

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 979-1900

DAVID C. PEARY,
Appellant

CASE NO. G2-21-019

v.
CITY OF WOBURN,
Respondent

Appearance for Appellant:

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623 Main Street
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Appearance for Respondent:

Ellen Callahan Doucette, Esq.
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Commissioner:

Paul M. Stein

DECISION

On January 25, 2021, the Appellant, David C. Peary, currently a Fire Captain in the Woburn Fire Department (WFD), appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b), from his bypass by the Mayor of the City of Woburn (City), the Appointing Authority, for appointment as WFD Deputy Fire Chief.¹ The Commission held a pre-hearing conference on March 26, 2021 via videoconference (Webex). A full hearing was held, also by videoconference (Webex), on May 3, 2021, which was digitally recorded.² Seventeen (17) Exhibits (*Resp.Exhs. 1 through 13, 13A, 14 through 16; App.Exhs. 1 through 17 & 19*) were received

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

² A link to the digital recording of the full hearing was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

in evidence.³ Woburn filed a Proposed Decision on July 16, 2021 and the Appellant filed a Proposed Decision on July 18, 2021. For the reasons stated below, Captain Peary's appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Woburn Mayor Scott D. Galvin
- Woburn Fire Chief (ret.) Stephen Adgate
- Elaine Pruyne, Woburn Director of Human Resources

Called by the Appellant:

- David C. Peary, WFD Fire Captain, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. In February 2013, the City received a Report from a Fire Department study conducted by Municipal Resources, Inc. (MRI). As part of the Report, MRI recommended that the City establish the position of assistant fire chief as a management position, exempt from civil service and the Woburn Fire Department's bargaining unit. (*Resp.Exh.13*).

2. On January 22, 2015, the Woburn City Council enacted an Ordinance creating the Assistant Fire Chief position at the WFD and defined the duties of the position. (*Resp.Exhs.11, 12; App Exhs.12, 14; Testimony of Galvin*).

3. On September 3, 2015, the Ordinance was revised to change the title of the position from "Assistant" to "Deputy" Fire Chief, after the Mayor notified the City Council that civil service did not recognize the Assistant Fire Chief title. (*Resp.Exh.13; Testimony of Galvin*)

³ App.Exh.18 was withdrawn.

4. The Mayor of Woburn, Scott Galvin, is the Appointing Authority for both the Deputy Fire Chief and the Fire Chief positions at the WFD. He has been Mayor of Woburn for twelve years. (*Resp.Exhs.1, 12; App.Exhs.12, 14; Testimony of Galvin*).

5. On or about August 20, 2020, the City posted a job bulletin inviting qualified applications for the “2020 Woburn Deputy Fire Chief Sole Assessment Center with Education & Experience” (Assessment Center) as part of the selection process for a new Deputy Fire Chief. (*Resp.Exh.1; App.Exh.8*).

6. On or about October 8, 2020, the Assessment Center exam was held which accounted for 80% of the applicant’s final score, while the applicant’s Education and Experience (E&E) accounted for 20% of the final score. (*Resp.Exh.1*).

7. On or about November 16, 2020, the Commonwealth’s Human Resource Division (HRD) established an eligible list containing the names and rank of the four (4) WFD Fire Captains who took and passed the October 2020 Assessment Center for the Deputy Fire Chief position. (*Resp.Exh.16*).

8. Elaine Pruyne, the City of Woburn’s Director of Human Resources, created a Promotional Certification of the eligible candidates for the Deputy Chief position. (*Resp.Exh.2, App.Exh.3; Testimony of Pruyne*).

9. Capt. Peary’s name appeared first on the Promotional Certification. He signed the Promotional Certification on November 24, 2020, indicating that he was “willing to accept” the position. (*Resp. Exh.2; App.Exh.3; Testimony of Ms. Pruyne*).

10. Capt. Perry is a tenured member of the WFD, appointed as a full-time permanent Firefighter in 1994. He has held the rank of Fire Captain for ten years. He reports to a District Fire Chief and, as senior Captain in his group, has filled in (estimated at over 500 hours) as

Acting District Chief in his supervisor's absence. Earlier in his career, he served as a District Chief's Aide. (*Resp.Exhs.1, 8 & 16; App.Exh.2; Testimony of Appellant*)

11. Capt. Peary was raised in a family of firefighters, including his father, who served as WPD Fire Chief, and an uncle and two (2) cousins, also longtime members of the WFD. (*Testimony of Appellant*)

12. Capt. Peary has no formal education beyond high school, having graduated from Woburn High School in 1976. (*Resp.Exh.4*)

13. Simultaneous with his service as a firefighter, Mr. Peary owned and operated a welding/metal fabrication company for many years, which he ultimately sold. As a welder, he is familiar with reading blueprints, yet he has no experience with the Fire Codes. He also has some background in construction, beginning when he was thirteen (13) years old, helping his father. (*Resp.Exh.4; Testimony of Appellant*).

14. Since he was appointed as a Fire Captain, Capt. Peary has served as the Department's Training and Safety Officer, which is a special duty assignment under the Collective Bargaining Agreement. (*Resp.Exhs.4, 14; Testimony of Appellant & Adgate*)

15. As the Training/Safety Officer, Capt. Peary's duties include coordinating training for each Department group including the preparation of lesson plans and materials and information used; obtaining outside training officers, materials, and equipment when necessary; maintaining training records; and providing written reports to the Fire Chief. (*Resp.Exh.14; Testimony of Appellant*).

16. The three other WFD Fire Captains whose names appeared on the Promotional Certification also signed the certification as "willing to accept" including Candidate C, the selected

candidate for the position of Deputy Chief, who ranked third on the list. (*Resp.Exh.2: App.Exh.3*)⁴

17. Candidate C worked in construction prior to becoming a Firefighter. He was appointed to the position of full time WFD Firefighter in 2003, nine (9) years after the Appellant. He was promoted to the rank of Lieutenant in 2009, four (4) years prior to the Appellant, and, thereafter, was promoted to the rank of Captain in 2013, four (4) years prior to the Appellant. (*Resp.Exh.6; Testimony of Galvin*)

18. As a Lieutenant, Candidate C served in the special assignment of Lieutenant assigned as Fire Prevention Officer. (*Resp.Exh.6; Testimony of Adgate*).

19. As Prevention Officer, Candidate C supervised and coordinated activities of fire personnel in inspecting buildings, interpreting regulations, and issuing permits; conducting educational programs; enforcing Fire Codes and Ordinances; conducting property inspections; reviewing development plans; and interacting with other code enforcement agencies. (*Resp.Exh.15*).

20. As Captain, Candidate C has been a Shift Commander since 2013, which is the Captain in-charge of one of the Department's four (4) groups of seventeen (17) firefighters that work a 24-hour shift. (*Resp. Exhs.5, 6, 8; App.Exhs.1, 6 Testimony of Galvin & Adgate*).

21. As Shift Commander, Candidate C had regular opportunities to work with and support the rank-and-file members of the WFD, to gain valuable field supervisory experience over lieutenants, and to with the Fire Chief on WPD policy. (*Testimony of Galvin & Adgate*)

⁴ Candidate C's name also appeared on the certification for Chief (Chief Certification) position in 2020 and he signed the Chief Certification and circled the option to "decline appointment" the position, as opposed to the option of "willing to accept." Candidate C did not date this form. Candidate C was ranked second on the Chief Certification. There were only two names on the Chief Certification. The first ranked candidate, who was the Deputy Chief at the time, was appointed to the Chief's job. The Mayor testified that, at no time, did Candidate C show interest in interviewing for the Chief's job and that the first ranked candidate on the Chief's Certification was the "clear cut candidate to be Chief." The Mayor recalls that Candidate C signed the Chief Certification, declining appointment, on the same day that he signed the Deputy Chief Certification ("willing to accept", which was the same day as his interview for the Deputy Chief position, November 25, 2020. The Mayor testified that Candidate C signed the Chief Certification on that same day of the Deputy Chief interview "to dot I's and cross T's." (*App.Exh.17; Testimony of Galvin*).

22. Both Capt. Peary and Candidate C are EMTs, as required by the WFD, and have obtained various related certifications throughout their tenure. (*Resp Exhs.4, 6*).

23. The Mayor knew each candidate's final score on the Assessment Center, specifically, that Capt. Peary had received a score of 81, the second ranked candidate scored 80 and Candidate C, who ranked third, scored 79. (*Resp. Exhs.2, 8; App.Exhs.1,3; Testimony of Galvin & Agate*)

24. In addition to considering each candidate's total score on the Assessment Center, Mayor Galvin personally reviewed each candidate's personnel files, their prior disciplinary history, their resumes and cover letters, their past education and experience as a firefighter, any other relevant experience, and any letters of recommendation. Additionally, each candidate underwent an interview with the Mayor. (*Resp.Exhs.7; App.Exh.10; Testimony of Galvin*).

25. The Mayor also requested and received a written recommendation from recently-retired Chief Adgate, who had personal knowledge regarding each candidate's experience and performance and had interacted with each of them professionally as a member of the WFD for years, especially the last three (3) years as WFD Chief. (*Resp. Exhs.7; App.Exh.10 Testimony of Galvin & Adgate*).⁵

26. Chief Adgate had been a member of the Department since 1980. He began as a Firefighter, was promoted to Lieutenant and held that rank for 18 years, was promoted to Captain for six (6) years and, thereafter, was named the Department's first Deputy Chief after the position was created by Ordinance. Having held the Deputy Chief position for eighteen (18) months, he was uniquely familiar with the responsibilities and duties of the position. Chief Adgate also had served as the

⁵ Chief Adgate and Mayor Galvin are personal friends and share a mutual friend in common. They are both friends with an attorney with whom Mayor Galvin used to share office space with when the Mayor practiced law as a sole practitioner. Chief Adgate is the godfather to this mutual friend's son. (*Testimony of Galvin & Adgate*).

Training/Safety Officer at one point in his career, the assignment Capt. Peary has held since he became a Captain (*Testimony of Adgate*).

27. Chief Adgate's recommendation stated that, in his opinion, Candidate C "would be the most desirable candidate [who] has shown a constant commitment to the goals of the Department. . . . [Candidate C's] involvement and participation in the Department's future, especially the construction of the new Fire Station, did not go unnoticed. He has attended most if not all New Station Building Committee meetings always adding insight and positive reinforcement to the City's project. It must also be recognized that [Candidate C] was the Department Fire Prevention Officer for a number of years gaining much knowledge which becomes extremely valuable during these times of growth." (*Resp. Ex. 7; Apt. Ex. 10*)⁶

28. The Mayor's interviews with the four candidates were conducted over a two (2) day period. Capt. Peary and the second-ranked candidate were interviewed on the first day and Candidate C and the fourth-ranked candidate were interviewed on the second day. (*Resp.Exhs. 3, 4, 5, 6; App.Exhs. 4, 5, 6, 7; Testimony of Appellant & Galvin*).

29. Mayor Galvin asked each candidate the same set of twelve (12) questions. The interviews were not recorded. HR Director Pruyne sat in on the interviews but did not ask questions. She took notes which she typed up at a later date. The Mayor did not produce any detailed interview notes. (*Resp. Exhs. 3, 4, 5, 6; App Exhs. 4, 5, 6, 7; Testimony of Pruyne & Galvin*)

30. The Mayor scored each candidate on a scale of 1 (Low) to 10 (High) based on four criteria described in the Interview Observation Scoring Sheet as follows (i) Appearance: Did they dress

⁶ In his testimony, Chief Adgate noted that this position required communication skills and daily contacts with the public. Chief Adgate felt Candidate C did a "spectacular job as the Fire Prevention Officer." Chief Adgate noted that Candidate C worked closely with the Building Department and with Fire Codes, making sure all construction projects in the City adhered to the Fire Code. Chief Adgate also cited the fact that Candidate C demonstrated dedication to the future of the Department by attending meetings of the New Fire Station Building Committee and offering suggestions. (*Testimony of Galvin & Adgate*).

in a manner that shows they want the job and respect the process? (ii) Poise: How do they handle the stress of the interview? Do they relax after a bit? Do they take they process seriously? (iii) Communication: Did they answer questions appropriately and completely? and (iv) Experience: How does the candidate’s experience meet the needs of the Deputy Fire Chief position? (*Resp. Exhs. 2, 3, 4, 5; App.Exhs. 3, 4, 5, 6, 7; Testimony of Galvin*)⁷

31. Capt.ain Peary , received a score of 33 out of 40 - 10 for Appearance, 9 for Poise, 8 for Communication, and 6 for Experience. (*Resp.Exh 5*).

32. Candidate C received a score of 39 out of 40 -10 for Appearance, 10 for Poise,10 for Communication, and 9 for Experience. (*Resp. Exh 3; App. Ex. 6*).

33. By letter dated December 4, 2020, Mayor Galvin informed Capt. Peary that he had been bypassed in favor of Candidate C for appointment to the position of Deputy Fire Chief. (*Resp.Exh.8*)

34. In the bypass letter, Mayor Galvin explained the reasons for his decision to promote Candidate C. These reasons included: (a) Candidate C’s more extensive record of leadership experience; (b) giving “significant weight” to the recommendation of Chief Adgate; (c) the Mayor’s personal knowledge of Candidate C’s commitment to long-term planning for the WFD as indicated by his (voluntary) participation in the New [Fire] Station Building Committee; and (d) better interview performance on Question #5 (how to “deal with a dissatisfied resident who was clearly in the wrong” and Question #7 (explain “two or three technological changes in

⁷ According to the Interview Scoring Observation Sheet: (*Resp.Exhs 3, 5; App.Exhs. 4, 6*).

firefighting and how they can change our current operations.” (*Resp.Exh.8: App.Exh.1;Testimony of Galvin*)

35. In his response to Question #5, Capt. Peary indicated that he had not been involved in any such instance during his time with the WFD, which Mayor Galvin was surprised to hear. (*Resp.Exh.3 & 8; App Exh. 4; Testimony of Appellant & Galvin*)

36. In Candidate C’s response to Question #5, he told of an encounter with a resident over issues with a neighbor over a propane tank. (*Resp. Exhs.5 & 8; App.Exh.6; Testimony of Galvin*).

37. Capt. Peary’s response to Question #7 focused mainly on training, the role he played in the WFD as the Training Officer, more specifically online training over Zoom rather than a broader discussion of any technological advancements in firefighting. (*Resp. Exhs.3 & 8; App Exh.4*).

38. Candidate C’s response to Question #7 addressed developments in computer tracking of EMS calls through equipment that can split the type of calls, whether it be a fire call or an EMS call. This technology, he explained, would help to distribute manpower to better manage and respond to scenes. He also spoke of a trade show that he had attended prior to the start of the pandemic where he saw advancements in safer hose storage. Candidate C acknowledged that it was not groundbreaking, but it could enhance putting out fires and prevent injuries to the crew. (*Resp.Exhs5 & 8; App Exh.6; Testimony of Galvin*)

39. On January 25, 2021, Capt. Peary duly filed a time appeal of his bypass with the Commission. (*App.Exh.2*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills”, assuring fair treatment of all . . . employees in all aspects of personnel administration,”

and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass.1106 (1996)

Promotional appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient” and upon “failure of proof by the [appointing authority]”, the commission has the power to reverse the [bypass] decision.”)

The governing statute, G.L.c.31,§ 2(b) gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) The Commission “. . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.”. Id See also Town of Brookline v. Alston, 487 Mass. 278 2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).Even if the appointing authority did not meet the burden of proof for bypass on every reason given, its discretion must be upheld if any reason is sufficient, standing alone, to justify the bypass. There is no requirement that the appointing authority prove every reason. Porter v. Town of Reading, 21 MCSR 43, 44-45 (2008); Driscoll v. Boston Police Department, 30 MSCR 477, 482 (2007).

ANALYSIS

Comparison of Education and Experience

Capt. Peary correctly points out that his Assessment Center final examination score and those of Candidate C include pre-determined points for the candidate's prior education and experience (E&E) as established by the Massachusetts Human Resources Division (HRD) pursuant to its broad statutory discretion to provide credit for such education and experience as HRD designates, typically weighted as twenty percent (20%) of the final examination score. G.L.c.31, §22, ¶1. See, e.g., Cataldo v. Human Resources Division, 23 MCSR 617 (2010)

This embedded accounting for E&E, however, does not preclude an appointing authority from considering candidates' relative education and experience when appropriate, so long as it does not undermine the credits awarded as part of the examination process prescribed by HRD. See generally, Sherman v. Town of Randolph, 472 Mass 892, xxx, ,n.19 (2015) (“Although credits are provided by statute to certified candidates for ‘training and experience,’ ..., and the names of veterans are placed ‘ahead of the names of all other persons’ on the certification lists, ... it does not follow that an appointing authority may not consider factors relating to a candidates experience, training, or military service in deciding to bypass a candidate”),

For example, when two candidates have tie scores, an appointing authority would be justified to pick a candidate who held an advanced degree over one who did not, in effect, using the educational record as a “tie-breaker,” although the scores had already accounted for those differences (i.e., the candidate without a degree actually would have scored higher on the written examination portion in such a hypothetical). Similarly, an appointing authority might justify considering whether a candidate's particular type of experience has more appropriately

prepared the candidate for the position for which he or she is aspiring over another candidate with a close, but lower overall score who had little such experience.

Mayor Galvin believed “experience” was the most important factor he considered in his appointment for the Deputy Chief position. He focused heavily on the differences in the type of experience that Capt. Peary and Candidate C had during their tenure with the WPD, most especially in their roles and tenure as Captain and Lieutenant. This distinction in the experience of candidates that Mayor Galvin applied in this case provides a reasonable basis for his preference for Candidate C, the more experienced candidate over the less experienced candidate, Capt. Peary, especially for a position as the second-in-command where the examination scores of the two candidates are very close (as here, within two (2) points.)

First, Capt. Peary has been with the WFD since 1994. He was promoted to Lieutenant in 2013 and ultimately Captain in 2017. Candidate C began his career with the Department in 2003, nine (9) years after Capt. Peary; however, he was promoted to Lieutenant four (4) years prior to Mr. Peary (2009) and has been a Captain since December 2013, also four (4) years longer than Capt. Peary. . It is reasonable to accord a longer tenure in a managerial position greater weight than overall longevity in the department.

Second, Candidate C has served as Shift Commander for all seven (7) years as a Captain, which has provided him with regular opportunities to support and supervise, both directly and indirectly through his Lieutenants, the seventeen (17) WFD rank-and-file members on duty and assigned to him on a daily basis each shift. and performs duties which span the entire range of the WFD, By contrast, the record evidence indicated that, as the Training and Safety Officer, Capt. Peary lacked such experience.

Third, prior to becoming a Captain, Candidate C was the Lieutenant assigned as the Fire Prevention Officer. Mayor Galvin considered Candidate C's experience as the Fire Prevention Officer to be influential in his decision, since Candidate C had experience working with the City's Building Commissioner, the Building Department, the Planning Department, and other fire departments. In his bypass letter, the Mayor noted that, given the growth and development within the City, Candidate C's experience as a Lieutenant (and prior experience in construction) and the relationship he has with other departments and leaders through the area is particularly valuable.

Fourth, unlike Candidate C's experience as Shift Commander, Capt. Peary's four (4) years of experience as a Captain, three years less than Candidate C, was served as the Training and Safety Officer which is primarily administrative in nature. As the Mayor testified, although the role of the Training and Safety Officer is a critically important one, it does not prepare him as well for the role of Deputy Chief as a Shift Commander would. Specifically, Capt. Peary's current role did not involve him in daily operations, and he has not had the same level of experience of overseeing and coordinating emergency responses or managing the day-to-day tasks associated with supervision of the crew as a Candidate C, a regularly assigned Shift Commander for seven (7) years.

Fifth, Mayor Galvin considered that Capt. Peary has no formal education beyond high school, noting that, although he is an experienced welder by trade, his experience involved blueprints, but not with the Fire Codes. Candidate C, however, held two Associate degrees (Fire Protection and Safety Technology; Business Administration), a Bachelor's degree (Fire Science), and is nearly finished earning a Master's degree in Public Administration in Emergency Services Management. This large difference in relevant education also represents an additional reasonable basis on which

the Mayor's selection of Candidate C for the senior command position of a Deputy Chief is reasonably justified.

Chief Adgate's Recommendation

Former Chief Adgate recommended Candidate C in his letter of recommendation to the Mayor and acknowledged Candidate C's varied work experiences and commitment to the goals of the Department under his leadership as the reasons for his recommendation. Chief Adgate's recommendation carried significant weight with Mayor Galvin, as someone who was intimately familiar with the candidates and the needs and operation of the WFD. Chief Adgate, a forty (40) year member of the WFD had personal knowledge of all of the candidates throughout their entire careers, most recently serving as their Chief for three (3) years. I am unpersuaded by the Appellant's argument that, personal friendship with the Mayor and another mutual acquaintance swayed Chief Adgate's honest, good faith assessment of the candidates' on-the-job performance. I acknowledge the potential for favoritism that might have crept into the picture here but, ultimately, the Appellant failed to come forward with adequate evidence of actual bias to undermine the bona fides of the final selection decision.

Interview Performance

Public safety agencies are properly entitled to, and often do, conduct interviews of potential candidates as part of the hiring process, especially in the case of promotional appointments of superior officers. In an appropriate case, a properly documented interview performance objectively ascertainable as subpar may justify bypassing the highest-ranked candidate for one deemed more qualified as the result of the latter's objectively superior interview presentation. See, e.g., Dorney v. Wakefield Police Dep't., 29 MCSR 405 (2016); Cardona v. City of Holyoke, 28 MCSR 365 (2015). See also Grenier v. Springfield Fire Dep't., 43 MCSR xxx (2021); Frost v. Town of Amesbury, 7 MCSR 137 (1994) (Commission upholds bypass where applicant's answers to

situational questions were unsatisfactory); LaRoche v. Department of Correction, 13 MCSR 159 (2000) (Commission upholds bypass where applicant's answers to situational scenarios did not comply with department policies and procedures and failed to demonstrate an ability to lead).

Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity” on the part of the interviewers, considerations that together form the linchpin of the basic merit principle set out in Section 1 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). Certain factors present in internal promotional interviews have been deemed significantly undermining or even fatal to the process, and as a result have caused the Commission to allow bypass appeals, including where an appointing authority has deviated from its standard promotional practices relative to specific candidates; where a department chief sits in on an interview and exercises undue influence over the process; where the actual recorded interviews cannot be reconciled with the assessment scoring of the interviewers; or where the interviewers rate similar answers markedly differently. The Commission gives especially heightened scrutiny to subjective interviews when it appears they have become a means to nullify the results of a duly administered, independent Assessment Center form of examination. See, e.g., Blanchette v. City of Methuen, 34 MCSR 431 (2021); Connor v. Andover Police Dept., 30 MCSR 439 (2017). Daley v. Town of Wilmington, 28 MCSR (2015), *aff’d sub nom.*, Town of Wilmington v. Civil Service Comm’n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

In this case, the Mayor’s interview procedures are problematic. Despite this Mayor’s long tenure as the civil service appointing authority, and knowing that it is advisable to record outcome-determinative interviews, he once again chose not to. The interviews were scored based on four,

largely subjective criteria— Appearance, Poise, Communication, and Experience – the candidates’ interview performance on answers to individual questions were not scored numerically, which would lead to more objectivity. The Mayor was the only person who asked questions and his recollection of the candidate’s performance rested primarily on his memory and the notes taken by the Director of Human Resources, the only other person in the room. Thus, the overall scores awarded by Mayor Galvin to Candidate C (39) versus Capt. Peary (33), alone cannot carry sufficient weight to override the far more complete and objective results of an Assessment Center examination in which Capt. Peary came out ahead, although nominally so, over Candidate C. See Hunt v. Woburn, xxx MCSR xxx (2020); Gibbons v. Woburn, xxx MCSR (2019)⁸

That, said, however, I do find credible Mayor Galvin’s explanation for why he believed that Capt. Peary’s response to two (2) particular questions, as compared to Candidate C’s responses, set Candidate C apart from Capt. Peary, Capt. Peary’s response to Question 5, relating to how he handled a situation with a citizen who was clearly in the wrong, stood out to the Mayor because Capt. Peary indicated that he had never been in such a situation. This was of concern to the Mayor because Mr. Peary had been with the WFD for twenty-six (26) years and he would have expected Capt. Peary to have had at least one instance where he exhibited some finesse with a disgruntled citizen. Candidate C, on the other hand, was able to describe an incident where he handled two neighbors who were in a dispute over a propane tank and Candidate C’s re-telling of the incident left the Mayor with the impression that Candidate C handled the situation well. The ability to handle complaints by residents diplomatically is certainly something a Deputy Chief would need to be able to do so and it is reasonable for the Mayor to consider Candidate C’s answer to be more acceptable and impressive than Mr. Peary’s response.

⁸ The City, on a going forward basis, should record all interviews for civil service appointments and promotions. Should the City failed to do so, the Commission may gave no weight to any such interviews.

Similarly, Capt. Peary's response to Question 7, asking the candidate to speak about two to three (2-3) recent advancements in technology in firefighting and how they impact operations, stood out to Mayor Galvin. Capt. Peary's response to this question was solely focused on the topic of training WFD members – which is Capt. Peary's purview – and, more specifically, how to utilize Zoom for online training. Candidate C's response regarding technological advancements was broader in scope and included specific examples: (1) advancements in tracking EMS calls through equipment that can split the type of calls (whether it be a fire call or an EMS call) and (2) advancements in safer hose storage, which Candidate C admitted was not groundbreaking, but could enhance putting out fires and prevent injuries to the crew.

After listening to the Mayor's testimony, I am persuaded that, despite the undue subjectivity of the process, and his regrettable decision not to record the interviews, the Mayor did not use the interview process as a predetermined subterfuge to override the results of the Assessment Center. The same questions were asked of all the candidates and extensive notes of the interviews were produced, to include the scoring methods. The Appellant suggests that, because Candidate C's father is a veteran who volunteers to help put on the local veteran's parades in the City, Mayor was predisposed to favor Candidate C over Capt. Peary. I do not believe the evidence supports such a finding. Furthermore, Capt. Peary himself is a member of a family with a rich tradition of service in the Department, with both former and current members. His own father was a former WFD Chief of the Department. Although it is clear that the Mayor and former Chief Adgate are personal friends, the evidence does not show that their friendship influenced Chief Adgate's recommendation of Candidate C. The Mayor was able to describe his thought process and analysis regarding Mr. Peary's responses to the interview questions, as compared to Candidate C's.

Finally, “[a] bypass may be reasonably justified on the merits, even where the appointing

authority uses flawed procedures for selecting candidates ... in such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with the fundamental purpose of the civil service system, to ensure decision-making in accordance with basic merit principles." Henderson v. Civil Service Comm'n, 54 N.E.3d 607 (Mass.App.Ct.2016) (Rule 1:28) citing Sherman v. Randolph, 472 Mass. 802, 813 (2015).

In sum, although it would be a close call to uphold this bypass solely on the basis of the interview scores, the other reasons provided for selecting Candidate C over Capt. Peary – a superior record of experience and advanced education, the former Chief's recommendation, and a well-founded conclusion by the Mayor that that Candidate C demonstrated a commitment to the WPD's future, are sound and sufficient reasons that provide reasonable justification to support the bypass decision for this second-in-command position with the WPD. Upon these facts, the Mayor's decision should not be disturbed by the Commission.

CONCLUSION

For all of the above reasons, the Appellant's appeal under G2-21-019 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 24, 2022.

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:
Ellen Callahan Doucette, Esq. (for the Respondent)
Michael Reilly, Esq. (for the Appellant)