

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

MICHAEL MONAGLE,
Appellant

v.

CASE NO: G1-08-56

**CITY OF MEDFORD
POLICE DEPARTMENT,**
Respondent

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Michael Monagle, acting pursuant to G.L.c.31, §2(b), duly appealed a decision of the City of Medford Police Department (MPD), the Appointing Authority, to bypass him for original appointment to the position of full-time Police Officer. A full hearing was held by the Civil Service Commission (Commission) on December 17, 2008. Witnesses were not sequestered. The MPD called one witness and the Appellant called two witnesses and testified on his own behalf. Thirty-two (32) exhibits were received in evidence. The hearing was digitally recorded. Post-Hearing submissions were received on February 5, 2009 from the Appellant and on February 6, 2009 from the MPD.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant; Barbara Monagle; Richard Monagle; and MPD Police Captain Barry Clemente) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

The Appellant's Background

1. The Appellant, Michael Monagle, was, at the time of the bypass involved in this appeal, a 29 year-old resident of Medford, Massachusetts. (*Exhibits 2, 26; Testimony of Appellant*)

2. Mr. Monagle is a 2001 graduate of Suffolk University, with a BS degree. After college, he served on active duty with the US Coast Guard from 2001 through March 2005, after which he was honorably discharged. (*Exhibit 11; Testimony of Appellant*)

3. While in the Coast Guard, Mr. Monagle was commended for his work, including development of an administrative filing system to aid with recordkeeping. He was selected to represent the Coast Guard at President Reagan's State Funeral and at President George Bush's second inauguration. There are no disciplinary entries in his service record. (*Exhibits 11, 26; Testimony of Appellant*)

4. In May 2006, Mr. Monagle began employment with the United States Postal Service as a letter carrier. He also worked part-time with his brother who owned a real estate development business. In December 2007, Mr. Monagle resigned his job at the USPS and began working full time with his brother. (*Exhibit 26; Testimony of Appellant*)

The Appellant's Driving Record

5. According to the official RMV driving record introduced by Mr. Monagle, he was

cited for speeding in Saugus on December 7, 1999, and was found responsible for that infraction. The driving history record provided to the MPD shows that Mr. Monagle was also cited for a seat belt violation in connection with the Saugus speeding incident, but, it does not appear he was found responsible for that infraction. The MPD version of the driving history also shows two prior stops (10/1/97 – wrong way on a one-way street; 2/1/96 – speeding), which Mr. Monagle disputed and he was found not responsible; neither of these charges appear on his official RMV Driving Record. (*Exhibits 5 & 10*)

The Appellant's Criminal Record

6. In 1994 (age 15), Mr. Monagle was charged with two juvenile criminal offenses. He was adjudged a delinquent on a charge of assault and battery arising from his fist fight in February 1994. He was charged again with assault and battery in July 1994, which was continued without a finding (CWOFF) and dismissed. Neither of these offenses are found on Mr. Monagle's "adult" CORI record but do appear on the more complete CORI report provided to the MPD. (*Exhibits 5 & 9, 32*)

7. In 1996 (age 18), Mr. Monagle was charged as a minor transporting alcohol, which charge was continued without a finding (CWOFF) and dismissed. According to the MPD police report, Mr. Monagle was one of four youths in a larger group assembled in Barry Park who had been observed by the arresting officer each to have been holding a "Bud Light" beer can. (*Exhibits 5 & 9; Testimony of Appellant*)

8. In June 1999, Mr. Monagle was charged with assault and battery. Mr. Monagle claimed that he was actually the victim, and the perpetrator had tackled him from behind and was then beaten up by his (Monagle's) brother. This charge against him was dismissed. (*Exhibits 3, 5, 9; Testimony of Appellant*)

9. On December 28, 1999, Mr. Monagle arrested by the MPD and charged with OUI Liquor, Negligent Operation of a Motor Vehicle, Failure to Stop for A Police Officer, Speeding, and a Lane Violation. Mr. Monagle refused a chemical test and his license was suspended for six months. All charges arising from that incident were dismissed after a motion to suppress was allowed and nothing appears on his official RMV Driving Record concerning this incident. At the hearing, Mr. Monagle strenuously disputed the facts concerning this incident as reported in the MPD's Arrest/Incident Report received into evidence. (*Exhibits 5, 10, 29, 32; Testimony of Appellant, Barbara Monagle*)

10. Mr. Monagle had one other brush with the MPD on July 4, 2006 stemming from his involvement in a fight at a family party. No charges resulted because a Clerk-Magistrate found no probable cause to issue a criminal complaint. The circumstances surrounding this incident are also strenuously disputed. (*Exhibits 1, 26, 30; Testimony of Appellant, Barbara Monagle, Richard Monagle*)

Appellant's By-Pass For Appointment as a Medford Firefighter

11. In June, 2006, Mr. Monagle's name appeared on a certification for original appointment as a Firefighter with the Medford Fire Department. A background investigation performed by Captain Barry Clemente of the MPD resulted in Mr. Monagle's bypass, without an interview for the following stated reasons:

"This candidate has an unacceptable driving record which indicates irresponsibility, poor judgment, and disregard for the law. He also has multiple criminal charges and court appearances. Based on the facts discovered during this background investigation, the Medford Fire Department recommends that Mr. Monagle is not a suitable candidate for a public safety position as Medford firefighter"

(*Exhibit 1*)

12. While Mr. Monagle application for appointment as a Medford firefighter was pending, Mr. Monagle's father, Richard, was a Medford Fire Lieutenant who had been

denied a request to return to duty from an accidental disability leave and who successfully appealed to the Commission which ordered Medford to allow Richard Monagle to be reinstated subject to taking and passing a PAT (Physical Abilities Test). (*Exhibit 1; Administrative Notice, CSC Case No. G1-06-44*)

13. Mr. Monagle appealed his bypass for appointment as a firefighter and the Commission allowed the appeal, finding that his criminal record was stale, he was not allowed to explain his record at an interview, at least one other successful candidate had a CORI record similar to his, and there appeared to be some animus toward him due to his father's ongoing civil service appeal. Based on these findings, by a 3-2 vote, the Commission majority determined that the the reasons given for bypassing Mr. Monagle for reasons of "fitness and character to be a firefighter" were inadequate. (*Exhibit 1*)

Appellant's Application for Appointment as a Medford Police Officer

14. Mr. Monagle's name appeared on Certification No. 260551 issued to the MPD in June 2006, for appointment of seven (7) permanent full-time police officers and he signed the certification as willing to accept. (*Exhibits 12, 13 & 14*)

15. The MPD conducted 30 minute interviews of twenty (20) candidates, including Mr. Monagle, over two days in August 2006. These interviews were conducted by a panel of MPD superior officers, including Captains Barry Clemente, Michael DiChiara and Alan Doherty.¹ The interviews consisted of a series of nine standard questions, with the candidates answers rated on a scale from 1 (poor) to 5 (excellent), the maximum total

¹ The evidence indicated that Lt. Dennis Durham also participated in the interview process (*Exhibits 3 & 20*), but none of his rating sheets were introduced at the hearing.

score being 45. The interviews were video recorded and DVDs of the interviews were introduced in evidence. (*Exhibits 15 thru, 20, 28, 33; Testimony of Capt. Clemente*)

16. In the fall of 2006, the MPD hired a total of six candidates from Certification 260551. The successful candidates included a “PAR.10” minority candidate and five other candidates, all of whom ranked above Mr. Monagle, including the son of the MPD Police Chief Leo A. Sacco, Jr. (*Testimony of Capt. Clemente*)²

17. As a result of a subsequent request, the MPD received a new Certification No. 27026, dated February 15, 2007, for original appointment of four (4) permanent full-time police officers, which was later enlarged in April 2007 to hire a total of six (6) additional officers. (*Exhibits 21, 22, 23, 24; Testimony of Capt. Clemente*)

18. The 2007 certification included Mr. Monagle’s name along with the names of the other candidates who had not been hired off the 2006 certification, as well as additional candidates further down on the eligible list whose names had not appeared on the 2006 certification. Mr. Monagle signed willing to accept and he completed the required application forms. (*Exhibits 4, 21, 22, 23, 24; Testimony of Capt. Clemente*)

19. The MPD conducted additional interviews of the candidates on the 2007 certification. First round videotaped interviews were conducted of the newly listed candidates, and second interviews were conducted of all candidates, including one with Mr. Monagle. (*Exhibit 33; Testimony of Capt. Clemente*)

19. The second round of interviews consisted of five “ethical” questions, which were graded 1 (Poor) to 5 (Excellent). These interviews apparently were not video recorded. According to Capt. Clemente, the MPD elected not to electronically record the second

² It was for this reason that Chief Sacco did not participate in the interview or hiring process. (*Testimony of Capt. Clemente*)

round interviews, because in the earlier interview process, two of the candidates “froze up” before the camera. Mr. Monagle’s second round rating sheet, and several, but not all of the other candidates, were introduced in evidence. (*Exhibit 25; Testimony of Capt. Clemente*).³

20. Although Mr. Monagle gave an inappropriate (Poor=1) response to one of the second round ethical questions (stating it would be appropriate to accept a free cup of coffee or discounted meal in some circumstances), his responses to the second round interview questions were not mentioned as reasons for his bypass. Capt. Clemente testified that Mr. Monagle gave a “pretty good” second interview and “communicated well.” (*Exhibits 3 & 25; Testimony of Capt. Clemente*)

21. The MPD selected six candidates for appointment, with an effective employment date of December 9, 2007: Michael J. Alpers, Derek F. Doherty,⁴ Greg G. Gianino, Roberto Luongo, Robert E. Moran and Patrick C. Munroe. All six of these candidates were ranked lower on Certification 270206 than Mr. Monagle. (*Exhibit 3*)

22. Capt. Clemente submitted letters to HRD to justify bypassing Mr. Monagle, including positive reasons for selecting the successful candidates as well as negative reasons for rejecting Mr. Monagle, which HRD approved on January 2008. This appeal duly ensued. (*Exhibits 3, 27; Testimony of Capt. Clemente; Claim of Appeal*)

³This Commissioner invited the MPD and the Appellant to offer the interview sheets for the other candidates in the 2007 hiring cycle, but neither party elected to do so. Thus, save for candidate Moran, none of the first or second round interview sheets for the successful candidates in the 2007 hiring cycle were offered in evidence.

⁴Because of his relationship to candidate Doherty, MPD Capt. Doherty, who participated in the 2006 hiring cycle, “took himself out” of the 2007 cycle. (*Testimony of Capt. Clemente*) The Appellant did not adduce evidence and did not advance any claim that bias or nepotism influenced the MPD’s selection of candidate Doherty.

The Reasons Stated For Bypassing The Appellant

23. Capt. Clemente's letter explaining Mr. Monagle's bypass states that he "did not score high on the interviews. Mr. Monagle indicated during the interviews that he had problems with some of the officers of the Medford Police Department." (*Exhibit 3*)

24. Capt. Clemente's letter also states:

"When asked about a police report that existed in which he had been implicated in a violent confrontation, he did take responsibility for his actions. He did however state that if hired, his partner would not have to worry about anything because he could handle himself.⁵ There was a concern among the Interview Board that Mr. Monagle solves problems with his fists instead of thinking out the problem. In his own written words, Mr. Monagle admits being in a fist fight with another young man in 1994. In 1999, Mr. Monagle described another incident by stating 'I was leaving a bar in Malden, Ma and I was tackled from behind. My brother beat up the kid that tackled me.' . . . Mr. Monagle did not have any additional entries in his folder since his last meeting with the Interview Board."

"Mr. Monagle. . . possesses a driving record and a criminal record. He has had interaction with the Medford Police Department as well."

"Mr. Monagle was also involved in an incident of violence that the Medford Police Department responded to. [Quoting details from the MPD Incident Record Report regarding the July 4, 2006 incident referred to above (*Exhibit 30*)]"

"Also, on 12-28-06,⁶ Mr. Monagle was arrested for OUI and miscellaneous motor vehicle offenses. Part of the police report reads [quoting from MPD Department Arrest/Incident Report referred to above (*Exhibit 29*)]"

(*Exhibit 3*)

25. Capt. Clemente's letter concludes:

"This candidate has an unacceptable driving record which indicates irresponsibility, poor judgment, and disregard for the law. He also has multiple criminal charges and court appearances. He has had negative contact with members of the Medford Police Department. Based on the facts discovered during this background investigation, the Medford Police Department recommends that Mr. Monagle is not a suitable candidate for a public safety position as a Medford police officer."

(*Exhibit 3*)

⁵ I find that, at the time of the interview, Capt. Clemente rated Mr. Monagle's response in this regard as "Acceptable". (*Exhibit 25*)

⁶ MPD's letter to HRD erroneously placed the OUI charge in 2006, when it actually occurred in 1999, and MPD acknowledged the error at the hearing. (*Testimony of Capt. Clemente*) While this error is a troubling mistake, taking the bypass letter provided to HRD as a whole, the error appears to have been obvious and it does not materially influence the Commission's ultimate conclusions about the underlying incident.

26. An undated and unsigned memorandum was introduced, containing the results of a background investigation of Mr. Monagle, apparently related to his application for appointment to the Medford Fire Department. In addition to quoting from his CORI and MPD records, the report provides additional detail concerning the July 4, 2006 incident, as related by a witness (A.Gr.) whom the investigator stated to have been interviewed on November 12, 2008. This report apparently related to Mr. Monagle's separate continuing effort to secure appointment to the Medford Fire Department, and was not prepared as part of the MPD hiring process. I infer, therefore, that the details of the November 2008 interview in this memorandum were not part of the reasons used to justify bypassing Mr. Monagle in September 2007. (*Exhibit 26; Claim of Appeal*)

Comparison With The Records of Successful Candidates

27. Mr. Monagle challenges the reason for bypassing him based on his criminal and driving record because he says certain other candidates with equally poor or worse records that he had were selected, despite such blemishes. The other candidates and their respective records are as follows::

- a. Candidate A (DOB: 1975):
 - 03/14/93 – Surchargeable Accident Medford
 - 09/07/94 – Speeding Medford – Not Responsible
 - 10/30/95 – Failure to Stop Medford – Not Responsible
 - 04/14/96 – No Inspection Sticker Concord – Responsible
 - 10/07/99 – Surchargeable Accident Medford
 - 05/12/99 – Driving W/O Reg/Lic in Possession Stoneham – Responsible
 - 05/12/00 – Failure to Keep In Right Lane Stoneham – No Prosecution
 - 02/20/07 – Failure to Stop Lexington – Responsible
- b. Candidate B (DOB: 1964)
 - 05/13/88 – Speeding Norwell – Responsible
 - 06/16/88 – Speeding Somerville – Responsible
 - 02/04/90 - Surchargeable Accident Stoneham
 - 02/27/90 – Surchargeable Accident Somerville
 - 05/18/91 – Surchargeable Accident Wilmington
 - 02/08/95 – Surchargeable Accident Wilmington
 - 12/21/96 – Surchargeable Accident Somerville

(Candidate B – continued)

11/20/97 – Out-of-State No Reg/Lic in Possession NH
06/12/98 – NDR-Financial Respon NH
06/23/98 – Revocation NDR- Financial Resp Indefinite NH
11/12/98 – Reinstated NH
11/01/01 – Revocation Bad Check Indefinite

c. Candidate C: (DOB 1978)

07/03/95 – No Inspection Sticker Arlington – Not Responsible
12/31/97 – Failure to Stop Saugus – Not Responsible
08/31/98 – Minor Transporting Alcohol
07/23/00 – Speeding Milton – Responsible
02/03/01 – Display Number Plate Boston – Responsible
05/01/01 – Display Number Plate Roxbury – Not Responsible
06/29/01 – Illegal Operation Tewksbury – Not Prosecuted
- Seat Belt Violation Tewksbury – Responsible

(Exhibits 7, 8 & 9)

28. According to Capt. Clemente’s letters of recommendation to HRD, the “driving” record of Candidate A and the “license” record of Candidate B, are “in proper order”. Capt. Clemente’s letter of recommendation regarding Candidate C omits to mention of that candidate’s driving or criminal record. (*Exhibit 27; Testimony of Capt. Clemente*)

29. I find that Mr. Monagle correctly asserts that it would be hard to justify a distinction between his fitness as a police officer from these three candidates based on the driving records alone. I find particularly noteworthy Captain Clemente’s semantics that Candidate B’s license history was “in order”, which I infer is intentional, so as to overlook Candidate B’s extremely problematic driving record (as referenced with other candidates), because it includes two speeding offenses and five at-fault accidents over an eight year period, all of which are certainly at least as problematic, if not more problematic, to the fitness to become a police officer as is Mr. Monagle’s record (of a single responsible speeding violation and two prior unfounded citations for which he was found not responsible). (*Exhibits 3, 8 & 27*)

30. Similarly, Mr. Monagle's CWO of on a minor transporting alcohol charge, was the same offense committed by Candidate C, but whose criminal record Capt. Clemente overlooked in recommending Candidate C. I find no substantial evidence upon which to distinguish these two similar, stale juvenile offenses for purposes of assessing present fitness for appointment as a police officer. (*Exhibits 7 & 27; Testimony of Capt. Clemente*)

Interview Performance

31. I reviewed rating sheets of the candidates interviewed in the 2006 first round and viewed the interview video for the Appellant as well as a number of the 2007 first round videos of the selected candidates in the 2007 hiring cycle. I find that the first round of interviews appear to have been conducted in a generally even-handed manner. The MPD gave a considerable amount of thought to the structure of the interview process and the questions to be asked, including reviewing the guidelines for interviews provided by HRD. Each candidate was asked the same questions and the interviewers ratings appear to be generally consistent across the candidates. Although the process certainly reflects a degree of subjectivity inherent in any interview process, Mr. Monagle has not pointed to any substantial evidence that would warrant the inference that the interviewers consciously skewed their evaluations of the interview performance of candidates due to pre-conceived perceptions or personal bias as to the relative merits of specific members of the pool of candidates. As noted earlier, all of the candidates selected in the 2006 cycle were ranked above Mr. Monagle on the certification, and all of the candidates selected in the 2007 cycle were ranked below him. (*Exhibits 15 thru 20, 28, 33; Testimony of Capt. Clemente*)

32. While the overall process appears to have been fairly conducted, the Appellant raises a fair challenge to MPD's explanation to HRD for the reasons to bypass Mr. Monagle based on his interview performance, i.e., Mr. Monagle did not score "high enough on the interview" and he "indicated during the interviews that he had problems with some of the officers of the Medford Police Department." (*Exhibit 3*)

33. Mr. Monagle's first round interview scores (27, 30, 33 = 90 out of 135) equates to a "3" average, which is considered "Acceptable" according to the MPD interview rating scores sheets. Mr. Monagle received above-acceptable ratings in 4 of the 9 areas of questioning (including two "Excellent" ratings from Capt. Clemente). His only unacceptable responses pertained to his prior contacts with the MPD. (*Exhibits 18 thru 20; Testimony of Capt. Clemente*)

34. Only one of the successful 2007 hiring cycle candidate's first round score sheets was provided to the Commission (scoring him 35, 36, 36 = 107 out of 135). Given the credible evidence of Mr. Monagle's otherwise acceptable interview performance, and the dearth of information by which to compare his ratings to the successful candidates who bypassed him, as well as the inherently subjective nature of the interview scoring process, I find that the evidence presented in this record too inconclusive to explain the basis upon which MPD concluded that Monagle's interview performance justified bypassing him in favor of six other candidates ranked below him on the civil service certification list. (*Exhibits 18 thru 20; Testimony of Capt. Clemente, Appellant*)

35. This finding does not ignore the clearly unacceptable ratings given to Mr. Monagle in the interview concerning his acknowledgement of a history of contacts with the MPD, which he apparently fully acknowledged. I must discount these ratings,

however, as an examination of the other candidate's rating sheets show what appear to be comparable history – including some who concealed their prior records – and who still were rated better than Mr. Monagle in this area. On balance, if it were the interview performance alone, in the absence of more objective explanation, the evidence cannot warrant a finding that his lower rating in this one (and only one) area was justified. (*Exhibits 18 thru 20; Testimony of Capt. Clemente, Appellant*)⁷

36. As to the second round of interviews, the Commission was provided with only partial records. According to the MPD's bypass letter to HRD, the only apparently negative impression about Mr. Monagle to come out of the second round of interviews was his response to being "asked about a police report that existed in which he had been implicated in a violent confrontation". The MPD bypass letter states that "he did take responsibility for his actions" and that "if hired, his partner would not have to worry about anything because he could handle himself." The letter states that there was "concern among the Interview Board that Mr. Monagle solves problems with his fists instead of thinking out the problem." (*Exhibits 3, 25; Testimony of Capt. Clemente*)

37. As previously noted, however, at the time of the second interview, Capt. Clemente rated Mr. Monagle's response to this question "Acceptable" and his testimony further elaborated on his opinion that Mr. Monagle had performed reasonably well in his second round interview. Accordingly, and in view of the incomplete record of the second round of interviews with the successful candidates, I find that the MPD would not be reasonable to infer that Mr. Monagle had a proclivity to "solve problems with his fists"

⁷ As discussed below, the substantive nature of Mr. Monagle's contacts with MPD is a different matter.

solely because of how he answered that question during his second interview. (*Exhibit 25; Testimony of Capt. Clemente*)

38. I am troubled by Mr. Monagle's second round response to an ethical question to which he apparently stated that he thought it would not be inappropriate for a police officer to accept "free coffee or a discounted meal" so long as it was "a certain store" or "if known thing" and there was no "crowd". Since the MPD bypass letter to HRD does not reference this point, and neither Capt. Clemente nor the Appellant testified about it, I do not address the issue except to state that Mr. Monagle should have thought more carefully about his answer to this question. (*Exhibit 25; Testimony of Capt. Clemente, Appellant*)

Appellant's Alleged Pattern of Violence

39. The final paragraphs of the MPD bypass letter reference Mr. Monagle's July 4, 2006 brush with the MPD and his prior 1999 OUI charge, among other incidents, as examples of Mr. Monagle's "irresponsibility, poor judgment and disregard for the law" that supports the conclusion he is "not a suitable candidate for a public safety position as a Medford police officer." (*Exhibit 3*)

40. I take notice that the Commission determined Mr. Monagle's 1999 OUI charges – of which he always claimed to be innocent and all of which charges were dismissed – did not justify his bypass for appointment as a Medford firefighter, where the substantial evidence indicated that an impermissible bias against him influenced that selection process and denied Mr. Monagle the opportunity to explain his innocence. (*Exhibit 1*)

41. In the present appeal, the MPD and the Appellant addressed these two incidents in detail, both during the MPD selection process and in the evidence presented to the

Commission. While I am concerned that the same official (Capt. Clemente), who recommended to the Fire Department bypassing Mr. Monagle, is the author of the MPD bypass letter to HRD, I am satisfied that Capt. Clemente's prior decision did not unduly influence him or the process in general. By his comments during the selection process (many of them favorable to Mr. Monagle), and his testimony and demeanor at the hearing before the Commission, I conclude that Capt. Clemente took care to ensure that his prior opinions did not skew the MPD process to the detriment of Mr. Monagle. (*Exhibits 3, 5, 10, 17 thru 20, 26, 29, 30; Testimony of Capt. Clemente, Appellant, Barbara Monagle*)

42. As to the 1999 incident, on this record, I find that the MPD was justified to conclude that, wholly apart from the dismissed charges themselves, there was good reason that Mr. Monagle's behavior concerning this incident was reasonably related to his fitness to perform as a police officer and properly could be taken into account by the MPD so long as it was fairly evaluated in the selection process. In particular, Mr. Monagle admits that he behaved badly after being arrested and brought to the police station for booking, because he was upset about how his younger brother had been treated. Mr. Monagle's own recollection of this incident leads me to believe that the statements in the police report accurately described his "attitude and demeanor towards [Officer McGillvray] and other officers was rigid, uncooperative and agitated. He was using obscenities towards us and this continued until he was placed into his cell." I find this behavior is clearly an appropriate factor that the MPD is justified to consider in the assessment of Mr. Monagle's fitness to serve as a MPD police officer. (*Exhibit 29; Testimony of Appellant*)

43. Both Mr. Monagle and his mother, Barbara Monagle, testified that neither he nor his younger brother had consumed any alcohol on the night in question. I find their testimony fairly credible but insufficient to outweigh the equally credible and highly detailed statements in the MPD official incident report that infer the contrary. Moreover, the inappropriate nature of Mr. Monagle's angry response to confrontation only would be magnified as more volitional if he were sober and not impaired. Thus, what distinguishes the importance of this incident from Mr. Monagle's prior bypass case is its relevance to his demonstrated inability to act calmly when faced with hostile interpersonal situations, something that is clearly goes to the essence of the duties of a police officer, while perhaps, less so with a firefighter or paramedic first-responder. (*Exhibit 29; Testimony of Capt. Clemente, Appellant, Barbara Monagle*)

44. The facts surrounding the July 4, 2006 incident are also disputed. According to the official police report, the MPD was dispatched to Mr. Monagle's residence in the early morning hours (approximately 0220 am) on a report that "kid may be in river after a fight". Upon arriving, the officers spoke with Mr. Monagle and he reportedly told them "nothing was going on." The report notes that the officers saw a Jeep with front windshield smashed but "nobody would say anything." A female (A.Gr., named as a witness in the report) approached the officers and stated that her friend (J.Gi., named as the victim) had jumped into the river to escape assault. She also stated that Mr. Monagle had grabbed a chair and began smashing the hood & window of J.Gi.'s car. The EMS/Fire was called and responded. J.G., wearing wet clothes showed up in the driveway and stated that Mr. Mongale had punched him several times in the face and stomach, after which he ran into the river. A.Gr. & J.Gi. left in a cab. Mr. Monagle and

his younger brother Jim were named as suspects. At some point, the Monagle's parents, who had been hosting a party at their home a short distance down the street, arrived on the scene. No criminal complaints ever issued over this incident. (*Exhibits 9 & 30*)

45. According to Mr. Monagle, he admits that he had a fight with J.Gi., which he claims J.Gi. started, but denies damaging the Jeep with a chair. Mr. Monagle had been at the party at his parent's house where he had been drinking but denied being intoxicated. J.Gi, an uninvited guest, had apparently come to the party with a female friend. Mrs. Monagle and her husband, Richard, had observed J.Gi. with another (unidentified) female, not the woman who accompanied him to the party, whom he repeated brought upstairs and into the Monagle's master bedroom. Eventually, Mrs. Monagle told J.Gi. to leave and he apparently wound up at Michael Monagle's house because he knew Mr. Monagle's roommate. Mr. Monagle states that he did not have personal knowledge of J.Gi's behavior in his parent's house, but had learned third-hand about it. (*Testimony of Appellant, Barbara Monagle, Richard Monagle*)

46. Mr. Monagle stated that the fight with J.Gi. "happened so quick" that he did not think to call the police. He testified that, when the police arrived, he told them "everything is over". He has little recollection of what J.Gi. did after the fight. (*Testimony of Appellant*)

47. According to Mr. Monagle's parents, at one point, one of the MPD officers on scene told them that he knew Michael was up for a police officer job and that the officer could "make sure he was off the list" by going from "desk to desk". I find that, although it is quite likely that such comments were made, there was no evidence that any of the officers who responded to the July 4, 2006 incident, played any role, directly or

indirectly, in the subsequent decision making process. Accordingly, while I find that the animosity between one or more of the members of the Mongale family and certain MPD officers may be real, other than giving the some of the reported facts of the incident a possible slant, that animosity or slant did not materially prejudice Mr. Monagle. (*Testimony of Capt. Clemente, Barbara Monagle, Richard Monagle*)

48. Nevertheless, I do not completely credit all the statements contained in the police report of the July 4, 2006 incident. I do not find sufficient and reliable evidence to conclude that Mr. Monagle – as opposed to his brother or another party – was the person who broke the windshield of the Jeep, which depends entirely on the hearsay statements of A.Gr., who clearly had some personal relationship with J.Gi and whose clarity of perception of the events of the 2 am incident were not described. (I have previously decided that no weight should be given to the reported statements of A.Gr. made in the November 2008 interview given two and a half years after the incident, and after this bypass). I also will not credit the characterizations of the reporting officers that Mr. Monagle wholly “refused to cooperate” with them, as there may have been good reason for him to be silent once it was clear he was a target of criminal charges. (*Exhibit 26, 30; Testimony of Appellan, Barbara Monagle, Richard Monagle*)

49. On the other hand, I find Mr. Monagle’s explanation of his behavior not entirely credible either. While I find he was generally truthful in his other testimony, when it came to the July 4, 2006 incident, I observed a heightened degree of discomfort in his demeanor and some evasiveness in his responses. I have no doubt that Mr. Monagle knew there was more to the incident than he initially told the police at the scene when they first arrived, and more than he described in his testimony at the Commission. I

believe it is reasonable to conclude, for example, that it is unlikely that J.Gi. would have run into the river, especially when the safety of his own Jeep was apparently close nearby, unless Mr. Monagle or someone else was in pursuit. Moreover, the evidence was wholly inconclusive as to how and why the fight broke out in the first place. Mr. Monagle did not claim, and I am unable to find the basis to conclude that Mr. Monagle acted reasonably in self-defense. (*Exhibit 30; Testimony of Appellant, Barbara Monagle, Richard Monagle*)

CONCLUSION

Summary

The Commission concludes that the MPD has met its burden to establish that “sound and sufficient” reasons justify bypassing Mr. Monagle for appointment as a MPD Police Officer, supported by substantial evidence in the record and application of correct principles of law. Although the MPD was not justified to bypass Mr. Monagle solely based on his interview performance and stale criminal and driving records largely indistinguishable from those of other selected candidates, the MPD did justify its conclusion that Mr. Monagle has not reasonably satisfied the MPD that he has put behind him his past pattern of aggressive behavior in confrontational situations, as evidenced by the fight in July 2006 and his lack of candor in how he responded to the police at the scene and in his testimony.

Applicable Standard of Review

The authority to bypass a candidate for permanent promotion or appointment to a civil service position is governed by G.L.c.31, Section 2(b). That statute provides:

“If an appointing authority makes an original or promotional appointment from certification of any 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 with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest.”

Civil service law and rules also require that the reasons for bypassing a candidate must be presented in writing for approval by HRD and no reasons not set forth in the written statement provided to HRD may be used as a justification for bypass in any hearing before the Commission. See generally, G.L.c.31, §27; HRD Rules, PAR.08(3). See also MacHenry v. Civil Service Comm’n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

These requirements create a statutory preference for selection of candidates according to their relative placement on the eligibility list that is compiled in rank order of their scores on the competitive qualifying examination administered by HRD for the position, which is a composite of the raw score on the written examination combined with certain other statutory preferences such as veterans’ status, and points for education and experience. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (“A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.”).

When the appointing authority seeks to justify bypassing a candidate higher on the list in favor of a lower-ranked candidate, the Commission applies the standard of review

required by the governing statute, G.L. c. 31, § 2(b): i.e., to find “whether, on the basis of the evidence before it, the appointing authority [has sustained its burden of proving by a preponderance of the evidence] that 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.” See Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006); Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 260 (2001) citing, Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303 (1997); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass.App.Ct. 315, 320n.10, 321n.11, 322n.12 (1991); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (1983) and cases cited.

Reasonable justification is established when such action is “done upon adequate reasons sufficiently established by credible evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law.” See 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); Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer *objectively legitimate* reasons for the bypass”) (*emphasis added*)

The preponderance of evidence test requires the appointing authority to persuade the Commission, on the basis of the evidence presented to it in a bypass appeal, that the reasons assigned for the non-selection of the Appellant were, more probably than not, sound and sufficient. Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321, (1991) citing Gloucester v. Civil Serv. Commn., 408 Mass. 292, 297 (1990). 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 (2001) In the event of a failure of proof, the commission has the power to reverse the bypass decision. Id.

It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988) The Commission may, in the discretionary exercise of its expertise, technical competence and specialized knowledge, make a 'choice between two fairly conflicting views' and, 'if its selection reflects reasonable evidence', a court may not displace the Commission's decision. See G.L.c.30A,§14; Lisbon v. Contributory Retirement Appeal Bd., 41 Mass.App.Ct. 246, 257 (1996). "When determining whether an agency decision is supported by substantial evidence, the standard of review is 'highly deferential to the agency.'" Connolly v. Suffolk Co. Sheriff's Dep't, 62 Mass.App.Ct. 187, 193 (2004), citing Hotchkiss v. State Racing Comm'n, 45 Mass.App.Ct. 684, 695 (1998).

Finally, all candidates must be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of arbitrary or capricious decision-making or other unfair, unequal or other unlawful treatment by an appointing authority. See G.L.c.31, §1 (definition of basic merit principles). The Commission has been 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). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles. . . .”); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the Civil Service Law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct.315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”. . . .“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’.”) See also Suppa v. Boston Police Dep’t, 21 MCSR 685 (2008) (presently pending judicial review in the Appeals Court).

Applying these principles, the Commission concludes that the MPD has adequately proved by a preponderance of the credible evidence that its decision to bypass Mr. Monagle for original appointment as full-time permanent Police Officer in the MPD is justified.

The Interview Process

The selection process employed by the MPD represents a major improvement from the process used by the Medford Fire Department when it considered Mr. Monagle for appointment as a Medford firefighter. The interviews were highly structured, with each member of the interview panel taking thorough, independent, contemporaneous notes of the candidates' answers and each panel member noting their individual, contemporaneous impressions of each candidate. The interview questions appeared to have been well-thought out. The interview panel assigned a numerical grade to each question, which each panel member assigned through independent judgment. A verbatim audio/video record was made of all the first round interviews. (The quality of the recording was not consistent, but, despite this minor technical flaw, the Commission found the recordings were a valuable aid to its consideration of the merits of the appeal.)

Some degree of subjectivity is inherent (and permissible) in any interview procedure, so long as care is taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of the Civil Service Law. E.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983). The Commission's Decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: Anthony v. Springfield, CSC No. G2-09-262, 23 MCSR --- (2010), Gagnon v. Springfield, CSC No. G2-07-180, 23 MCSR --- (2010); Boardman v. Beverly Fire Dep't, 11 MCSR 179 (1998). Examples of the latter: Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007);

Belanger v. Town of Ludlow, 20 MCSR 285 (2007); Horvath v. Town of Pembroke, 18 MCSR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005); Saborin v. Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep't, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep't, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep't, 10 MCSR 133 (1997).

Thus, the Commission is satisfied that the evidence demonstrates that the MPD's used an interview process that was appropriate to the selection of a class of candidates for appointment to entry level positions of police officer, established in good faith and without any intent or effect to tip the scales in advance in favor of or against any of the candidates. The inclusion of Capt. Clemente as a key member of the selection team could be fairly questioned, as he had been responsible for conducting and reporting to the Medford Fire Department his recommendation to bypass Mr. Monagle previously. However, upon a careful review of the record as a whole, the Commission is satisfied that Capt. Clemente took specific notice of the Commission's decision in the Medford Fire bypass case, took care to demonstrate that he acted de novo, and, by taking the additional steps of including two additional independent evaluators and a numerically-rated interview record, making a verbatim record and straight-forwardly offering Mr. Monagle the opportunity to fully address all the issues in his dossier that were potentially disqualifying, the Commission is satisfied that, in the particular circumstances of this case, MPD took reasonable steps to ensure that the Medford Fire Department bypass decision did not unduly prejudice Mr. Monagle's chances this time around.

In sum, the Commission agrees that MPD's selection process, including the interview process, meets acceptable standards to assure that such procedures give all applicants a

fair and level chance and are not incapable of meaningful review. While MPD's procedures might bear some improvement – better diligence in keeping the interview rating sheets for all candidates and better quality and recording of all interviews would be preferred – they were not so patently subjective as to be grounds for disturbing the selections involved here as procedurally arbitrary and capricious.

Mr. Monagle's Interview Performance

Although the selection process was fair to Mr. Monagle, it does not necessarily follow that MDP proved his bypass was justified by an allegedly poor interview performance. As the Findings of Fact stated, in view of the incomplete records of the interview ranking of the 2007 selected candidates, taken together with Mr. Monagle's interview ratings of "Acceptable" or better, and the positive testimony by Capt. Clemente that Mr. Monagle gave a generally good interview (contradicting certain of his earlier statements made to HRD in justification of the bypass), the Commission agrees with the Appellant that this record is simply too inconclusive and insufficient to warrant a determination that Mr. Monagle's interview performance adequately distinguished him from the performances of all six other candidates who bypassed him.

Mr. Monagle's Driving & Criminal Record

The Commission also accepts the Appellant's contention that the MPD did not establish that Mr. Monagle's past criminal and driving record disqualifies him. As set forth in the Findings of Fact, it is hard to justify the MPD's distinction between Mr. Monagle's fitness as a police officer from at least three successful candidates based on their respective, similarly stale driving records. In particular, the MPD inexplicably overlooked one selected candidate's two speeding offenses and five at-fault accidents

over an eight year period, which would appear far more problematic to the fitness to become a police officer as Mr. Monagle's one responsible speeding violation and a total of two earlier unfounded citations for which he was found not responsible. Similarly, Mr. Monagle's CWOFF on a minor transporting alcohol charge, was the same juvenile offense committed by another successful candidate who was selected but whose record Capt. Clemente overlooked. All other criminal charges against Mr. Monagle were dismissed, most were juvenile offenses, and all of them pre-dated his undisputed honorable military service which Capt. Clemente testified was an important consideration. In sum, for reasons similar to those found persuasive in the earlier bypass of Mr. Monagle by the Medford Fire Dept., the Commission concludes that the MPD has not established by a preponderance of substantial evidence how it distinguishes Mr. Monagle's paper record of offenses for purposes of assessing his present fitness for appointment as a police officer from the other similar records of selected candidates and how such relatively stale disciplinary records are relevant to one candidate's present fitness to perform but not another's. See Monagle v. City of Medford, 21 MCSR 437 (2008), citing, Halliday v. Boston Police Dep't, 8 MCSR 45 (1997) ("Most of the motor vehicle violations occurred while the Appellant was a teenager or in his early 20s. In any event, only one violation exists within the last 5 years, and Appellant had a credible explanation of the incident.")

Mr. Monagle's History of Violence

The MPD's final reason for bypassing Mr. Monagle was its concern that he had a record of involvement in multiple incidents that suggested he was inclined toward "solving problems with his fists", which is clearly not an appropriate trait to be carrying into a career as a police officer. The credible history of such risky behavior is sufficient

to justify his bypass. See, e.g., See, e.g., Preece v. Department of Correction, 20 MCSR 153 (2007), aff'd sub nom, Preece v. Massachusetts Civil Service Comm'n, Bristol C.A. BRCV2007-00510 (Mass.Sup.Ct. July 16, 2008) (credible and reliable evidence supporting the serious felony charges for which applicant was indicted, although later acquitted); Nahim v. Boston Police Dep't, 20 MCSR 232 (2007) (assault and battery, coupled with subsequent domestic abuse restraining order and "lengthy" history of driving offenses, for which applicant failed to accept responsibility); Thames v. Boston Police Dep't, 17 MCSR 125 (2004) (applicant's "extensive criminal history" and "further evidence of [violent] tendency in the statements appellant himself included in his application"); Tracy v. City of Cambridge, 13 MCSR 26 (2000)(additional evidence in form of police reports and appellant's admissions); Lavaud v. Boston Police Dep't, 12 MCSR 236 (1999) (multiple charges within preceding five years, including two incidents of insurance fraud and unlawful possession of and concealment of a firearm).

Mr. Monagle did provide a reasonable explanation that would seem to warrant discounting some of his past alleged violent behavior (he admitted his responsibility for getting into fist fights as a juvenile in 1994 and justified his use force in a bar fight in 1999 as self-defense). However, Mr. Monagle's past history of verbal and physical confrontation with the MPD in 1999 following his stop and subsequent arrest on an allegedly DWI remained a legitimate red flag. No matter how unjustified Mr. Monagle believed the MPD had treated him and his younger brother, the credible evidence (including Mr. Monagle's admissions about his behavior) demonstrated a lack of self-control and respect for law enforcement that is clearly unacceptable in a police officer

who must be expected to exercise good judgment and quick thinking so as to diffuse aggressive, confrontational situations, rather than escalate them.

The Commission does give credit to Mr. Monagle's testimony that his military service had a positive and maturing effect on him, and has taught him the importance of responsible behavior. Indeed, had his 1999 confrontation with the MPD been the last incident, the Mr. Monagle might well have a credible explanation that his fighting days were behind him, and that incident should not stand in the way of derailing his opportunity to serve as a police officer. See Ramirez v. Springfield Police Dep't, 10 MCSR 256 (1997) (noting that although pending bypass was justified, appointing authority may be required to provide additional reasons in any future by-pass of appellant based on the same prior criminal record to rebut appellant's claim of subsequent rehabilitation); Radley v. Brookline Police Dep't, 10 MCSR 289 (1997) (noting appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

Unfortunately, despite a positive military record and other extenuating circumstances, there exists sufficient credible evidence that, as of 2006 and 2007, Mr. Monagle still remained at risk for use of excessive force in a confrontational situation, as evidenced by the most recent fight in which he engaged in the early morning hours of July 4-5, 2006. Moreover, the evidence as a whole, including his simplistic explanation to the police that everything was "over" and his professed ignorance about details of the incident that he could reasonably be expected to know, reflects a troubling lack of responsibility and forthcoming that the MPD could rightly consider in deciding whether his was a suitable candidate for selection as a police officer. The Commission is satisfied that the MPD

properly exercised sound discretion in weighing Mr. Monagle's questionable behavior in 1999, as reinforced by his behavior in the 2006 incident, and, despite other evidence that might suggest the contrary, was justified to reach the conclusion that Mr. Monagle presented an unacceptable risk that was unsuitable to serve as an MPD Police Officer at the time of his bypass in 2007.

In reaching this conclusion the Commission has taken into account the case law that imposes special obligations upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self control and to refrain from unjustified threatening and intimidating conduct and use of force.

“[P]olice officers voluntarily undertake to adhere to a higher standard of conduct Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also, Falmouth v. Civil Service Commission, 61 Mass.App.Ct. 796, 801-802 (2004).

Thus, having established by a preponderance of the evidence that one of the main reasons for bypassing him was justified, the MPD acted appropriately in declining to appoint Mr. Monagle to the MPD.

Accordingly, for the reasons stated above, the appeal of the Appellant, Michael Monagle, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis McDowell & Stein, Commissioners) on May 6, 2010.

A True Record. Attest:

Commissioner

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

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

Notice to:

F. Robert Houlihan, Esq. (for Appellant)

Mark E. Rumley, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)