

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

THOMAS E. MOSES,  
Appellant

CASE NO: G2-08-88

v.

TOWN OF WINTHROP,  
Respondent

Appellant's Attorney:

Leah M. Barrault, Esq.  
Pyle, Rome, Lichten, Ehrenberg &  
Liss-Riordan, P.C.  
18 Tremont Street, Suite 500  
Boston, MA 02108

Respondent's Attorney:

Howard L. Greenspan, Esq.  
200 Broadway, Suite 304  
Lynnfield, MA 01940

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Fire Lieutenant Thomas E. Moses, brought this appeal, pursuant to G.L.c.31, §2(b), from the action of the Massachusetts Human Resources Division (HRD) which approved a decision of the Town of Winthrop (Winthrop), as Appointing Authority, to bypass him for promotion to temporary Captain in the Winthrop Fire Department in favor of a candidate of lower rank. At a full hearing on June 23, 2008, the Respondent presented evidence through two witnesses. The Appellant called three witnesses and he testified on his own behalf. Witnesses were sequestered, save for the Appellant and Respondent's representative, Richard White. Sixteen (16) exhibits and a Stipulation were received in evidence. The hearing was recorded on three audiocassettes.

## FINDINGS OF FACT

With appropriate weight to the Stipulation and Exhibits (JX1-JX14), the testimony of Chief Paul Flanagan, Winthrop Fire Department; Richard J. White, Winthrop Town Manager; Fire Lieutenant Thomas C. Moses; Deputy Chief Gregory J. Menard, Town of Revere Fire Department; Firefighter William A. Carabine, Jr., Winthrop Fire Department; and Firefighter Jaffrey A. Perrotti, Jr., Winthrop Fire Department; and inferences reasonably drawn from evidence as I find credible, I make the findings of fact set forth below.


### Procedural History

1. Fire Chief Joseph "Larry" Powers retired from the Winthrop Fire Department effective at the end of March 2008. Following Chief Powers's announced retirement, then Captain (now Chief) Paul Flanagan was appointed Acting Fire Chief, pending completion of the process necessary for appointment of a new permanent Fire Chief. (Flanagan, White)
2. Anticipating that one of Winthrop's existing Fire Captains would be elevated to the position of Acting Fire Chief, Winthrop Town Manager Richard White requisitioned, and HRD supplied, on or about March 18, 2008, Certification No. 280216, which comprised the list of candidates eligible for appointment to the position of temporary Fire Captain, to fill the vacancy that would be created upon the appointment of an Acting Chief. (Flanagan, White; JX1)
3. Certification No. 280216 contained only two names: the Appellant (Lt. Moses) and Firefighter William "Scott" Wiley. Lt. Moses was ranked number one with a score of 92; Firefighter Wiley was ranked number two with a score of 81. Both candidates stated their willingness to accept the appointment. (JX1)

4. On April 8, 2008, Acting Chief Flanagan recommended Firefighter Wiley over Lt. Moses for appointment to the position of temporary Fire Captain. The Town Manager accepted Chief Flanagan's recommendation. (Flanagan, White; JX2, JX3, JX4)
5. Acting Chief Flanagan stated these reasons to appoint Firefighter Wiley (JX4):

JX 4  
6.23.08  
*mf*

TOWN OF WINTHROP



FIRE DEPARTMENT  
*Paul Flanagan Acting Chief of Department*  
Phone: (617)846-3474  
Fax: (617)539-3247

MEMORANDUM

TO: Mr. Richard White

FROM: Acting Chief Flanagan

SUBJECT: Acting Captains Position

DATE: April 8, 2008

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After careful consideration of both candidates currently eligible for the position of Acting Captain, it is my recommendation to appoint firefighter William "Scott" Wiley. Firefighter Wiley has been a member of the Winthrop Fire Department for 17 years. During this time he has consistently demonstrated sound judgment, good decision making skills and competence in routine and emergency situations. These traits have been recognized by his peers and supervisors and have earned him their respect.


Having been his Captain, I have found him to be self-motivated and prepared for his duties. His mechanical ability and the knowledge of the department's equipment have been a great asset to the Winthrop Fire Department. When he has served as an out-of-grade officer, he has demonstrated his leadership capabilities and has shown that he can positively influence the motivation and productivity of his subordinates.

At a time when the Winthrop Fire Department is faced with unprecedented number of inexperienced firefighters, I find it imperative to have a command staff that is confident and decisive in their decision making. Scott Wiley possess all of the elements necessary to be a successful fire officer.

6. On April 11, 2008, Acting Chief Flanagan issued a departmental memo announcing that Firefighter Wiley had been promoted to the rank of Acting Captain and would take command of Group 3 beginning on April 16, 2008. (JX8)
7. On April 16, 2008, Lt. Moses filed this bypass appeal with the Commission.

8. On April 18, 2008, Winthrop Town Manager White submitted Acting Chief Flanagan's Memo along with the following additional statement of reasons to HRD for his selection of Firefighter Wiley over Lt. Moses (JX5):

JX-5 6129108  
mg



## TOWN OF WINTHROP

### OFFICE OF THE TOWN MANAGER

Town Hall, 1 Metcalf Square, Winthrop, MA 02158 Telephone: 617-846-1077 Fax: 617-846-5458

Richard J. White  
Town Manager

Friday, April 18, 2008

Commonwealth of Massachusetts  
Department of Human Resources  
One Ashburton Place  
Boston, MA 02108

Attn: Luz M. Henriquez, Civil Service

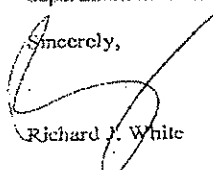
To whom it may concern:

This letter is written to explain the rationale for the appointment of William "Scott" Wiley to the position of Acting Captain in the Winthrop Fire Department. Mr. Wiley's performance as a fire fighter during his 17 years service to the Town of Winthrop has been exemplary. He is a self-motivated, productive and dedicated employee. He has consistently demonstrated remarkable leadership qualities throughout his career and in his various capacities working out of grade have been a motivator for his subordinates. His unique technical abilities combined with sound practical judgment has made him an informal and formal leader in the department. Mr. Wiley has consistently demonstrated sound practical knowledge on the scene in an emergency and as a result is seen as a leader by his peers in the department. Mr. Wiley has been the primary assigned mentor and teacher in the training of new employees during the last several years; specifically because of his extraordinary technical abilities and his capacity to transfer that knowledge in a practical and extemporaneous way on the scene in an emergency.

In addition, Mr. Moses' interview performance was poor, incomplete and misleading. Mr. Moses was less than reflective and introspective with me during his interview regarding past instances where he had exhibited a lack of judgment in his performance as a Lieutenant, despite being questioned by Acting Chief Flanagan regarding a number of lapses in judgment during a separate interview. It took a considerable amount of time and effort on my part to get Mr. Moses to look at his past misjudgments and consider that he had not managed fire scenes or emergency scenes according to appropriate protocol and that his lack of judgment and unwillingness to follow emergency procedures could have endangered the lives of his co-workers. His unwillingness to learn from his errors and provide evidence that he had grown professionally from his negative experiences convinces me that Mr. Moses is not ready for promotion to a command position. Even in the interview, Mr. Moses showed evidence of poor judgment.

Mr. Wiley is the right candidate at the right time to lead a group and be part of the Fire Chief's command staff during a time when Winthrop has an unusually large number of inexperienced firefighters. His sound judgment, leadership skills and respect within the department make him the right candidate.

Sincerely,

  
Richard J. White

9. On May 6, 2008, HRD approved the reasons stated to bypass Lt. Moses. (JX13)
10. No party objects to the procedure followed above (as opposed to the substantive reasons given) for approval of the bypass of Lt. Moses and appointment of Firefighter Wiley, or Lt. Moses's appeal of the bypass in advance of that approval. Any such procedural or timing irregularities are now deemed cured and waived. (JX14)

The Winthrop Fire Department

11. Town Manager Richard J. White is the Appointing Authority for the Winthrop Fire Department. (White; JX 3)
12. The Winthrop Fire Department operates from a Headquarters (Center Station) on Pauline Street and one substation on Shirley Street (B Station). There are four work Groups (Groups 1 through 4), each commanded by a Fire Captain stationed at Headquarters; There is also one administrative Captain. (Flanagan)
13. Prior to the elevation of Chief Flanagan, the last opening for the position of Captain in the Winthrop Fire Department occurred in August 1996, with the appointment of Charles Flanagan, brother of Chief Flanagan, as Captain of Group 1. The next expected opening for Captain will be in 2012, with the retirement of the administrative Captain. (Moses; JX6(a))
14. The Winthrop Fire Department has experienced an unusually large number of new hires in the past eight years. Two Captains – Charles Flanagan and Richard Schwartz – are the assigned training officers. All personnel contribute to training the recruits on-the-job. (Flanagan, White, Perrotti)

Lieutenant Thomas C. Moses

15. Lt. Moses is 52 years old and joined the Winthrop Fire Department in November 1985, giving him 22 years of seniority as of the date of Certification 280216. He received his promotion to Lieutenant in August 1996, filling the position in Group 1 vacated by Charles Flanagan, who had been promoted to Group 1 Captain. Lt. Moses was ranked first (out of two) candidates on the certification for that promotion. (Moses; JX6(a), JX6(b))
16. Lt. Moses was transferred to Group 3, effective September 2001, replacing Lt. Flynn in that position. According to Lt. Moses, the transfer was initiated at then-Captain (now Chief) Flanagan's request. (Moses)
17. Since 2001, Lt. Moses has been the senior officer in command of the Shirley Street Station, reporting to the off-site Group 3 Captain (Paul Flanagan) at Headquarters. In his capacity as the Shirley Street lieutenant, Lt. Moses supervises an engine company and a ladder company. He interacted with Captain Flanagan on visits to Headquarters and would see Captain Flanagan on about 10 to 20 percent of the fire service calls to which the Shirley Street apparatus was dispatched. Prior to serving as lieutenant in the administration of Chief Powers, Lt. Moses served as a firefighter under the administration of Chief David Higginbotham and prior Chief Flanagan (father of Captain Charles and current Chief Flanagan). (Flanagan, Moses, Carabine, Perrotti; JX6(a), JX9)
18. It is customary in the Winthrop Fire Department for a lieutenant to be assigned to serve as "out-of-grade" Acting Captain and Lt. Moses was so assigned to cover at least 150 different shifts. He has received numerous citations for excellence.

Numerous letters from grateful citizens appear in his file. In 1990, in connection with the response to the Grandview Avenue fire, for which the entire Department was commended, Lt. (then Firefighter) Moses was personally singled out by Chief Higginbotham with an individual written Commendation of Valor. (Moses; JX11)

19. Lt. Moses holds a B.A. degree in General Studies from Salem State College, with a concentration in Marine Science, and has earned 85 credits toward a Fire Science bachelor's degree. He has received numerous certificates for satisfactory completion of courses in fire management. He has been ranked Number 1 on the Fire Captain's Civil Service List since April 2003. His raw score on the 2005 Fire Captain's exam was 91, to which 1 point was added resulting in a final score of 92. (Moses; JX10, JX11)

20. Two Winthrop firefighters, Firefighter William Carabine and Firefighter Jaffrey Perrotti, who have known Lt. Moses for many years and worked under his command, testified about him in very specific terms, which will be addressed in detail below. I found their testimony quite candid and particularly useful to provide a glimpse into the realities of a firefighter's life, both at fire scenes and in the stationhouse. (Carabine, Perrotti)

21. Lt. Moses has never been formally reprimanded or disciplined. Until recently, it had not been the policy of the Town of Winthrop to conduct performance reviews. However, for a few years after his promotion, Lt. Moses took it upon himself to informally ask Captain Flanagan, from time to time: "How am I doing?" He was told: "Fine. If there is a problem, you will know" or words to that effect. (Flanagan, Moses, White)

Firefighter (Acting Captain) William "Scott" Wiley

22. Acting Captain Wiley is 46 years old and joined the Winthrop Fire Department in February 1991, giving him 17 years of seniority as of the date of Certification 280216, five years less than Lt. Moses. He has been assigned to Headquarters, and was part of work Group 3 in 2001 when Chief Flanagan took command of that group. As Chief Flanagan's successor in command of Group 3, Acting Captain Wiley is now Lt. Moses's supervising officer. (Flanagan; JX 6(c), 8, 9)
23. Acting Captain Wiley has also received certificates for his satisfactory completion of numerous fire management courses. Many commendations for excellence, and numerous letters from grateful citizens also appear in his file. The evidence does not indicate his level of formal education, but his 2005 Fire Captain Examination results indicate an examination score of 76.99, increased 4 points to a final score of 81. (JX8)
24. According to his file, from January 21, 2007 to March 5, 2007, then Firefighter Wiley was temporarily re-assigned from Group 3 to Group 2 in the position of Acting Lieutenant. No testimony was provided to explain the circumstances or relevance of this appointment. (JX8)
25. Acting Captain Wiley did not testify and no witness testified as to Firefighter Wiley's disciplinary history. There is no record of any such discipline in his file and the Commission will infer that Firefighter Wiley has never been disciplined.
26. Firefighter Wiley and then-Captain Flanagan worked on off-duty construction jobs, one as a licensed electrician and one as a licensed plumber, and, in this capacity, they were present on the same work site, although for different



employers, on five or six jobs. The evidence did not establish that either one has been a source of referral business to the other but the evidence of the off-duty relationship does invite some heightened scrutiny of Chief Flanagan's preference for Firefighter Wiley. (Flanagan)

#### The Selection Process

27. Mr. White became Winthrop Town Manager in April 2006. His experience in municipal government includes service as Assistant Town Manager in Winchester (1980-1984), Town Administrator in Bedford (1984-1986) and Town Manager in Lexington (1986-2004). Mr. White has no prior personal knowledge of the work history or performance of either Firefighter Wiley or Lt. Moses. (White)
28. In April 2008, Mr. White appointed then Captain (now Chief) Paul Flanagan to the position of Acting Chief for the Winthrop Fire Department. Mr. White appointed Paul Flanagan to the position of permanent Fire Chief, effective June 23, 2008. (Flanagan, White)
29. Chief Flanagan has more than two decades of service with the Winthrop Fire Department, including 23 years as a Captain, and, as noted above, both Firefighter Wiley and Lt. Moses have served under his command. (Flanagan, Moses)
30. The elevation of Chief Flanagan and the resulting opening for Captain were the first such appointments that had arisen in Mr. White's tenure as Winthrop Town Manager. Using his prior experience, Town Manager White planned three sources of input to evaluate candidates for Acting Captain: (1) the Acting Chief; (2) a panel of the candidates' peers, i.e., Lieutenants and Captains; and (3) his own input. However, Mr. White discovered that due to "details" with which he was

unfamiliar, "there was a situation" so that peers "felt uncomfortable" providing input. Thus, Mr. White adapted the procedure and the sole evaluators were reduced to Chief Flanagan and Town Manager White. (White)

31. Mr. White designed a two-step interview format in which: (1) each candidate was interviewed by Acting Chief Flanagan in the presence of Winthrop's Information Secretary, and (2) a second interview followed about thirty minutes later with Mr. White, at which Acting Chief Flanagan and the Information Secretary were also present. (White, Flanagan, Moses)

32. Chief Flanagan prepared the questions below to be posed to each candidate. Four of the questions were identical. A fifth question was tailored to what he believed to be each candidate's "weakness". (Flanagan; JX7).

<i>Chief Flanagan's</i>	JX 7 6/23/03 <i>MF</i>
(Captains Interview Questions)	
1.) What do you see as the primary day to day responsibilities as a Captain?	
2.) In your opinion, what are three necessary qualities a captain must possess while on the fire ground?	
3.) What have you done to gain the respect of your peers? And what will you continue to do going forth?	
4.) What is one unique skill/characteristic that you believe you bring to the department at large?	
5.) Tommy- Over the years you have consistently shown a lack of judgment in terms of emergency response, what do you think is necessary from you to overcome these allegations?	
Scott- With never having served in a command capacity, what makes you believe that you have the ability to step into the role of a shift commander?	

### The Interview with Chief Flanagan

33. Lt. Moses's interview with Acting Chief Flanagan lasted approximately 10 minutes. Acting Chief Flanagan asked Lt. Moses the five prepared questions essentially verbatim. (Flanagan, Moses)
34. No evidence was produced as to the responses given by either Lt. Moses or Firefighter Wiley to any of the four "standard" questions, or Chief Flanagan's assessment of their responses. (Flanagan)
35. In posing Question 5, Chief Flanagan gave Lt. Moses no "particulars" or examples of the poor judgment he had in mind. Lt. Moses's response to Question 5 was, in substance, that he believed he made "good decisions" and not that he had "consistently shown a lack of judgment" in emergency response situations. He also said something to the effect that: "Like all of us, experience is the best teacher." Chief Flanagan did not follow up. (Flanagan, Moses)
36. After his interview with Chief Flanagan, Lt. Moses was "very confident." (Flanagan, Moses)
37. Chief Flanagan's fifth question to Firefighter Wiley asked about lack of supervisory experience. Firefighter Wiley's response was, in substance, that he believed that by working at Headquarters, as opposed to a substation, he gained more experience in learning how command decisions were made. (Flanagan)

### The Interview with Town Manager White

38. Town Manager White had no set questions of the two candidates, preferring a more "free flowing" interview approach. Lt. Moses estimated the length of his

interview by Mr. White, Chief Flanagan and the Information Secretary to have lasted approximately 15 to 20 minutes. (White, Moses)

39. Prior to the interview, Mr. White had been told that retiring Chief Powers and Chief Flanagan had issues with Lt. Moses's "on scene response" in an emergency. Initially, Mr. White testified he was not told "anything in particular", but he later testified that, at some time prior to the interview, he did recall having learned some details from both Chief Powers and Chief Flanagan about one of the specific incidents they had in mind. (White)

40. Mr. White was permitted to use notes that he had prepared during the hearing before the Commission – while listening to the testimony of Chief Flanagan – in aid of his testimony. There was no evidence that Mr. White's notes were prepared in advance or for the benefit of counsel, or that that they were made with reference to notes made contemporaneously with the interview itself. The evidence was that no such contemporaneous notes were created. (White)

41. Mr. White testified that he followed his customary interview procedure with both Firefighter Wiley and Lt. Moses. He described this procedure to involve an introductory phase to establish a perspective of a candidate's career – what motivates him – followed up by questions that seek to learn about a candidate's special contributions, and, finally, questions on "growth issues". The three specific factors that Mr. White said he looked for as the Appointing Authority: (1) credibility within the ranks; (2) support of the persons they work with day to day; and (3) being aware of who they are, i.e., their strengths and weaknesses. (White)

42. Mr. White testified that he did not know either candidate's score on the Captain's exam at the time he interviewed them. He did later learn, prior to making the appointing decision, that there was an 11 point difference in the two scores. He assumed that substantially the entire differential was due to 10 points having been added to Lt. Moses's score for command experience. (That assumption was mistaken.) Thus, in Mr. White's mind, the raw scores were "not compelling either way" and he chose the "more qualified" candidate based on his assessment of intangible qualities not measured by examination, specifically, "judgment and ability to grow." (White; Moses)
43. In his interview with Firefighter Wiley, Mr. White said he expressed "concerns" about Firefighter Wiley's lack of supervisory experience and asked the candidate to address that issue. According to Mr. White, Firefighter Wiley acknowledged his lack of formal experience as a lieutenant, but suggested that he had been given other leadership opportunities by Chief Powers and Captain Flanagan, particularly in the training of new recruits and had taken command during an incident. When asked what he would do to "fill in the gaps" if he were appointed, Firefighter Wiley said he would seek out in-service training opportunities and make it a point to meet regularly with other captains to share experiences. No mention was made of Firefighter Wiley's six week duty assignment as an acting Lieutenant. When asked for specific examples of Firefighter Wiley's leadership in an emergency situation, Mr. White could not recall any. (White)
44. The testimony of Mr. White and, to some extent, Chief Flanagan, concerning Mr. White's interview with Lt. Moses, departs in significant and material ways from

the testimony of Lt. Moses. The witnesses do agree that the interview began cordially. Mr. White characterized Lt. Moses's answers to the initial questions as "fairly succinct" and "direct and to the point". The witnesses also agree that the questioning quickly turned to Mr. White's "growth" issues and that most of the interview was devoted to that subject. In order to make the appropriate findings as to this disputed part of the interview, it is necessary, first, to examine the evidence of the underlying incidents that came up at that time. (Flanagan, White, Moses)

#### The Oil Burner Fire

45. The Shirley Street substation, under Lt. Moses's command, was dispatched to respond to a box alarm fire at 600 Shirley Street, a 32 room hotel. Chief Flanagan erroneously placed this incident to have occurred in early 2007. I find that the incident occurred more than three years prior (2003 or 2004), based on the credible and undisputed testimony that Firefighter Daniels was the driver of the apparatus that responded to the call with Lt. Moses, and Firefighter Daniels had retired at least that long ago. (Flanagan, Moses)

46. No incident report or other documentation concerning the fire was produced. Based on the testimony of the witnesses, I find it reasonable to infer that a fire had ignited in the boiler located in the basement of the hotel; that, at the time Lt. Moses responded, flames were shooting up the chimney flue, and that black smoke could be seen coming from the scene. Captain Flanagan saw the smoke as he headed to the hotel. The fire had not involved any other part of the structure of the building at that point. Lt. Moses was told by the building maintenance operator that he had the fire under control and he reported this over the Fire

Department radio. When Captain Flanagan arrived on scene, he proceeded with Lt. Moses to the basement and they both saw that the fire had not been extinguished. It required CO<sub>2</sub> equipment to put it out. Captain Flanagan told Lt. Moses: "Tommy, you always have to check" and never take a building superintendent's word. Lt. Moses immediately acknowledged at the scene that he had "screwed up." There was no disciplinary action of any kind taken as a result of this incident. The incident never came up again between Lt. Moses and Captain Flanagan, until the interview with Mr. White. (Flanagan, Moses)

47. In the three or four years since the date of that incident, Lt. Moses had responded to "many" other boiler fire calls. He never made the same mistake. He has always "looked for himself", sometimes with the assistance of a subordinate under his command, who is licensed in HVAC equipment service and repair. (Moses)

#### The Motor Vehicle Accident

48. On a late afternoon or early evening in September/October 2007, the Shirley Street substation responded to the scene of a serious motor vehicle accident near the intersection of Shirley and Tewksbury Street in Winthrop, with Lt. Moses in command. Several police cruisers were on the scene when the fire apparatus arrived. Lt. Moses positioned the engine in which he was riding across the street from the accident approximately 30 feet, according to him and Firefighter Carabine, who followed Lt. Moses in the ladder truck. (Captain Flanagan recalled the engine was 150 feet from the accident, but I find the preponderance of the evidence fails to persuade me that Captain Flanagan's recollection was correct on that point.) Lt. Moses directed the ladder truck in position across from the engine

- about 25 feet from the accident, which was “as close as they could to the scene” and leave room for the ambulance that was en route. (Moses, Carabine, Flanagan)
49. Lt. Moses ordered a dry line (fire hose) run from the engine, which is standard procedure, although he had observed that the fire risk was low at the scene. He made his immediate priority the extrication and care of injured occupants, which he personally attended to along with others. As a result of his efforts, the unconscious occupant was extricated from the damaged vehicle, “boarded” (as a precaution for spinal injury), transferred to an ambulance and removed from the scene and taken to the hospital safely. The ladder truck was equipped with “Jaws of Life”, but that equipment was not needed. (Moses, Carabine)
50. At some point during the emergency, Captain (now Chief) Flanagan arrived on scene and took command. He ordered the engine and ladder truck moved up closer to the scene of the accident. The move enabled the fire apparatus lighting to assist the police accident reconstruction team that arrived on scene as darkness fell. There was no interchange about this repositioning at the time. Lt. Moses did not question the order as he would never “second guess” his Captain. Firefighter Carabine confirmed that there was never anything critical stated about Lt. Moses’s performance that day. No documentation of the incident was introduced. (Moses, Carabine, Flanagan)

#### The Revere Fire

51. At the end of October 2007, Lt. Moses commanded a mutual aid response to a “second alarm” nighttime fire in the City of Revere. The Deputy Fire Chief in Revere is Greg Menard, Lt. Moses’ first cousin. Deputy Chief Menard testified



before the Commission and was a very credible witness who spoke highly of Lt. Moses. I do not rely on his testimony about Lt. Moses's general character due to the family relationship, but I do find his specific testimony about the October 2007 fire, some of which could be viewed as personally self-deprecating to himself, clear and fully credible and supported by the testimony of Winthrop Firefighter Jaffrey Perrotti, who was also on the scene of that fire. (Menard, Perrotti)

52. Deputy Chief Menard and Firefighter Perrotti described how Lt. Moses's ladder truck had executed an order made by the Revere Fire Chief to position a ladder to a certain second-floor window, which happened to be about 12 inches from an exterior electrical line. (The line was "grandfathered"; code now requires electric lines to be at least three feet from a window.) A warning was heard from an unidentified source: "Watch the electrical line." After the ladder was positioned, Deputy Chief Menard noticed that there was another window on the back of the building that allowed an even better opportunity to get a line to the second floor and he ordered the Winthrop ladder repositioned to take advantage of this opportunity. The Revere Fire Chief "wasn't too happy" about moving the ladder, but Deputy Chief Menard elected to follow his own judgment, believing he had a more complete knowledge of the entire fire scene. (Menard, Perrotti)

53. Firefighter Perrotti testified about his personal observations of Lt. Moses during the Revere fire. He saw Lt. Moses give the nozzle to one of the recruits – Sunday Reth – and guide him up to the second floor of the building, with his hand on the recruit's shoulder, instructing him all the way on the details of the proper

technique. Firefighter Perrotti was so impressed with Lt. Moses's mentoring and leadership that he went to Chief Powers to tell him what he had observed. Chief Powers's only question to Firefighter Perrotti was about the ladder and the electrical line and "what went wrong". Firefighter Perrotti said he "squelched the rumor". (Perrotti)

#### Interview of Lt. Moses on Issues of Judgment

54. When Mr. White's interview of Lt. Moses moved to the questions of past judgment, Mr. White turned to Acting Chief Flanagan to lay out the specific examples, and the 600 Shirley Street boiler fire and the Shirley/Tewksbury motor vehicle accident were mentioned. This is the first time in the interview process that Lt. Moses had heard any specifics about the questions of his past judgment calls. Based on the credible testimony from both Chief Flanagan and Lt. Moses, I do not credit the Mr. White's inconsistent opinion to the contrary. (White, Moses, Flanagan)

55. As to the 600 Shirley Street fire in 2003/2004, I credit testimony that he had immediately accepted responsibility for his error of judgment concerning that incident and that he told Mr. White that he had learned from this mistake and did not take another person's word again without checking it out himself. (Moses, Flanagan)

56. As to the motor vehicle accident, I credit Lt. Moses's testimony that he confidently defended his actions in that situation to Mr. White, telling him, as he also told the Commission, that he believed he had used good judgment in managing that scene and, in particular, that the apparatus had been positioned

appropriately to allow access by the ambulance to the injured party, which was the priority at that time. (Moses, Carabine)

57. Lt. Moses presented at the hearing as a generally articulate witness, with a confident demeanor, who answered most questions responsively and stood up well on cross-examination. I find nothing in Lt. Moses's testimony or any of the other evidence that leads me to infer that he would have performed any differently in a fair and objective interview with Mr. White and/or Chief Flanagan.

58. Chief Flanagan and Mr. White gave unconvincing or evasive responses to a number of questions posed to them. Both demonstrated a faulty recollection of material facts, for example: Captain Flanagan's mistake about the date of the Shirley Street fire and certain particulars about the motor vehicle accident, Mr. White's mistake about the reason behind Lt. Moses's significantly higher test score, and Mr. White's mistaken impression that confronting Lt. Moses with specific instances of misjudgment was no surprise to Lt. Moses because Captain Flanagan had already covered the subject in depth in his initial interview with Lt. Moses. (Moses, Flanagan, White)

59. Prior to the interviews, Lt. Moses told Captain Flanagan the "word on the street" was that he would not be chosen. (Moses, Flanagan)

60. Lt. Moses, concluded from the tenor of the questions and comments that Mr. White's opinion was not favorable. His impressions were confirmed when, on April 10, 2008, Chief Flanagan called him to Headquarters and informed him that Firefighter Wiley would be appointed Acting Captain. Lt. Moses testified that Chief Flanagan stated: "The fix is in, they jumped you." (Moses)

## CONCLUSION

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (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.”). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (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 . . . . the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (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”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (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”)

It is well settled that reasonable justification requires that the Appointing Authority’s actions be based on “sound and sufficient” reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. 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).

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

*The greater amount of credible evidence must in the mind of the judge be to the effect that such action ‘was justified,’ in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence

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

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the Town of Winthrop's bypass of Lt. Moses for appointment to the position of Acting Fire Captain did not comport with basic merit principles resulting in harm to his employment status through no fault of his own.

First by any reasonable measure, Lt. Moses appears more qualified than Firefighter Wiley for promotion to Acting Fire Captain. While a candidate's ranking on a civil service list does not create any cognizable "vested right" or "property interest" to a position, Callanan v. Personnel Admin'r, 400 Mass. 597, 601, 511 N.E.2d 525, 528 (1987); Burns v. Sullivan, 619 F.2d 99 (1980), the Commission notes that the unusually large exam point spread in this case between Lt. Moses and Firefighter Wiley (92 vs. 81) is a particularly "significant difference between candidates in any civil service examination" that must carry due weight in any appointment decision, and certainly ought not to have been summarily discounted as the Appointing Authority has done in this case. Compare Sabourin v. Town of Natick, 18 MCSR 79, 82 (2005) (seven point differential "significant"; by-pass appeal allowed) with Radford v. Andover Police Dep't, 17 MCSR 93 (2004) (1 point differential considered; bypass appeal denied) and Sullivan v. North Andover Fire Dep't, 7 MCSR 175 (1994) (5 point difference in scores not "significant") See also Bradley v. City of Lynn, 443 F.Supp.2d 145, 173-74 (D.Mass.2006) and cases cited (experts consider from three to eight points on exam "statistically significant" for purposes of establishing Title VII discrimination) A bypass

decision, as here, that fails to fairly and appropriately consider such a significant difference in exam scores between two candidates is not justified. In addition, while both candidates appear to possess equivalent, distinguished training and performance records, Lt. Moses has served with distinction in the Winthrop Fire Department longer than Firefighter Wiley (22 years vs. 17 years) and has nine more years of continuous command experience in a higher rank than Firefighter Wiley.

Second, in addition to the misunderstanding significant difference in the candidates' civil service test scores, Winthrop's bypass decision was grounded on other assumed facts that are not correct. Contrary to the statements in Captain Flanagan's recommended reasons (JX5), Firefighter Wiley has not been the "primary assigned mentor and teacher in the training of new employees during the last several year. Captains Schwartz and Charles Flanagan have been assigned that duty. In fact, the only direct evidence presented to the Commission on either candidate's training skill was Firefighter Perrotti's impressive description of Lt. Moses's on-scene mentoring of a recruit.

Similarly, the evidence fails to establish the assertion in the statement of reasons provided to HRD, that Lt. Moses had a record of multiple "instances, where he had exhibited a lack of judgment . . . despite being questioned by Acting Chief Flanagan regarding a number of lapses in judgment during a separate interview" in which he "had not managed fire scenes or emergency scenes according to appropriate protocol and that his lack of judgment and unwillingness to follow emergency procedures could have endangered the lives of his co-workers." (JX5) (*emphasis added*)

Only two questionable incidents were advanced to support these statements. Both percipient witnesses (Chief Flanagan and Lt. Moses) agree that Lt. Moses was not

“questioned” about either of these instances in his “separate interview” as Mr. White stated. Moreover, the credible evidence simply falls short of establishing that Lt. Moses showed any lapse of judgment or in any way endangered his co-workers lives in the way he responded to the 2006 motor vehicle accident.

Thus, at most, there is but one questionable call made by Lt. Moses in his 22 year fire service career, twelve of which he has served as Lieutenant, which related to his undue reliance on a building technician’s word that he had the fire in question under control. To be sure, Winthrop proved that this one error of judgment did occur. Chief Flanagan confirmed that Lt. Moses admitted his error immediately, the fire was extinguished without endangering any person or property, and Lt. Moses has since appeared to have responded appropriately to other boiler fires. Chief Flanagan’s recollection of the incident placed it much closer in time to the present than it was. Accordingly, the bypass of Lt. Moses cannot be sustained solely in reliance on this one error, in the face of the inaccuracy about it and in combination with the other factual errors and unproved allegations about Lt. Moses’s alleged poor judgment, upon which Winthrop erroneously relied and used to procure HRD’s approval of the bypass.

Third, posing disparate interview questions to each candidate and, especially, Mr. White’s “free flowing” interview format, are risky choices. While some degree of subjectivity is inherent (and permissible) in any interview procedure, care is needed to preserve the “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, 444 N.E.2d 407, 409, rev.den., 388 Mass. 1105, 448 N.E.2d 766 (1983). Winthrop's process, here, failed to meet this standard.

Fourth, the Commission concludes that Winthrop failed to justify by a preponderance of the evidence the Appointing Authority's statement of reasons to HRD concerning Lt. Moses' interview performance. The Commission is troubled by Winthrop's failure to preserve any type of record whatsoever of the interviews in this case. When confronted with a bypass decision that is heavily weighted on the performance of the candidates at the interview, in the absence of any record of the interview, the Commission's conclusions about what took place, necessarily, will turn on the evidence and credibility assessment of the witnesses presented to the Commission at the formal hearing. Thus, an appointing authority that makes no record of the interviews it uses in the promotional appointment process to distinguish between otherwise qualified candidates, may do so at its peril. See, e.g., Dillion v. Brookline Police Dep't, 20 MCSR 273 (2007) (evidence of appellant's alleged misconduct disbelieved); Smith v. City of Lynn, 18 MCSR 74 (2005) (insufficient evidence to permit reasonable person to believe appellant showed poor judgment or denied responsibility for prior misconduct); Sihpol v. Beverly Fire Dep't, 12 MCSR 72, 75 (1999) (Commission found interview assessment invalid based on observation of appellant as witness); Hamilton v. Boston Police Dep't, 11 MCSR 16 (1998) (insufficient investigation into alleged misconduct the subject of military court martial against appellant; preponderance of evidence did not establish underlying misconduct). cf. Brown v. Town of Duxbury, 19 MSCR 407 (2006) (Commission's impression of appellant as witness same as interview panel); Wooster v. Division of Employment & Training, 16 MCSR 43 (2003) (appellant's performance consistent with

interview assessment); Barber v. Department of Mental Health, 6 MCSR 132 (1993) (concerns expressed about appellant's communication skills corroborated by performance before Commission). Here, the Commission concludes that Lt. Moses simply presented more credible evidence at the Commission hearing that he did not act in a "less than reflective and introspective" manner or give a "poor, incomplete or misleading" performance at his interview than Winthrop adduced evidence to the contrary.

The best evidence of what takes place in the interview is a verbatim record, preferably, videotaped, but at least tape recorded and available for stenographic transcription. See, e.g., Belanger v. Town of Ludlow, 20 MCSR 285, 287 (2007) (interviews recorded on DVD); Frost v. Town of Amesbury, 7 MCSR 137, 138 (1994) (transcripts). In addition to avoiding the risk noted above, that the Commission may be asked to rely on faded memories and conflicting or hearsay appraisals, such a record, especially when accompanied by a complete and contemporaneous record of the interviewers' evaluations and scoring, could save hearing time and, in some cases, substitute for further duplicative testimony from interview panel members at the Commission hearing. That, in turn, could improve the chances of recruiting quality members to serve on interview panels.

There remains one final wrinkle to this appeal germane to relief that requires attention. The Commission has come to learn that Winthrop has initiated the process to fill Acting Captain Wiley's position on a permanent basis and HRD has issued a certification for that promotional appointment, returnable on or before August 8, 2008. The only two names on the new certification are Lt. Moses (#1) and Acting Captain Wiley (#2). Lt. Moses filed an Emergency Motion to require, among other things, that

Winthrop cease and desist from making a permanent appointment until after this Decision issued. The Commission has not acted on that motion, or chosen to vacate the temporary promotion and revive any prior certification, because it believes that the relief ordered by this Decision is the preferred means to protect the rights of the Appellant in these circumstances with minimum disruption to other affected parties. However, in view of the pending permanent promotional appointment in which Winthrop presumably will be required to evaluate the same two candidates involved in this appeal, and given the credibility assessments previously made by Town Manager White and Chief Flanagan, as well as the Commission's above-referenced conclusions regarding the flaws in the selection process, the most appropriate relief regarding this appeal is to ensure that the selection process for the permanent position does not repeat the missteps that occurred in making the temporary appointment.

The relief provided in this appeal does not mean to urge or require such a procedure in every case. The Commission acknowledges that appointing authorities must have discretion in designing and implementing interview programs and there is no "one size fits all" format.<sup>1</sup> The Commission intervenes here as a matter of relief, in its discretion, because of the unique circumstances presented here, i.e., the significant difference in the candidate's civil service scores, seniority and rank, and the facts that the exact same few players are involved both in this appeal and in the pending permanent appointment to the

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<sup>1</sup> The Commission's Decisions have commented on a wide range of interview plans, some of which have been commended and some more problematic, and may be a useful starting point for any appointing authority which is considering such a plan. Some examples of the former: Sellon v. Mansfield Police Dep't, 21 MCSR 99 (2008); Brown v. Town of Duxbury, 19 MCSR 407 (2006); Boardman v. Beverly Fire Dep't, 11 MCSR 179 (1998). Examples of the latter: Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Horvath v. Pembroke, 18 MSCR 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).

same position, in a relatively small Department, arising within a matter of months of each other. cf. Staveley v. City of Lowell, 71 Mass.App.Ct. 400, 406, 882 N.E.2d 362, 367 (2008) (“In the remedial category, the commission’s powers are broad and its expertise particularly helpful.”) See also, Memorandum of Decision and Order, Boston Police Dep’t v. Cawley, Suffolk Sup.Ct., Docket SUCV2006-5331C (July 2, 2008), affirming, Cawley v. Boston Police Dep’t, 20 MCSR 389 (2006) (upholding order that future psychiatric evaluations of appellant be conducted by persons other than persons who initially evaluated her); McGunagle v. North Attleborough Police Dep’t, 13 MCSR 1 (1999) (noting, but not exercising, authority to vacate appointment made through a flawed interview process); Rydzak v. Westfield G.& E. Light Dep’t, 6 MSCR 234 (1993) (ordered redesign of selection process).

For the reasons stated herein, Lieutenant Moses’ appeal is hereby *allowed, as follows*:

**RELIEF TO BE GRANTED TO THE APPELLANT**

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission orders the following relief:

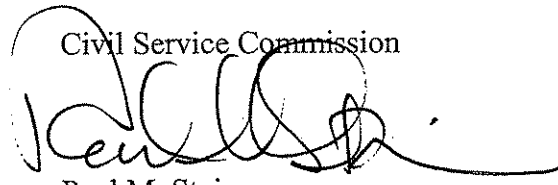
(1) The same statement of reasons provided by the Town of Winthrop, as Appointing Authority, to bypass Lieutenant Thomas C. Moses for promotion to temporary Captain in the Winthrop Fire Department in favor of Firefighter William “Scott” Wiley shall not be used in the selection process for the appointment of a permanent Fire Captain under the current pending or any future certification unless they are justified after conducting an acceptable selection process described below;

(2) Winthrop may proceed with the current pending certification for appointment of a permanent Fire Captain subject to these conditions: (a) a digital video recording shall be

made and preserved of any and all interviews of candidates; (b) Winthrop shall include as part of any interview process, not less than four persons as interviewers in addition to or other than the Town Manager and Fire Chief Flanagan; (c) all candidates shall be interviewed on the basis of specific questions, identical in substance and tone; and (d) each interviewer shall provide an independent, written numerical and narrative evaluation of the candidate's performance, which shall be prepared without consultation with any other interviewer;

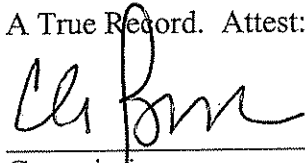
(3) the Commission does not vacate the appointment of temporary Fire Captain made by Winthrop on or about April 11, 2008, or revive any prior certification, but will reserve decision on those issues until the appointment of a candidate to the pending permanent position;

(4) the Commission will retain jurisdiction of this matter as may be appropriate in aid or clarification of the relief herein.

Civil Service Commission  
  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Marquis; Taylor [absent]) on August 4, 2008.

A True Record. Attest:

  
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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: Leah M. Barrault, Esq. (Appellant) (By Facsimile & First Class Mail)  
Howard L. Greenspan, Esq. (Respondent) (By Facsimile & First Class Mail)  
Martha O'Conner, Esq. (HRD) (By Facsimile & Interoffice Mail)