative notice)
23. Francis J. Pederson (hereinafter "Pederson") is now the Director of the Boston Municipal Protective Services and was the Civilian Director of the BMPD before it

was abolished. He has worked with the Appellant since 2001. First as the Director of the BMPD, where the Appellant was a police officer, and then as Director of the BMPS, where the Appellant was placed in 2006. (when the BMPD was abolished) He knew him from both departments. Pederson has never directly supervised the Appellant. (Exhibit 7 and Stipulation) All communication to the Appellant went through Lt. DeRosa at the BMPD and Sgt. Stearns at the BMPS. They were the Appellant's direct supervisors. (Testimony of Francis J. Pederson)

24. At the time of the abolishment of the BMPD on December 31, 2006, there were approximately 60 police officers in the Department. Since then approximately 33 police officers were absorbed by the City of Boston Police Department and approximately 31 officers remained with the reconstituted BMPS, retired or were hired by other municipal police departments. Pederson is experienced, familiar and practiced in the process of appropriately disseminating employee information to prospective new employers and documenting same. (Testimony of Pederson)
25. Pederson testified that almost all employees at the BMPD regularly received letters regarding their sick leave usage. The allowed annual sick leave was averaged on a quarterly basis and the letters were sent out according to that period's prorated usage. In his testimony; he referred to them as "good boy letters" for those letters sent out commending an employee's low use of sick leave for the period and "bad boy letters" for those who received letters regarding using too much sick leave for the period. He testified that the Appellant, like most employees, had received both kinds of letters over his career. (Testimony of Pederson)



26. Brennan claims that he also interviewed Lieutenant Frank DeRosa (hereinafter “DeRosa”) while conducting the Appellant’s background check. (Exhibit 7) DeRosa stated that he was the Appellant’s direct supervisor at the Boston Municipal Police Department. DeRosa gave the Appellant consistently high scores on the evaluation sheet given to him by the Department as part of the recommendation. He rated him either high, as a 4 or 5 in a variety of categories regarding candidate skills and personality traits. The scale was 1-5. 1 being the lowest and 5 being the highest. DeRosa commented that during his tenure, the Appellant “had lots of arrests, he was a good police officer, he could be used in any capacity.” (Exhibit 7, testimony of Brennan).
27. Brennan did not have documentation or notes to show the time and date of his claimed telephone interview with Pederson, he stated that it was his practice to ask the same set of predetermined questions to everyone in the interview process. He testified that his report or “Candidate Review” with attachments, (Exhibit 7) is the only documentation of his investigation regarding the Appellant. (Testimony of Brennan)
28. Brennan testified that someone he identified as Frank Pederson, in a phone interview did make negative comments about the Appellant. Those comments were that the Appellant had been disciplined for excessive absenteeism, that he was not proactive and that he possessed poor decision making ability. These comments were submitted to HRD and accepted by HRD, as bypass reasons. There were also other negative comments which Brennan attributed to Pederson, which were not included as reasons for bypass, but were included in his report. (Testimony of Brennan, Exhibits 2& 7)

29. However, Pederson did not recall a phone interview by Brennan or any contact whatsoever, with the Marshfield Police Department. In preparation for his testimony he racked his memory in an attempt to recall any contact with Marshfield and came up with nothing. He denied making any of the negative comments attributed to him; to anyone representing Marshfield or to anyone else at any time. He denied making any comments which would be considered negative regarding McGrail. He testified that he holds McGrail in high regard both personally and as a police officer.

(Testimony of Pederson).

30. However, Pederson specifically did recall that at that time, he contacted Cohasset Police Chief Hussey, a person he knows, to get a reference or a positive recommendation for McGrail for the Marshfield Police Department position.

(Testimony of Pederson).

31. Pederson testified in a definite and emphatic manner regarding the issue of release of any information on an employee. He has held high level administrative positions, with much responsibility associated with them. He is well aware of the importance of legal and proper disclosure of information on employees and documenting same. He would follow his "normal course" and practice which is; **to require any investigator to come into his office and show him the signed release of information form, before discussing an employee.** He would be very reluctant to even speak generally with an investigator over the telephone, without first seeing the signed form. He would then as now, have advised his office staff, administrators and officers to follow this practice. At that time, although he would have been generally aware of overall employees' sick leave use, as a group, he would not have been familiar with

McGrail's sick leave use or any possible discipline for it, since he did not handle sick leave. Therefore he would not have addressed that issue. Sick leave was handled then by Joseph Corso. Also, Pederson as a matter of practice would automatically have referred any inquiry from an investigator regarding McGrail's job performance to McGrail's direct supervisors: Sgt. Michael Stearns at the BMPS and Lt. Frank DeRosa at the BMPD. Pederson never had direct supervision over McGrail.

(Testimony of Pederson).

32. One of the bypass reasons submitted to HRD was the Appellant's alleged "some discipline issues with absenteeism". The evidence is unclear but there "may have been a suspension", of 1 day for absenteeism, which the Appellant did not grieve. This sick leave usage took place thirteen years ago. These witnesses' answers were unsure and indefinite, based on their unclear memories. (Testimony of Appellant and Stearns) and (Exhibit 8)
33. The Town of Marshfield, by use of the signed release of information, could have obtained complete and accurate written records of sick leave use and discipline from the Appellant's past employers, the keeper of the records. Those written records would have been the best evidence of the actual facts. The Appellant and Stearns had to rely on their memories of these stale prior events. (administrative notice, reasonable inference)
34. Director Frank Pederson is a direct and confident witness. His answers were prompt and unhesitant. He exhibited a good memory and offered examples of it when called upon. He did not volunteer an answer for which he had no factual basis. His statement that he did not recall any telephone call from anyone from Marshfield on McGrail, is

not an indication of any doubt in his mind that he did not receive such a phone call. It is simply his style. He is cautious and not prone to making absolute statements. Although he holds McGrail in high regard, he did not embellish or expand his testimony to benefit McGrail. He answered every question on direct and cross-examination responsively, easily and confidently, volunteering a time reference to the BMPD or the BMPS to avoid any chronological confusion. He was consistent and never had to modify his prior testimony. His overall demeanor, including tone of voice, phraseology and word choice, good eye contact and other body language conveyed honesty and reliability. His testimony rang true. He provided several indicia of reliability in his testimony and background credentials. He specifically remembered a contemporaneous telephone call he made to the Cohasset Police Chief to secure a positive reference or recommendation for McGrail, for the Mansfield position. I find it highly improbable that Pederson would have made negative comments about McGrail at all, since he held a positive opinion of him; and even less likely to have made them over the phone and less likely than that to have done so without first receiving a signed release and documenting same. He is an experienced, responsible and knowledgeable high level administrator. He follows a set practice and procedure for the dissemination of employee information, which is pinned to first receiving a signed release of information form from the investigator in an office visit, face to face. He would likely keep a copy of the release and other notation in the employees file. He would be very reluctant to speak over the telephone, even generally about an employee, without first obtaining that signed release form. If someone called him and wanted information quickly, he would require a signed

release to be faxed to him and he would respond by fax, keeping the documentation in the employees file. Ironically, Marshfield actually had this signed release form for McGrail but did not ever send it to Pederson or show that Pederson had requested it to be sent. I find Frank Pederson to be a very credible and reliable witness. (Exhibits, testimony and demeanor of witnesses, Testimony and demeanor of Pederson)

35. Sgt. Michael Stearns (hereinafter "Stearns") is the Appellant's direct supervisor, and has worked with him directly for the past nine years. Stearns testified the same way he had reported to Brennan; that he thinks very highly of the Appellant. Stearns testified that the Appellant was "an excellent officer, very proactive, involved, knowledgeable, very reliable, eager to work, has excellent motivation and easily adjusts to situations." He works with the Appellant on a daily basis, noting also that the Appellant is well liked and easy to talk with. Stearns gave an example of his police abilities; in a near riot situation in a parking lot with a large angry crowd. The Appellant calmed the crowd down and defused the situation in an orderly fashion. (Testimony of Stearns)

36. Sgt. Michael Stearns is straight forward and unhesitant in his testimony. His demeanor is that of a professional law enforcement officer. His testimony was brief but strongly in support of the Appellant's qualifications and performance as a police officer, under his supervision. His cross-examination was brief and focused on his answer: the Appellant "may have been suspended" this is viewed as a cautious answer by Stearns, based on an unsure memory of stale events. I find Stearns to be a truthful and reliable witness. He is a credible witness. (Exhibits and testimony, testimony and demeanor of Stearns)

37. Brennan's "Candidate Review" summary report, with attachments, which is the source of the Town's negative reasons for bypass is substantially unfounded. Current Director of BMPS and previous Civilian Director of the BMPD emphatically and convincingly, categorically and specifically denied all of the negative statements and opinions attributed to him in that report and the attached employer questionnaire, (Exhibit 7) and in the testimony of Brennan. Pederson testified to the contrary; he believes the Appellant has strong positive character, qualities and past performance for police work. The absenteeism and related discipline and the negative character opinion statements are not found to have actually been made by Pederson or anyone in his behalf, or in a knowledgeable position, at the time of the bypass decision. (Testimony and demeanor of Pederson and Brennan, Exhibits 2 & 7).

38. Detective Brennan's investigation and report are **beyond sloppy**. Brennan's fundamental investigative and record keeping practices are nearly non-existent. He relied mostly on his memory in testimony, which was weak. He couldn't remember and he didn't record the date of his critical telephone interview with Director Frank Pederson. Pederson denied any telephone interview ever occurred. Brennan believes that the purported telephone interview occurred sometime in later winter, 2006 to early spring, 2007, yet he has no documents or notes to support that contention. Brennan admitted that he had the release of information form signed by the Appellant and that this signed form is usually requested by people he seeks information from. However, he could not remember if Pederson had requested the signed form from him or whether he had faxed the signed form to Pederson. In either event, he had no notes or documentation to show either. Brennan could not remember if during the purported

telephone interview of Pederson, he asked for examples, background, observations, or experiences which supported Pederson's answers or statements. Brennan said he simply read the questions from the questionnaire and wrote down the answers. Brennan seemed genuinely perplexed at the line of questioning regarding distinguishing among: direct supervisor, indirect supervisor or administrative head and the need of asking for examples to support an opinion or statement. Brennan had contact and interview people categorized in his mind generally, as employer and supervisor. Finally it was explained to Brennan that a direct supervisor would have daily or some routine experience with the Appellant on which to base a meaningful statement or opinion. This hearing officer had to explain to Brennan that if the person's identity and relationship was not established and defined from the beginning of the interview and examples asked for; the answers might be meaningless. People mistakenly being interviewed, might just try to answer to be helpful or accommodating, without having any real life basis for their answers. This is especially true in a telephone interview, where the interviewee can not be observed. Brennan remained confused or skeptical regarding this explained interview purpose and procedure. He defended his methods by testifying that he did it the way he had been taught by his predecessor. Brennan did not have sound and sufficient investigative and record keeping abilities at the time of the alleged telephone interview of Pederson. Brennan did not interview Frank Pederson by telephone as he claimed he did, at any time. Brennan did not know Pederson and did not properly attempt to identify the person he spoke with on phone as the witness Pederson. I find Detective Brennan to be a completely unreliable witness. I find his testimony to lack

credibility or believability, not due to dishonesty but due to very sloppy or inept practices. (Testimony and demeanor of Pederson and Brennan, Exhibits 2 & 7).

39. Detective Brennan testified in a halting and nervous manner with sometime indefinite responses like, "I believe..." He testified as if he made no preparation for his testimony. His verbalization and thinking indicate youth and inexperience, despite his many years in this position. It is difficult to reconcile the degree of ineptitude he displayed in his investigation, report and testimony, with his experience. He relied on his memory, which is poor and had no documentation to refresh it when it failed. The fundamental acts of documenting and identifying: a date, a person, relationship, means of communication and foundation for a statement or opinion; were not considered to be important by him. He was confronted by this hearing officer near the end of his testimony, with an explanation of the serious omissions in his investigation and the serious potential consequences of erroneous information; on a person identified as disseminating it improperly and the Appellant's career aspirations. He was told by this hearing officer that it was "beyond sloppy". Brennan answered: A.- **"I can't argue with you on that."** Regarding the serious potential consequences, Brennan answered: A.- **"I'll be honest. I never brought it into account before"** Q. - **"In your thinking?"** A. **"Yes, that's the way I was taught by the person before me."** He was then asked if he was specifically taught to not document dates of phone calls or that face to face interviews were not preferable to telephone interviews? He answered "No" to these two questions. What should have been fundamental and automatic for Brennan in conducting his investigation, documenting and reporting of it seems to have been completely foreign to him. Brennan's entrenched lack of



knowledge and/or awareness of acceptable investigating, documenting and reporting practices tips the balance against any determination that he is lying about his phone call to someone he thought was Frank Pederson. Whoever, he may have spoken with on the phone was not the Frank Pederson, the identified witness. The other Frank Pederson has not been identified. Detective Brennan's testimony and reporting of his investigation are unreliable and inaccurate and little or no weight is attributed to it. (Exhibits and testimony, Testimony and demeanor of Detective Brennan)

40. It is noted that **Brennan's "Candidate Review" summary report** ends with the following statement: **\*\*\*Married a woman, got divorced, then decided to marry her again\*\*.** The double asterisks on either end of the statement indicate the author believed that this was important information. However, this statement was not reviewed in the testimony, as this exhibit was admitted later during the hearing. This hearing officer did not notice it until a post-hearing review, while drafting this decision. However, this is some evidence or indication that a personal circumstance and an impermissible consideration might have infected the selection and bypass decision making process. (Exhibit 7, reasonable inference)
41. The Appellant, Kevin McGrail is married and has 4 grandchildren. He is tall with a large frame and athletic build. He is neat and appeared dressed in a suit and tie. He seems bright. He is poised and prompt in his response to questions. He is polite as example answering "Yes Sir" or "No Sir" to questions. He makes good eye contact and did not show any signs of nervousness, even under cross-examination. He answered every question appropriately based on his actual knowledge. For example, he was asked if he knew what was contained in his personnel file. He answered he did

not know but assumes what is in it. He tries to be overly honest, so as not be accused of any untruthfulness. I find him to be a credible and reliable witness. (Exhibits and testimony, testimony and demeanor of Appellant)

**CONCLUSION OF HEARING OFFICER (COMMISSIONER HENDERSON):**

In a bypass appeal, the Commission must decide 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 the reasons asserted by the appointing authority for its' action are not found to be "sound and sufficient" or 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.

In the instant case the appearance or overtones of bias against the Appellant and favoritism for the two selected candidates is noticeable. Detective Brennan ended his "Candidate Review" summary report with a clear and emphatic statement on the Appellant's personal circumstances, which circumstances are completely unrelated to basic merit qualifications for the position sought. The connotation of the statement is clearly disapproving. This disapproval may have affected Brennan's impartiality and therefore his ability to afford the Appellant a fair and accurate investigation he deserved. The comment alone indicates that the process was tainted. Brennan's inept investigation and erroneous results corroborate that taint.

The favoritism toward the selected candidates is indicated by the fact that the Appellant was bypassed by Caulfield and Rooney, who were both serving as permanent intermittent police officers (PI) in the Town of Marshfield at the time of their selection. In Marshfield, no candidate in memory has ever been selected as a permanent full-time police officer without first being hired as a permanent intermittent, ("PI"). Captain Tavares claimed that the Town or the Department did not have any preference for choosing a **"PI"** over other candidates. However he referred to the Marshfield PIs as **"Our farm team"**. Both Caulfield and Rooney, the selected candidates were on the farm team as PIs. He observed Caulfield as a PI. The usual process of selection only involved the pool of PIs. This is the only time that he is aware of that a reemployment list was also involved. In his 9 years, only McGrail was on the reemployment list for consideration. Tavares himself was selected off of the PI list, when he was hired. Circumstantial evidence alone virtually substantiates the fact that you must first be a Marshfield PI or

permanent intermittent in order to be chosen as a permanent full-time police officer in Marshfield. This is a predetermined result in Marshfield.

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). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001).

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). Also, Basic merit principles, as defined by Chapter 31 of the General Laws, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993).

**Appointing Authorities** are charged with the responsibility of exercising **sound discretion and good faith** when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and stated the

following: “On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of **a sound discretion**, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) See the following line of cases as quoted in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272.”

In the instant case, the Town violated basic merit principles in several ways. First, by the selection of candidates who appeared lower on the certification and/or scored lower on civil service exam. Here, the Appellant was placed at the top of the eligibility list by operation of law, by his placement on the reemployment list according to his seniority. However, the Appellant’s position on the reemployment list supercedes the other candidates’ position on the certified eligibility list by operation of law. Appointing an 18 year experienced and proven product is less risky than a paper or short term tested product. Certainly, his training and experience or seniority of 18 years of successful performance as a police officer is a greater substantiation or at least a functional equivalent of a current very high civil service test score. Such very high test score,

without seniority and being on the reemployment list, would be 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); Bardascino et al v. City of Woburn, Docket No.: G1-04-134, G1-04-120, G1-04-111 (2006). The Appellant had previously taken such an exam, passed it as qualified and was hired by the BMPD. Both according to the law and certainly by experience he is a well qualified candidate.

Appointing authorities must choose among candidates for civil service appointments who, have qualified for the position by taking and passing a competitive examination or as here, by operation of law, (reemployment list), placed on an eligibility list. The appointing authorities have limited ability to bypass qualified candidates appearing on a certified eligibility list. Rather, in order for a candidate higher on the list to be bypassed, the appointing authority must submit “sound and sufficient” reasons that affirmatively prove “reasonable justification” for picking a lower ranked candidate. “In the context of review, means done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and correct rules of law.” For a thorough discussion of all of the factors incorporated in establishing the correctness of the legal standard applied by the Commission in these matters. See City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, (1997). See also, Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials

. . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action” has been taken “consistently with ‘basic merit principles’ as provided in G.L.c.31,§1, which gives assurances to all civil service employees that they are ‘protected from arbitrary and capricious actions’.”); Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”) <sup>2</sup>

Basic merit standards require that an employer not act so 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 bypass reasons given by the Town assert that the Appellant is: (1) subpar recommendations from employers (not proactive, is a poor decision maker); (2) has some discipline issues with absenteeism; and (3) he had failed the psychological examination as administered by the Boston Police Department. **The Town has failed to meet its burden of production, persuasion and proof by a preponderance of the credible evidence in the record to support any of these three stated reasons**

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<sup>2</sup> The commission regularly receives proposed decisions from parties, which rely on the oft-cited precedent for such alleged wide discretion and purportedly limited commission oversight found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm’r, 400 Mass. 597, 601 (1987). The quotation from the Callanan opinion, however, was made in the entirely different context of considering the statutory discretion of the Personnel Administrator [HRD] to establish eligible lists, and had nothing to do with the standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for “sound and sufficient” reasons that must be provided to “justify” a “valid” bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the “sound and sufficient reasons” in the Mayor of Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. This erroneous reference to the appointing authority’s “wide” or “broad” discretion in the place of the correct, “sound” or “valid” discretion in hiring or promotional selection has subsequently infected numerous commission and superior court decisions and at least one Appeals Court decision. For an example of erroneous citation of “broad discretion” through City of Cambridge See Town of Burlington & another vs. James McCarthy, 60 Mass. App. Ct. 914, (2004) For an example of accurate citation of “sound discretion” See Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971) and Goldblatt cited in Charles W. Flynn & others vs. Civil Service Commission & others 15 Mass. App. Ct. 206, 209 (1983)

The first reason for bypass was a subpar recommendation from Pederson, the Appellants listed supervisor. This subpar recommendation was broken down more specifically into negative traits identified as “not proactive” and “is a poor decision maker.” This reason was determined and reported on by the investigator, Detective Brennan. However, Detective Brennan’s investigation, reporting and testimony regarding it, was totally discredited. He was found to be an unreliable and inaccurate investigator, reporter and witness. Additionally, the alleged source of this negative information, witness Frank Pederson refuted all of this negative information, specifically and categorically. Pederson was found to be a credible, accurate and reliable witness. Brennan on the other hand, had no proof whatsoever of time and date or the identity of the person who he interviewed by telephone. Frank Pederson the supposed person he interviewed and the source of the information was not actually interviewed by Brennan. Frank Pederson was the Director of the BMPD and its successor BMPS and not the Appellant’s direct supervisor. He was not in a position to observe the Appellant on a daily basis and for that reason among the others previously stated would not have ventured a negative opinion regarding the Appellant, especially by telephone. However he held the Appellant in high regard both personally and as a police officer. He actually tried to secure a positive recommendation for the Appellant for the Marshfield position. He testified strongly and positively on the Appellant’s behalf. Sergeant Michael Stearns, the Appellant’s direct supervisor at BMPS, testified that the Appellant was “an excellent officer, very proactive, involved, knowledgeable, very reliable and easily adjusts to situations.” Lt. DeRosa, the Appellant’s direct supervisor at BMPD, reported to Brennan that the Appellant... “Follows up on



investigations, works well with others and the community, had lots of arrests, was a good police officer, could be used in any capacity and would be a good asset to any Department.” (Exhibit 7)

The second reason stated for bypass of the Appellant was “some discipline issues with absenteeism”. During the roundtable sessions and interview process, the Appellant acknowledged that he may have been disciplined for sick leave usage. He informed the Town that he may have received at a one day suspension and more than one written warning. However it has been determined here that the written warnings were actually notices or “bad boy letters”, which most employees also regularly received, for being over the quarterly, prorated annual sick leave usage. However, after final accounting they may not be over the annually allowed sick leave. The Appellant’s actual sick leave use was much lower than reported since he had been injured on the job at least five (5) times in his long career as a police officer. Each time the Worker’s Compensation laws and his employers practice forced him to take five (5) days sick leave until the worker’s comp. kicked in, and then he would be later reimbursed for 60 % of the sick time taken, after he was cleared medically to return to work. The time taken for sick leave due to the on the job injury was designated as sick leave on the books for a period until it was later reclassified. The sick time taken and not reimbursed, remained in the sick leave category. This accounts for a good part of his sick leave usage. The Town had the signed release of information form and could have used same to obtain accurate written records from the employer’s keeper of records to properly and accurately document sick leave usage and discipline. The Town chose not to pursue this method.

The Town also gave no time limit for the consideration of the Appellant's past sick leave use or prior discipline. The Town did not show any evidence of what time period the other candidates' background was examined, if at all, for sick leave usage or discipline. As a practical matter, the Appellant is treated unequally, and penalized in this area, since his past employment history was 5 to 10 times that of the selected, bypassing candidates. The Appellant's attendance record over his entire career as a police officer is not unusual, especially in consideration of the 5 or so Worker's Comp. injuries being temporarily included in and eventually partially charged to his sick leave. This Worker's Comp. accounting of sick leave greatly increased his sick leave usage. These alleged issues with attendance occurred thirteen years ago

The Appellant testified that in order to use workman's compensation benefits, an employee must use 5 sick days first. After workmen's compensation benefits kick in, the employee is refunded 60% of his sick time. The Appellant was injured 5 times during the course of his employment. (Testimony of Appellant)

The final bypass reason proffered by the Department was the Appellant's supposed failure of the Boston Police Department psychological exam. Because **the psychological exam is not an element of the Department's background check**, by using the purported failure as a bypass reason, the Department is imposing a standard on the Appellant that no other candidate is required to satisfy. This is an arbitrary act that violates basic merit principles. The Town of Marshfield did not introduce any evidence to authenticate, define and substantiate the nature and circumstances of the Appellant supposedly "**had failed the psychological examination as administered by the Boston Police Department.**" The Appellant specifically disagreed with Stipulation of fact # 4

which referred to the BPD psychological exam. Stipulation of fact # 4 is not part of the evidence in this matter, as it has been excluded from evidence. It is noted that the area of psychological examinations is complex and relies ultimately on expert opinion and therefore the testimony of an appropriate expert witness or some other acceptable evidence to authenticate, interpret, and assess that opinion; so that it may be qualified and weighed as evidence. The Appellant as a layperson, non-expert would be unable to fulfill this role. The Town has failed to meet its burden of production, persuasion and proof, by a preponderance of the credible evidence in the record to support the above stated reason for bypass.

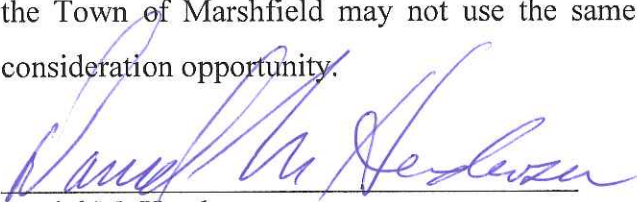
In its reasons for bypass, it is evidenced that the Town gives undue weight to the minor negative comments erroneously derived from a flawed and inept investigation; while disregarding the substantial, accurate positive comments about him. The Department did not properly authenticate the negative comments it relied on. Those comments were found here to be erroneous. On balance, after crediting the favorable information from Pederson, Stearns and DeRosa and after crediting the explanation of the sick leave use and routine letters on quarterly prorated use; the Appellant had a good employment record.

All candidates must be adequately and fairly considered. The Commission has made it clear that it 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 Town has failed to meet its burden of production, persuasion and proof, by a preponderance of the credible evidence in the record to support any of the stated reasons for bypass.

For all the reasons stated above, I conclude that the Appellant's appeal filed under Docket No. G1-08-149 should be *allowed* with the following relief.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs HRD to place the name of the Appellant, Kevin McGrail at the top of the eligibility list for original appointment to the position of permanent full-time Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of permanent full-time Police Officer in the Marshfield Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a MPD police officer. The Commission further directs that, if and when Kevin McGrail is selected for appointment and commences employment as a MPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #80296. Finally, the Commission directs that the MPD or the Town of Marshfield may not use the same reasons for bypass in any subsequent consideration opportunity.



Daniel M. Henderson  
Commissioner

## **CONCLUSION OF THE MAJORITY (BOWMAN, STEIN and McDOWELL)**

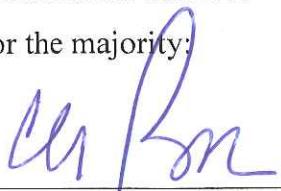
Chairman Bowman and Commissioners McDowell & Stein adopt the findings of fact of the hearing officer and, save for one difference in the scope of the appropriate relief, the majority concurs with the conclusion of the hearing officer. The majority finds that the last sentence of the hearing officer's proposed relief – "Finally, the Commission directs that the MPD or the Town of Marshfield may not use the same reasons for bypass in any subsequent consideration opportunity" – should be modified. That form of proposed relief has been adopted in the past, and is appropriate to the alleged "current supervisor's poor reference" and "sick time" abuse issues which were fully litigated here, decided in the Appellant's favor, and ought not be open to re-litigation in any future case between these same parties. The alleged failure to pass a psychological screening, however, stands on a different footing. While there are limitations on how long a medical evaluation may be used by an appointing authority for civil service appointment and promotional decisions, it would go too far to prohibit Marshfield from ever asserting such a reason in any future appointment or bypass decision involving the Appellant. Accordingly, the majority finds that the final sentence of the hearing officer's proposed relief shall be modified to add the language; "provided, however, nothing in this decision shall preclude the MPD or the Town of Marshfield from asserting that the Appellant is not medically fit for any future appointment or promotion based on appropriate and timely proof to that effect."

Also, both Chairman Bowman and Commissioner McDowell (as well as Commissioner Marquis) dispute the statement of the hearing officer contained in footnote 2 of the Conclusion as incorrect as a matter of law and unnecessary to the Decision.

For all of the reasons stated in the conclusion of the majority, the Commission,  
pursuant to Chapter 310 of the Acts of 1993, order the following relief:

The Commission directs HRD, or the Town of Marshfield in its delegated capacity, to place the name of the Appellant, Kevin McGrail at the top of the eligible list for original appointment to the position of permanent full-time Police Officer in the Town of Marshfield so that his name appears at the top of the next certification from which the next original appointment to the position of permanent full-time Police Officer in the Marshfield Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as an MPD police officer. The Commission further directs that, if and when Kevin McGrail is selected for appointment and commences employment as a MPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #80296.

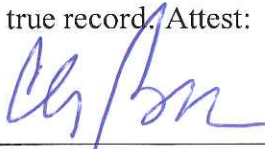
For the majority:

  
\_\_\_\_\_  
Christopher Bowman  
Chairman

By a 1 - 4 vote of the Civil Service Commission (Bowman, Chairman – No; Marquis – Commissioner – No; Stein, Commissioner – No; McDowell, Commissioner – No; Henderson, Commissioner – Yes) the hearing officer's conclusion was rejected.

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Stein, Commissioner – Yes; McDowell, Commissioner – Yes; Henderson, Commissioner – No; Marquis, Commissioner – No), the conclusion of the majority was adopted and the Appellant's appeal was allowed.

A true record. Attest:

  
\_\_\_\_\_  
Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Joseph G. Donnellan, Atty.

John J. Clifford, Atty.

John Marra, Atty. - HRD