

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MARK McKEOWN,
Appellant,

v.

G1-06-02

BOSTON POLICE DEPARTMENT,
Respondent.

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Mark McKeown (hereafter "McKeown" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Boston Police Department (hereafter "Appointing Authority" or "BPD"), bypassing him for original appointment to the position of police officer. A pre-hearing was held on March 20, 2006 and a full hearing was held over two days on September 5, 2007

and December 6, 2007 at the offices of the Civil Service Commission. Three tapes were made of the hearing.

FINDINGS OF FACT:

Twenty-two (22) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Robin Hunt, Human Resources Director, Boston Police Department;

For the Appellant:

- Daniel Ciccolo, Boston Police Department;
- Joseph Coppinger, Boston Municipal Protective Services;
- Paul DeLeo, Boston Police Department;
- Kathleen Durepo, Boston Police Department;
- Daniel Linskey, Boston Police Department;
- Mark McKeown, Appellant;
- Tara McKeown, Appellant's wife;
- Mark Walsh, Boston Police Department;

I make the following findings of fact:

1. The Appellant is a thirty-five year old male, who is a lifelong resident of Boston who graduated from the University of Massachusetts at Amherst. (Testimony of Appellant)
2. The Appellant, subsequent to the bypass which is the subject of the instant appeal, was appointed to the position of police officer in the Boston Police Department via a lateral transfer from the Boston Municipal Police Department (BMPD) after both the BMPD and the

position of municipal police officer was abolished on December 31, 2006. (See BPPA et al v. v. City of Boston and HRD, CSC Case No. G-07-33) (2007). (Testimony of Appellant)

3. After being transferred to the Boston Police Department, he chose to continue with the instant appeal seeking a retroactive civil service seniority date.
4. Prior to the above-referenced lateral transfer, the Appellant's name appeared on Certification 250537 by virtue of his taking and receiving a score of 94 on the May 2003 civil service exam for the position of police officer. (Testimony of Appellant)
5. The Appellant applied for a position with the Boston Police Department on June 29, 2005. After the Appellant submitted his application, a background investigation was undertaken by Detective Janeen Mitchell, who is assigned to the Boston Police Recruit Investigations Unit. (Testimony of Robin Hunt)
6. Robin Hunt, Director of the Boston Police Department's Human Resources Unit, testified that the results of the Appellant's background investigation were presented to the Department hiring committee during a "roundtable" discussion. Typically, the "roundtable" discussion involves the Commander of Recruit Investigations, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor's Office. (Testimony of Robin Hunt)
7. Robin Hunt explained the hiring process in order to become a Boston Police Officer. She explained that the Department heavily considers a candidate's prior employment attendance history when making hiring decisions, since police officers are expected to not only show up for their scheduled shifts but are often times ordered to perform mandatory overtime shifts. She explained that one's past attendance history is something the Department examines very closely since the Department must make sound hiring decisions because the public's safety is

at issue. The Department is not in a position to hire a candidate who has not proven that he is dependable. (Testimony of Robin Hunt)

8. The investigation into the Appellant's background revealed that the Appellant had been a member of the City of Boston Municipal Police Department since 1999. (Exhibit 11)
9. Boston Police Detective Janeen Mitchell, as part of her investigation into the Appellant's attendance history, obtained the Appellant's personnel file from the Boston Municipal Police Department. Included in that personnel file were the Appellant's 2002-2005 attendance history. (Testimony of Robin Hunt and Exhibits 1-8)
10. The attendance records revealed that, during the time period from January 1, 2002 through April 2, 2005, the Appellant used fifty four (54) sick days. Of those fifty four (54) days, thirty four (34) were used before or after authorized time off.
11. As the Director of Human Resources, Robin Hunt was a member of the "roundtable" discussion involving the Appellant's candidacy. All members of the "roundtable" discussion agreed that the totality of the circumstances surrounding the Appellant's use of sick time from 2002-2005 (the three (3) years immediately preceding his application) rendered the Appellant unsuitable to be a Boston Police Officer. (Testimony of Robin Hunt)
12. Not only did the Boston Police deem the Appellant's usage of sick time as excessive, but a clear pattern of sick time usage emerged from careful review of his attendance history from 2002-2005. That pattern of sick time usage, before and after authorized days off, was concerning to the Department. (Testimony of Robin Hunt)

2002 Attendance

13. In February 2002, the Appellant called in sick two (2) days in a row, on May 5 and 6. The Appellant was unable to provide any medical documentation relative to these days off.
(Exhibit 1)
14. In March 2002, the Appellant had authorized days off on February 22 and February 23. He called in sick the next day, February 24. The Appellant supplied a doctor's note; however, the note pre-dated his "sick day" (the 24th) by six days. The note is dated March 18, 2002. The Appellant did not call in sick immediately after seeing the doctor on the February 19, 20, or 21. (Exhibit 1)
15. In April 2002, the Appellant had authorized days off on April 21 and 22. He called in sick the next day, April 23. (Exhibit 1). The Appellant supplied a doctor's note; however, the note post-dated the illness. (Exhibit 14B)
16. In May 2002, the Appellant had authorized days off on May 15, 16, 17, 18 and 19. He called in sick the next day, May 20. He then had authorized days off the next two days, May 21 and 22. (Exhibit 1). The Appellant admits that he was in Las Vegas from May 15-19. He testified that he took a red-eye flight from Las Vegas on May 20 and did not arrive home on time and felt he was too tired to go to work due to the delayed flight, so he called in sick on the 20th. When asked if he actually remained in Las Vegas until the May 22, so as to extend his vacation to 8 straight days, he denied doing so. (Testimony of Appellant)
17. In June 2002, the Appellant called in sick on June 1. He had authorized days off the next two days, June 2 and 3. The Appellant supplied a doctor's note for his day off; however, the note is dated June 14, 2002, which post-dates the "sick day" by fourteen (14) days. (Exhibit 1)

18. In July 2002, the Appellant called in sick on July 18 and 19. He had authorized days off on July 20 and 21. He then called in sick again on July 22. (Exhibit 1)
19. In October 2002, the Appellant called in sick on October 3 and was not at work the next day, October 4, due to swapping his shift with a co-worker, which was authorized. (Exhibit 1). The Appellant supplied a doctor's note; however, the note pre-dates the "sick day." (Exhibit 14D). He saw the doctor on October 1, was able to go to work on October 2, and then called in sick on October 3. (Exhibit 1)
20. Also in October 2002, the Appellant called in sick on October 28. He could not supply a doctor's note relative to the day off. (Exhibit 1)
21. In November 2002, the Appellant had two authorized days off, November 23 and 24. He called in sick the next day, November 25. (Exhibit 1) In his August 11, 2005 letter to the Department (Exhibit 10), the Appellant refers the Department to a December 6, 2002 doctor's note; however, the note post dates the "sick day" by eleven (11) days. (Exhibit 14P). The Appellant claims that the first time the doctor could see him was on December 6. (Testimony of Appellant)
22. In December 2002, the Appellant called in sick on December 10. He had authorized days off the next two days, December 11 and 12. (Exhibit 1)
23. Also in December 2002, the Appellant called in sick on December 28 and had authorized days off the next two days, December 29 and 30. He called in sick the next day three days, December 31, 2002 (New Years Eve), January 1, 2003 (New Year's Day) and January 2, 2003. (Exhibit 1)

2003 Attendance

24. In February 2003, the Appellant called in sick on February 26. He had authorized days off the next three days, February 27-28 and March 1. The Appellant was unable to provide any medical documentation relative to this day off. (Exhibit 3)
25. In March 2003, the Appellant called in sick on March 3 and March 20. (Exhibit 3). He testified that he believes he may have been having tests relative to a possible kidney donation for his sister. Although he thinks this may have been the reason he was out sick on those dates, he could not be sure, nor could he provide any medical documentation to prove it. He testified that he underwent all tests at Brigham and Women's Hospital. Under cross-examination, he acknowledged that the hospital does keep medical records, however, he did not have any records to substantiate his absences. The Appellant also testified that he was never given any advance notice of any of these tests by the hospital. He said that the hospital would call the night before and expect him to be there the next day. (Testimony of Appellant)
26. In April 2003, the Appellant called in sick on April 9. He had authorized days off the next two days, April 10 and 11. (Exhibit 3). The Appellant testified that he believes he may have been having tests relative to a possible kidney donation for his sister. Although he thinks this may have been the reason he was out sick on those dates, he could not be sure, nor could he provide any medical documentation to prove it. He testified that he underwent all tests at Brigham and Women's Hospital. Under cross-examination, he acknowledged that the hospital does keep medical records, however, he did not have any records to substantiate his absences. The Appellant also testified that he was never given any advance notice of any of

these tests by the hospital. He said that the hospital would call the night before and expect him to be there the next day. (Testimony of Appellant)

27. In May 2003, the Appellant called in sick on two consecutive days, May 25 and 26 (Memorial Day). (Exhibit 3) The Appellant provided a doctor's progress note, which indicated that the Appellant had an appointment scheduled for June 6, 2003, which post dates his days off by twelve (12) days. The Appellant failed to even attend that doctor's appointment, as indicated by the progress note which states "no show." (Exhibit 16)
28. In June 2003, the Appellant worked seven (7) total days. He was off from May 9 through May 29, all of which was authorized (regular days off and vacation time) time off. He did not call in sick once during the month of June 2003. (Exhibit 3)
29. On July 25, 2003, the Appellant was disciplined by his employer for his use of sick leave. In a letter dated July 25, 2003, his employer states "...we have found your sick leave proves to be considerably above average, and is therefore, a matter of serious concern.... Your attendance will be monitored for improvement during the next quarter. If there is no substantial improvement, more severe progressive disciplinary action will be taken." (Exhibit 21).
30. The day after the Appellant was disciplined for his use of sick leave, the Appellant called in sick (July 26, 2003). He had authorized time off the next two days, July 27 and 28. He could provide no medical documentation relative to the sick day off. (Exhibit 3).
31. During the entire month of August 2003, after receiving the discipline letter in July 2003, the Appellant did not call in sick once. (Exhibit 3)
32. In September 2003, the Appellant called in sick on September 6. The Appellant was unable to provide any medical documentation relative to this day off. (Exhibit 3).

33. In October 2003, the Appellant took a “personal day” on October 4. He then called in sick the very next day, October 5. The Appellant worked on the 6th and had authorized days off on October 7 and 8. He called in sick the next two days, October 9 and 10. The next two days, October 11 and 12, he was authorized to “swap” his shift with a co-worker. He then had authorized time off on October 13 and 14. In summary, the Appellant was not at work from October 4 through October 14, for various reasons, three of which were sick days (before and after authorized time off). (Exhibit 3) The Appellant provided a doctor’s note from Eye Care Specialists, P.C. The note “excuses” the Appellant from work on October 5, 9 and 10. The date of the note, however, post dates the “illness” by twenty four (24) days. The first day the Appellant was out sick was October 5. The note is dated October 29. At the bottom of the note, it states “scratched eye.” (Exhibit 13)
34. In November 2003, the Appellant called in sick on November 5, which was before two authorized days off on November 6 and 7. (Exhibit 3) The Appellant provided a doctor’s progress note which indicates that the Appellant was complaining of “head and neck pain... x years... acted up last month....” (Exhibit 14P)
35. In December 2003, the Appellant used a “personal day” on December 5. He had the next two days off, December 6 and 7 (authorized days off). He called in sick the next two days, December 8 and 9. In summary, the Appellant was not at work from December 5 through 9, for various reasons –two of which were sick days. The Appellant was unable to provide any medical documentation relative to the two “sick” days off on December 8 and 9. (Exhibit 3).

2004 Attendance

36. In April 2004, the Appellant called in sick on April 2. (Exhibit 5). The Appellant admits that he was not sick on this date. He testified that his grandfather fell and injured himself and the Appellant stayed home to visit him. The Appellant testified that he was granted three (3) personal days per year. (Testimony of Appellant). Up to that point, he had only used two (January 15 and 16). (Exhibit 5). Rather than use the third personal day, the Appellant chose to call in sick instead.
37. Also in April 2004, the Appellant called in sick on April 21, which was before two authorized days off on April 22 and 23. (Exhibit 5). The Appellant notes that his grandfather died on April 22 and he needed to visit him in the hospital on the 21st. (Testimony of Appellant)
38. In May 2004, the Appellant called in sick on May 14, which was the day before a vacation day, May 15. The Appellant then had two authorized days off on May 16 and May 17. (Exhibit 5). In his letter to the Boston Police Department dated August 11, 2005, the Appellant indicates that his wife experienced a miscarriage and such was his reason for calling in sick. (Exhibit 10)
39. At no time during the Appellant's tenure with the City of Boston Municipal Police Department did the Appellant ever apply for Family Medical Leave Act assistance (FMLA). (Testimony of Appellant).
40. In July 2004, the Appellant had two authorized days off on July 21 and 22. He called in sick the next day, July 23. (Exhibit 5). In his letter to the Boston Police Department dated August 11, 2005, the Appellant indicates that he was sick on the 23rd. He could not provide any medical documentation relative to this day off. (Exhibit 10)

41. In August 2004, the Appellant called in sick on August 1. He then had two authorized days off on August 2 and 3. (Exhibit 5). In his letter to the Boston Police Department dated August 11, 2005, the Appellant indicates that he was sick on the 1st. He could not provide any medical documentation relative to this day off. (Exhibit 10)
42. In September of 2004, the Appellant called in sick on September 14 and September 21. (Exhibit 5). He was able to provide medical documentation which indicates that he injured his knee on September 9. (Exhibit 14J). Even though he injured his knee on September 9, he was able to go to work the next day, September 10. He called in sick five days after his injury, on September 14. He was able to go to work from September 15-20 thereafter, yet he called in sick again on the September 21, allegedly due to the same knee injury. (Exhibit 5)
43. In October 2004, the Appellant called in sick on October 24, which was the day before an authorized day off on October 25. (Exhibit 5). In his letter to the Boston Police Department dated August 11, 2005, the Appellant indicates that he called in sick to stay home with his pregnant wife on the 24th. (Exhibit 10)
44. In November 2004, the Appellant called in sick on November 15 and November 21. (Exhibit 5). In his letter to the Boston Police Department dated August 11, 2005, the Appellant indicates that he called in sick on those two dates because he “was made union president. The combination of pregnancy and the new duties created a significant amount of stress. Which resulted in my stomach problems....” He could not provide any medical documentation relative to these two days off. (Exhibit 10)
45. In December 2003, the Appellant called in sick on December 23, the day before two authorized days off on December 24 (Christmas Eve) and December 25 (Christmas Day). He called in sick again on December 27. Two days later, he called in sick again on December

29, which was the day before two authorized day off on December 30 and 31 (New Year's Eve). (Exhibit 5). The Appellant provided medical documentation which post-dates his sick time by thirteen (13) days. The first day he was out sick was December 23, 2004, yet the first time he saw the doctor for this absence was on January 5, 2005. One of the notes the Appellant provided was on a prescription pad dated 1/5/05, which states, "Mark McKeown was seen today for symptoms experienced on 12/23/, 12/27, 12/29/04 and 1/3/05." (Exhibit 14K). An accompanying progress note, dated 1/5/05, indicates "stomach ache for two weeks." (Exhibit 14L).

2005 Attendance

46. In January 2005, the Appellant called in sick on January 3. He also called in sick on January 27, which was the day before a day off to attend jury duty (on the 28th). The Appellant was unable to provide any medical documentation relative to this day off on the 27th. (Exhibit 7)
47. In February 2005, the Appellant called in sick on February 2. He could not provide medical documentation relative to this day off. Thereafter, the Appellant had two authorized days off on February 16 and 17. He then called in sick on February 18, 19 and 20. (Exhibit 7). The Appellant provided conflicting medical documentation relative to these absences. The first note, dated February 17, indicates that the Appellant went to the hospital for chest pains at 11:02 PM. He was told that his chest pain does not have an easily identifiable cause and that hospitalization is not necessary. The hospital advised the Appellant to see his doctor within 48 hours. (Exhibit 14N). The Appellant failed to see his doctor within 48 hours. The first time he saw his doctor was five (5) days later on February 22. The second medical note contradicts his February 17 note. The second note, from a different doctor, indicates that the

Appellant was seen for a “viral syndrome” and makes no mention of chest pains. (Exhibit 14M)

48. In March 2005, the Appellant had two authorized days off on March 12 and 13. He called in sick the next two consecutive days, March 14 and 15. (Exhibit 7). He provided a medical note that post dates the absences. The Appellant saw his doctor of March 16 for “abdominal pain.” The note states that the Appellant “was ill on 3/14, 3/15.” (Exhibit 14O).
49. In April 2005, the Appellant called in sick on April 2. He had an authorized day off (he swapped his shift with a co-worker) the next day, April 3. The Appellant could not provide any medical documentation relative to the sick day off. (Exhibit 7).
50. The Appellant testified that he never once was able to get an appointment with his doctor for the same day as his illness. When asked on cross examination if his doctor would see him on the same day of the illness if it was an emergency, the Appellant indicated that it was never an emergency. (Testimony of Appellant)
51. The Appellant testified at the hearing that when he worked as a Municipal Police officer, he would call in sick if he did not feel 100% healthy. When asked on cross examination if he felt that he could still go to work “feeling 90%,” he indicated that he could not do that since he was a police officer and he was expected to protect the public and could not do so if he wasn’t 100%. (Testimony of Appellant)
52. The Appellant testified that he was often forced to use sick time because, prior to now-Superintendent Daniel Linskey assuming a leadership role in the Boston Municipal Police Department, last-minute requests for vacation and/or personal time were rejected if they would result in overtime. According to the Appellant, there was a tacit understanding that officers, as an alternative, should use sick time instead. (Testimony of Appellant)

Discretionary Interview

53. As part of its investigation into the Appellant's application to become a Boston Police officer, the Recruit Investigations Unit requested the Appellant undergo a "discretionary interview." This interview was arranged in order to talk to the Appellant about the pattern of sick time usage that appeared in his personnel records from the Municipal Police. (Testimony of Robin Hunt)
54. The Appellant testified that he was notified of this interview two weeks prior to its scheduled date. He was personally told by Detective Janeen Mitchell that he would be interviewed relative to his sick time. In preparation for the interview, the Appellant reviewed his personnel file and counted the sick days as best he could. (Testimony of Appellant)
55. The discretionary interview was held at the Boston Police Headquarters on August 11, 2005. Present at the interview were Boston Police Detective Janeen Mitchell, Sergeant Detective Norman Hill, Deputy Superintendent Marie Donahue, and the Appellant Mark McKeown. (Exhibit 15)
56. During the interview, the representatives of the Boston Police told the Appellant that they were concerned with his attendance issues and inquired as to why he used so much sick time from 2002-2005. They were concerned with the obvious pattern of usage, both before and after authorized days off. (Exhibit 15)
57. The Appellant admitted in the discretionary interview that some days he could have been extending his time off when he called in sick. He estimated that it was 50% of the time that he would call in sick to extend his days off. He admitted that "it is not the best situation." (Exhibit 15)

58. When asked during the discretionary interview if he thought fifteen (15) sick days used in 2002 was excessive, he admitted that he thought it was excessive. (Exhibit 15)
59. When asked about the use of seventeen (17) sick days in 2003, the Appellant stated that he was shocked that he used seventeen (17) days. (Exhibit 15)
60. The Boston Police representatives conducting the interview impressed upon the Appellant the importance the Department places on investigating a candidate's attendance history because the Department needs to be able to hire people who are dependable and who are going to show up for shifts, whether they are regularly scheduled shifts or mandatory overtime shifts. (Exhibit 15)
61. The Boston Police representatives conducting the interview informed the Appellant that they took issue not only with the obvious pattern of usage (before and after authorized days off), but also with some of the notes that the Appellant provided from his doctors. Many of the dates on the notes post-dated the sick day(s). (Exhibit 15)
62. Robin Hunt testified on behalf of the Department at the hearing of this matter and told the Commission that the roundtable discussion involved the Appellant's pattern of sick time usage and the fact that many of the notes he provided were vague and/or they post-dated the sick time used. (Testimony of Robin Hunt).
63. The Appellant admitted in the discretionary interview that he was shocked at the amount of sick time he has used. (Exhibit 15).

First Letter from Appellant to BPD, dated August 11, 2005

64. The Appellant wrote a letter to the Boston Police Department on August 11, 2005, the same day as the discretionary interview. In that letter, the Appellant states: "I understand that there are certain days and patterns that appear to be problematic. Despite the possibility of

mitigating factors, the decision to use my sick time was my own and I accept full responsibility.” (Exhibit 10)

Second Letter from Appellant to BPD, dated September 5, 2005

65. The Appellant wrote a second letter to the Boston Police Department on September 5, 2005.

In that letter, the Appellant further attempts to explain his sick time usage. He admits that his “usage of sick time appears to be excessive” but that its usage was due to extenuating circumstances. (Exhibit 17).

Third Letter from Appellant to BPD, dated October 16, 2005

66. The Appellant wrote a third letter to the Boston Police Department on October 16, 2005.

This letter was addressed to the Police Commissioner herself, Kathleen O’Toole. In that letter, the Appellant states, “I was told that you were personally notified of the situation and that steps were going to be taken to resolve it.” (Exhibit 20). When asked on cross examination if the Appellant had anyone contact the Police Commissioner personally on his behalf, he admitted that he did have someone make a phone call for him. (Testimony of Appellant).

67. Despite phone calls made on the Appellant’s behalf, the Department determined that the

Appellant’s level of sick leave usage was unacceptable and notified the Human Resource Division of the Commonwealth on November 14, 2005 that the Appellant’s excessive absenteeism rendered him ineligible for appointment as a Boston Police officer. (Exhibit 9).

68. During cross-examination at the Civil Service Commission hearing, the Appellant admitted that he drastically improved his sick time after he underwent the discretionary interview in 2005. He admitted that he did not want sick time to hold him back. He said that he made the decision to improve as an employee. He admitted that he realized that sick time should be

used when he really needs it. He also admitted that he previously said that he “understood why he was bypassed” by the Boston Police the first time around. (Testimony of Appellant).

69. The Appellant drastically improved his sick time usage as a Municipal Police officer. From August 2005 to November 3, 2006, the Appellant only used 2 sick days. (Testimony of Robin Hunt and Testimony of Appellant).

70. The Appellant re-applied for the position of Boston Police Officer and was appointed to the position on January 1, 2007. He was hired during this round of hiring because he proved to the Boston Police that he was capable of not abusing sick time, as evidenced by his drastic improvement from mid-2005 through 2006. (Testimony of Robin Hunt).

Paul DeLeo's Testimony

71. Paul DeLeo, a former City of Boston Municipal Police Officer, applied for a position with the Boston Police Department but he was not part of the same hiring cycle as the Appellant. He was considered for a prior class. DeLeo testified that sick time was an issue for the Boston Police Department when he applied. DeLeo, like the Appellant, was given a discretionary interview. (Testimony of DeLeo).

72. DeLeo's attendance records indicated that he used 51 sick days over a three year span of time. Nineteen (19) of those sick days, however, were used during the last nineteen (19) consecutive days of his employment with the Municipal Police. He was told by Human Resources at the Municipal Police that he could “dump” his sick time prior to his departure for another job. He was told to “use it or lose it.” (Testimony of DeLeo).

73. Immediately upon leaving the Municipal Police, DeLeo began work for the Newton Police Department. He did not miss a single day of work due to sick time during his first year of

employment with the Newton Police. He worked for the Newton Police for fourteen (14) months. (Testimony of DeLeo).

74. After DeLeo worked for the Newton Police, he was up for consideration for hiring by the Boston Police. After an investigation, the Boston Police considered the fact that 19 of DeLeo's 51 sick days were days that DeLeo was authorized to "dump" prior to his departure for another job. (Testimony of Robin Hunt).

75. DeLeo was able to prove to the Department that he was reliable and capable of showing up for scheduled shifts by his performance at the Newton Police Department. He did not miss a single day due to sick time in his first year with the Newton Police. (Testimony of Robin Hunt).

76. Just as DeLeo was hired after he was able to prove to the Boston Police that he was capable of not abusing sick time, so too was the Appellant. (Testimony of Robin Hunt).

Daniel Ciccolo's Testimony

77. Daniel Ciccolo is a current Boston Police officer. He was formerly a Sergeant on the City of Boston Municipal Police Department. He was the Appellant's supervisor. (Testimony of Ciccolo).

78. Ciccolo testified that Family Medical Leave Act (FMLA) assistance was available to Municipal Police officers in qualifying circumstances, pursuant to the statute. Postings for FMLA were in employee handbooks. (Testimony of Ciccolo).

Testimony of Daniel Linskey

79. Daniel Linskey is currently a Superintendent of the Boston Police Department. He has never been a City of Boston Municipal Police Officer. In April 2004, he was assigned by the Boston Police to command the Municipal Police Department. He held that job until January

2007. He knew the Appellant when the Appellant worked for the Municipal Police.

(Testimony of Linskey).

80. During his testimony at the hearing of this matter, Linskey was asked if he was aware of McKeown's sick time usage and whether, in his opinion, it appeared to be used in a particular pattern (before and after authorized days off). Linskey stated that, while he did not notice it when the Appellant worked for him, a review of the records after the fact indicate a pattern of usage. (Testimony of Linskey).

81. When asked about sick time usage in general by Appellant's attorney, Linskey stated that "it all depends on the person. I haven't called in sick in years." (Testimony of Linskey).

Testimony of Tara McKeown

82. The Appellant's wife testified at the hearing of this matter. She testified generally to the times when she was experiencing numerous difficult pregnancies. (Testimony of T. McKeown).

83. She was unsure of any particular date when the Appellant called in sick. She assumed that certain sick days were used by the Appellant to tend to her when she was ill. She could not confirm that any one particular date was used for that purpose, however. (Testimony of T. McKeown).

Testimony of Kathleen Durepo

84. The Appellant's sister testified at the hearing of this matter. She testified that she suffers chronic kidney disease and that the Appellant was going to be a possible kidney transplant donor for her. (Testimony of Durepo).

85. She testified that the Appellant underwent testing at the Brigham and Women's Hospital to determine if he qualified as a donor. She could not point to any specific date when the

- Appellant was tested. She could only assume that some of the days that he called in sick from December 2002 through Spring 2003 were due to his testing. (Testimony of Durepo).
86. No medical records from Brigham and Women's Hospital were provided by the Appellant relative to any particular kidney testing dates. (Testimony of Appellant).
87. The Appellant testified that he had no control over when the testing would take place. He never received advance notice of the testing date. The hospital would call him the night before and tell him to be in the next morning for testing. (Testimony of Appellant).
88. The Appellant was officially bypassed for appointment as a Boston police officer on November 14, 2005. (Exhibit 9).

CONCLUSION

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 v. 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 v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a 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). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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, 332 (1983). See Commissioners of Civil Service 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.

Mr. McKeown is a life-long resident of Boston; a 10-year employee of the City of Boston; and a graduate of the University of Massachusetts at Amherst. Subsequent to the bypass which is the subject of the instant appeal, the Appellant was transferred to the Boston Police Department as a police officer. After being transferred, he chose to continue with the instant bypass appeal in order to seek a retroactive civil service seniority date from the Commission, back to the date of his bypass.

Unfortunately for the Appellant, at the time of his bypass, he had a horrendous attendance record that provided the Boston Police Department with reasonable justification for bypassing him. Subsequent to the bypass, his attendance record dramatically improved, leading the Boston Police Department to transfer him from the Boston Municipal Police Department to the Boston Police Department, when the position of Boston Municipal Police Officer was abolished on December 31, 2006. Given that the Boston Police Department chose, at its discretion, to give

more weight to the Appellant's most recent attendance record in order to approve his lateral transfer, it is perplexing that the Appellant would continue to pursue the instant bypass appeal, which is based on his previous and admittedly poor attendance record.

During the discretionary interview conducted by the Boston Police Department, the Appellant himself admitted that some days he could have been extending his time off when he called in sick. He estimated that it was 50% of the time that he would call in sick to extend his days off. He admitted that "it is not the best situation". Now aware that this candid admission provided the Boston Police Department with reasonable justification to bypass him at the time, the Appellant engaged in an eyebrow-raising exercise of revisionism during two days of hearing before the Commission.

First, the Appellant testified before the Commission that he was blindsided by the question at the discretionary interview and did not have the opportunity to review his attendance records before the interview. In fact, the Appellant was notified of the discretionary interview two weeks in advance and was told by the detective conducting his background check that his attendance record would be discussed.

Second, the Appellant had both his wife and sister testify before the Commission in an attempt to justify his sick time. It is undisputed that the Appellant's wife, at various times during the period in question, had medical issues that required the Appellant to use sick time. Further, it is undisputed that the Appellant volunteered to be screened for an organ transplant for his sister. However, even if the Commission fully accepts the Appellant's testimony, the sick time attributed to these two matters represents only a fraction of the sick time used by the Appellant during the period in question.

Third, the Appellant testified that he was forced to use excessive sick time because, prior to the now Superintendent Daniel Linskey assuming a leadership role in the Boston Municipal Police Department, last minute requests for personal and vacation time were not allowed if they would result in overtime. Yet, the Appellant acknowledged that in addition to his excessive sick time, he always used all of his allotted vacation and personal time. This reasoning was not persuasive. Moreover, even now-Superintendent Daniel Linskey, who was called to testify on behalf of the Appellant, acknowledged that he was troubled by the Appellant's pattern of sick time usage.

Fourth, the Appellant called Robert DeLeo to testify in order to show that the Boston Police Department hired someone with an attendance record as dismal as his own (51 sick days in three years). According to DeLeo's testimony, however, 19 of those days came at the end of his employment with the Boston Municipal Police Department when he was told he could "dump" 19 sick days prior to his departure. Although the Commission is appalled that the City of Boston would encourage such a blatant abuse of taxpayer dollars, it does distinguish Mr. DeLeo's sick time usage from that of the Appellant. Further, a significant portion of the remaining 32 days was used as a result of eye surgery. Moreover, between his employment at the Boston Municipal Police Department and his transfer to the Boston Police Department, Mr. DeLeo was employed by the Newton Police Department where he had an exemplary attendance record. Similar to the situation with the Appellant, the Boston Police Department gave more weight to the most recent attendance record when they agreed to transfer him from the Newton Police Department.

Finally, the Appellant testified that he believes he was singled out for non-appointment because of reasons unrelated to basic merit principles (i.e. – his union leadership role). In fact, the record shows that it was the Appellant who sought to use political influence in the

appointment process, including having others contact the then-Police Commissioner on his behalf. That intervention failed and the Boston Police Department, consistent with basic merit principles, bypassed the Appellant due to this excessive use of sick time at the time of his bypass.

As referenced earlier, the Boston Police Department, based on the Appellant's improved attendance record, subsequently hired the Appellant as a police officer as a result of a lateral transfer from the Boston Municipal Police Department to the Boston Police Department. But for the Appellant's stark improvement in attendance, the BPD may well have been justified in declining his lateral transfer.

After considering all of the testimony and evidence in the record, I conclude that the BPD established just cause, by a preponderance of the credible evidence, for bypassing the Appellant for selection as a police officer in the City of Boston at the time of bypass and there is no evidence of inappropriate motivations or objectives that would warrant the Commission's intervention in this matter.

For all of the above reasons, the Appellant's appeal under Docket No. G1-06-2 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman-YES; Guerin, Commissioner – YES; Henderson, Commissioner – YES; Marquis, Commissioner – YES; and Taylor, Commissioner - NO) on January 31, 2008.

A true record. Attest:

Commissioner

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Joseph G. Donnellan, Esq. (for Appellant)

Tara Chisholm, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)