

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

JAMES MCINNIS,
Appellant

v.

G2-17-083

TOWN OF IPSWICH,
Respondent

Appearance for Appellant:

James McInnis
Pro se

Appearance for Respondent:

Timothy D. Zessin
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110-1109

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, James McInnis (Mr. McInnis or Appellant), filed a timely appeal with the Civil Service Commission (Commission) on May 12, 2017, under G.L. c. 31, s. 2(b), appealing the decision of the Town of Ipswich (hereinafter Town or Respondent) to bypass him for promotion to the position of permanent Fire Lieutenant in Ipswich. A prehearing conference was held in this case on June 12, 2017. A full hearing was held on July 17, 2017 and September 12, 2017.¹ The hearing was digitally recorded and copies of the recording were sent to the parties.² After the hearing, the parties submitted post-hearing briefs. For the reasons stated

¹The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

²If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the

herein, the appeal is denied.

FINDINGS OF FACT:

A total of twenty-three (23) exhibits were entered into the record.³ Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Gregory Gannon, then-Chief of Ipswich Fire Department (IFD)

Called by the Appellant:

- James McInnis (Appellant)

and taking administrative notice of all matters filed in the case; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant has been a full-time Firefighter in the IFD for more than two (2) decades. He has been a licensed plumber and gas-fitter for many years. He is passionate about his work at the IFD, working on or improving various mechanisms there on his own, offering guidance to new firefighters one-on-one, taking numerous training courses and participating, for example, in the IFD rescues and responses to marine incidents. He frequently calls the Fire Chief with his suggestions or concerns. (Testimony of Appellant) On his own, the Appellant also has followed up on calls to which the Lieutenants have responded. (Testimony of Gagnon)

substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³ Respondent's Exhibits (R.Ex.) 1 – 5, 5A and 6 – 10; Appellant's Exhibits (A.Ex.) 1 - 8; and four (4) exhibits submitted separately by the Appellant post-hearing (in addition to the documents attached to the Appellant's post-hearing brief) (A.Post.Hrg): A – 2015 Investigation Request by Appellant and others; B – Purchase Order of Hats; C – Appellant's 2014 Sick Leave Grievance (5 pages); D – Letters of FFs Dingle and Chapman. The Respondent received such post-hearing submissions and made no comments thereon. As with all evidence, the exhibits are given the weight they are due.

2. The IFD is comprised of the Chief, a Deputy Chief, five (5) lieutenants (one (1) Administrative Lieutenant and 4 Shift Commanders), and three (3) firefighters per shift. The IFD also employs call firefighters. (Testimony of Gagnon)
3. The Department maintains two (2) fire stations, only one (1) of which is regularly staffed. (Testimony of Gagnon)
4. Gregory Gagnon was appointed the Chief of the Department on June 1, 2014 and was chief at all times pertinent to this appeal. (Testimony of Gagnon)
5. The Town Manager is the appointing authority for all positions within the Fire Department. (Testimony of Gagnon)
6. In 2016, the Town sought to fill two (2) Lieutenant vacancies. As of September 14, 2016, the Town was a party to a Delegation Agreement with the state Human Resources Division (HRD) authorizing the Town to hire a vendor to conduct an assessment center to help the Town identify appropriate candidates for the Lieutenant promotion instead of asking HRD to conduct a written promotional exam. (R.Ex. 1)⁴⁴
7. Pursuant to the Delegation Agreement, the Town was authorized, in part, as follows:
“With the exception of additional points as required by statute or rule, including credit for employment or experience in the Fire Lieutenant title, this delegated selection process for Fire Lieutenant will be used as the **sole basis** for scoring and ranking candidates on an eligible list. ...” (R.Ex. 1)(emphasis in original)

⁴⁴ In 2015, the Appellant and other members of the IFD submitted a request asking the Commission to conduct an investigation, alleging that the Town was going to conduct a promotional assessment center, in lieu of a civil service promotional exam, without first pursuing a delegation agreement with the state Human Resources Division (HRD). The Commission concluded, “[s]ince the Town has decided to postpone the administration of the assessment center until such time as it receives the appropriate approvals from HRD, there is no need for the Commission to initiate an investigation. For this reason, the request for investigation is denied and this matter is closed.” (Request of Gary Chapman and nine (9) others to Investigate the Town of Ipswich, 28 MCSR 540 (2015). As indicated here, the Town had concluded the appropriate delegation agreement with HRD prior to pursuing an assessment center.

8. Accordingly, on or about September 29, 2016, the Town entered into a Memorandum of Agreement (“MOA”) with the Ipswich Fire Fighters Local 1913 (“Union”), the union that represents the Firefighters and Lieutenants within the IFD. (R.Ex. 2; Testimony of Gagnon)
9. The Town and the Union agreed that the Town would utilize MMA Consulting Group (“MMA”) to determine the structure of the assessment center and evaluate the performance of candidates. (Testimony of Gagnon; R.Ex. 2)
10. The parties further agreed that, upon issuance of a certification of candidates after an assessment center, each candidate on the listing would be subject to an interview by an oral interview board (board) comprised of the Town Manager, Fire Chief, Human Resources Director and three outside active and/or retired chief officers or captains to be selected by MMA. (Testimony of Gagnon; R.Ex. 2)
11. Upon execution of the MOA, the Chief posted notice of the assessment center on the fire station bulletin board, informing eligible employees of the examination scheduled for November 15, 2016. (Testimony of Gagnon; R.Ex. 2)
12. The Assessment Center, the exercises for which were designed and administered by MMA, was conducted on November 15, 2016. (Testimony of Gagnon; R.Ex. 4)
13. The Center consisted of evaluation of managerial capabilities through scenario questions, presentations, and situations involving employee issues. (Testimony of Gagnon)
14. Chief Gagnon was not present at the assessment center and was not involved in planning for the center. (Testimony of Gagnon)
15. At the conclusion of the assessment center, MMAS sent a listing of the seven (7) candidates who participated, ranked by their performance, to the state’s HRD and the

Town's Human Resource Director. (R.Ex. 4; Testimony of Gagnon) This listing constituted the eligible list for the promotional appointment. (R.Ex. 4) The candidates were ranked as follows for their performance on the assessment center:

- 1 Candidate A
 - 2 (tie) Candidate B
 - 2 (tie) Appellant, a member of the union executive board
 - 4 Candidate C
 - 5 Candidate D, a member of the union executive board
 - 6 Candidate E
 - 7 Candidate F, a member of the union executive board
- (Id.)

16. Since the IFD wanted to make two (2) Lieutenant promotions, it considered the first five (5) firefighters on the listing, including the Appellant. (Testimony of Gagnon; R.Ex. 3)
17. The Town, pursuant to the terms of the MOA it had entered into with the Union, then conducted separate oral interviews of the five (5) candidates. (Testimony of Gagnon; R.Ex. 2)
18. All interviews were conducted by the interview board on March 6, 2017. (Testimony of Gagnon; R.Ex. 5)
19. The oral interview board (board) consisted of the following seven (7) individuals: Town Manager Robin Crosbie; Human Resources Director, Jennifer Breaker; Chief Gagnon; Mark Morse, President of MMA Consulting Group, Inc. (MMA); and three (3) others selected by MMA: Dennis Fire Chief, Mark Dellner; Wrentham Fire Chief, Mark Pare; and former Framingham Fire Chief, Gary Daugherty. (Testimony of Gagnon; R.Ex. 5)
20. All candidates were asked the same questions by the board, and the board utilized a scoring document to rate each candidate's performance immediately after his interview. The Town's Human Resources Director took notes of the group's observations and recorded these on an evaluation criteria sheet. (Testimony of Gagnon; R.Ex. 5)

21. Each interview lasted between ten (10) and twenty (20) minutes, and an audio recording was made of all of the interviews except the interview of Candidate B.⁵ (Testimony of Gagnon)
22. During his interview, the Appellant provided unfocused and erratic answers to the questions asked of him, at times making questionable statements that were not responsive to the questions asked. (Testimony of Gagnon; R.Exs. 5 and 5A)
23. For example, when asked about his relevant experience, the Appellant began telling a childhood story about being on a farm and stated that he had various family members who worked in various law enforcement jobs. Similarly, the Appellant stated during the interview that he should be the Chief of the Department, which was not relevant or responsive to any portion of the interview. Moreover, the board found the latter statement to be inappropriate. The board also concluded that the Appellant's performance during the interview was self-centered in that he repeatedly talked about various mechanisms that he had worked on in the Department, of his own choosing, and about the one-on-one help or guidance he had provided to individual new members of the IFD. (Testimony of Gagnon; R.Exs. 5 and 5A)
24. The Chief found that the Appellant's responses did not reflect someone who was focused, clear and concise. The Appellant's answers included references to peripheral subjects not germane to the Lieutenant position for which he was being interviewed. (Testimony of Gagnon; R.Exs. 5 and 5A)

⁵ Counsel for the Respondent indicated that Mr. B's interview was conducted via online meeting because he was out of the country at the time of the interviews. Counsel advised that the Respondent had been unable to produce an audio recording of the online meeting but indicated that it would attempt to make such a recording and submit it to the Commission. I did not receive such a recording. Candidate B was not selected for promotion.

25. Candidate D, who was ultimately selected despite his lower rank on the Certification, provided confident, direct and strong responses to questions posed during his interview. He displayed a strong understanding of the role of a lieutenant as a group leader and the associated duties, demonstrating a disciplined approach to the position, and he presented as a professional who is competent to hold a leadership position within the IFD.

(Testimony of Gagnon; R.Exs. 5 and 5A)

26. At the conclusion of each interview, the seven (7) members of the board discussed the candidate's performance based on the following four (4) evaluation criteria:

communication, supervision, teamwork, and technical competence and together they determined each candidate's interview score. (Testimony of Gagnon; R.Ex. 5)

27. The seven (7) candidates' scores for a particular category were then averaged, which became the candidate's score for that category. The average scores for each category were then combined for a total score. (Testimony of Gagnon; R.Ex. 5)

28. The five (5) interviewed candidates had the following scores:

Candidate A	35.8
Candidate B	32.7
Appellant	27.4
Candidate C	35
Candidate D	35.5

(R.Ex. 5)

29. In addition to the candidate's total score, the board came to a consensus with regard to its comments on each candidate's overall performance. The Human Resources Director wrote down these comments in the section titled "additional comments" on the candidate's score sheet. (Testimony of Gagnon; R.Ex. 5)

30. On the scoring sheets for each of the candidates, the board commented in writing as follows:

Candidate A – “Understands position and draws/applies experiences gained through acting officer roles.”

Candidate B – “Communicates very well but didn’t communicate technical knowledge/capabilities”

Appellant - “Communication was weak and hard to follow. Too self-oriented in answers.” (R.Ex. 5)

Candidate C – “Good communication: answers responsive to questions; understands concepts of leadership and teamwork”

Candidate D – “Practical sense of job requirements and understands role of supervisors. Understands teamworks (sic).”

(R.Ex. 5)

31. Prior to making a final promotional decision, Chief Gagnon and the Town Manager reviewed the employment histories of all five (5) candidates. This included a review of each employee’s personnel file, including their disciplinary history. (Testimony of Gagnon)
32. At the time of the promotional decision, the Appellant’s personnel file contained three (3) disciplinary incidents, including two (2) suspensions and one (1) written warning. (Testimony of Gagnon)
33. The Chief and Town Manager also reviewed the personnel files and disciplinary histories of the other candidates. (Testimony of Gagnon)
34. The review showed that Candidate C had received a verbal warning in 2010 for failing to wear a seatbelt. (Testimony of Gagnon)
35. The review further showed that Candidate D had no disciplinary history. (Testimony of Gagnon)
36. Candidate A, who was ranked higher than the Appellant on the Certification, was suspended without pay for a period of approximately 25 calendar days more than twenty (20) years ago. (Testimony of Gagnon)

37. Based on consideration of these factors, including each candidate's ranking on the Certification, their interview performance and their disciplinary histories, the Town Manager selected Candidates A and D to fill the promotional vacancies, with only Candidate D bypassing the Appellant. (R.Ex. 7; Testimony of Gagnon)
38. On or about March 22, 2017, the Town Manager sent correspondence to the Appellant stating that he had been bypassed for the promotional appointment in favor of a lower-ranked candidate. As grounds for the bypass decision, the Town Manager cited the Appellant's poor interview performance and his disciplinary record within the Department. (R.Ex. 6)
39. The Appellant subsequently timely filed the instant appeal. (Administrative Notice)
40. At the Commission hearing, the Appellant's testimony was difficult to comprehend at times in that his responses to questions were sometimes indirect, missed the mark, or he referenced matters unrelated to the question posed to him. The Appellant did not intentionally refuse to answer questions. Rather, the Appellant's manner of speaking can be confusing. In addition, at times, I needed to convey the meaning of the Appellant's cross-examination questions (more often than usual with other pro se appellants) because the Appellant's questions were unclear. (Testimony of Appellant; Administrative Notice)

Applicable Law

The authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides, in part:

If an appointing authority makes an original or promotion appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such

appointment, the appointing authority shall immediately file...a written statement of his reasons for appointing the person whose name was not highest.
(Id.)

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing the civil service competitive examination or an assessment center is not absolute and is subject to review by the Commission. The appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "reasonably thorough review" and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. *See, e.g., Brackett v. Civil Service Comm'n*, 447 Mass. 233, 543 (2006) and cases cited; *Beverly v. Civil Service Comm'n*, 78 Mass.App.Ct. 182 (2010); and *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).

In reviewing a bypass decision, "[t]he commission's primary concern is to ensure that the appointing authority's action comports with 'basic merit principles,' as defined in G.L.c.31, §1." *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012) citing *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission "finds the facts afresh", and is not limited to the evidence that was before the appointing authority. *E.g., Beverly v. Civil Service Comm'n*, 78 Mass.App.Ct. 182 (2010); *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727-28 (2003); *Tuohey v. Massachusetts Bay Transp. Auth.*, 19 MCSR 53 (2006) (appointing authority must proffer "objectively legitimate reasons" for the bypass).

Analysis

The Respondent has established by a preponderance of the evidence that it had reasonable justification to bypass the Appellant. While the Appellant was tied for second on the Certification, he ranked at the bottom among the five (5) candidates that the Respondent interviewed. I repeatedly and carefully listened to the recorded interviews of the four (4) candidates for whom a recording is available. Although it is problematic that the interviewers collectively scored each candidate, undermining the purpose of having multiple interviewers scoring the candidates individually, the recordings provide the Commission with the opportunity to review the interviews directly. In addition, three (3) members of the board were from other municipalities, giving at least the appearance of a relatively objective assessment of the candidates' interviews.

There is a clear distinction between the interviews of Candidates A and D, whom the Respondent selected, only one (1) of whom bypassed the Appellant, and the Appellant. Both Candidates A and D responded knowledgably, directly, confidently and without hesitation to the questions they were asked at their interviews. In addition, their responses clearly exhibited their leadership abilities, explicitly and promptly indicating how they would respond to various challenges that may arise in supervising IFD personnel. By comparison, the Appellant's responses to the interview questions were sometimes hard to follow, he referenced unrelated topics in response to some questions, he spent considerable time talking about the many mechanical problems he has addressed at the IFD over the many years of his tenure, and he offered little information to show the board that he was ready and able to supervise the IFD firefighters as a Lieutenant. At the Commission hearing, I also found it difficult to comprehend aspects of his testimony and could not follow his train of thought on multiple occasions. A

Lieutenant must be able to communicate clearly, quickly and directly with the firefighters, most critically when they are actively fighting fires. While it is clear that the Appellant has many professional skills that he has honed over the many years of his dedicated service to the IFD, the Respondent had reasonable justification to decide that the Appellant's communication skills were not at the level needed to be able to communicate commands effectively, especially in the midst of a fire fight. Lacking sufficient communication skills, a Lieutenant's efforts to lead members of the IFD would be hampered, increasing the risk of harm to the firefighters and the public.

In addition, the Respondent bypassed the Appellant based as he had a disciplinary record at the IFD and Candidate D, the one (1) candidate selected who was named below him, had no disciplinary record.

Finally, the Appellant argues that Candidates A and D were unfairly promoted, alleging that, as members of the union executive board, they were involved in negotiations leading to the Memorandum of Agreement between the union and the Town that provided that interviews would be conducted after the assessment center. However, the Appellant also said that he was a member of the union executive board at the time. There is no indication in the record that some members of the union executive board had access to material that could have given them an unfair advantage in the subsequent assessment center and interviews. The Appellant also questioned the need for interviews. I find nothing in the delegation agreement between the Town and HRD, or the MOA between the Town and the union, that precludes the Town from conducting interviews.

Conclusion

For all of the foregoing reasons, the appeal of Mr. McInnis, docketed as G2-17-083, is hereby *denied*.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

James McInnis (Appellant)

Timothy D. Zessin, Esq. (for Respondent)