

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

JAMES J. PIERSIAK,
Appellant

v.

Docket No. G2-07-210

TOWN OF NEEDHAM,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Hearing Officer:

Angela C. McConney, Esq.

DECISION

Pursuant to c. 31 § 2(b), the Appellant James J. Piersiak (hereinafter “Appellant” or “Piersiak”) appeals the decision of the Town of Needham (hereinafter “Town,” or “Respondent”), claiming that he was bypassed for promotional appointment to the position of full-time permanent fire lieutenant in the Needham Fire Department (hereinafter “Fire Department”). A full hearing was held on March 24, 2008 and May 14, 2008 at the offices of the Civil Service Commission (hereinafter “Commission”). The witnesses were not sequestered. Five (5) tapes were made and are retained by the Commission. Transcripts of the hearing are

deemed the official record of the proceedings. The record was left open in order for the Town to submit further documentation.

FINDINGS OF FACT

Twenty-two (22) exhibits were entered into evidence at the hearing. Exhibit 23 was submitted on a later date as agreed among the parties and the hearing officer. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Fire Chief Paul F. Buckley;

For the Appellant:

- Deputy Chief James Benedict, and
- James J. Piersiak, the Appellant;

I make the following findings of fact:

1. Town Manager Kate Fitzpatrick is and was, at times relevant, the Appointing Authority, as defined in G.L. c. 31 §1 for the Town of Needham Fire Department. (Stipulated Fact)
2. There are two fire stations in the Town. There is a total of 74-75 uniform and support personnel in the Fire Department. (Testimony of Chief Buckley)
3. The Appellant has been employed by the Town as a firefighter since March 6, 2000. (Stipulated Fact, Testimony of Appellant)
4. Matthew P. Dooher (hereinafter “Dooher”) has been employed by the Fire Department since September 11, 2000. (Stipulated Fact) He has ten years of emergency services experience. (Testimony of Chief Buckley, Exhibit 5)

5. Both the Appellant and Dooher took and passed the promotional exam for fire lieutenant. The Appellant received a score of 82, Dooher received a score of 77. (Stipulated Fact)
6. The Appellant's name appeared at the top of the eligible list for Certification No.: 270437. Dooher's name appeared in the second position on the list. (Stipulated Fact)
7. On May 14, 2007, the Appointing Authority submitted a list of bypass reasons to HRD. (Exhibit 2)
8. The Appointing Authority promoted Dooher to the position of lieutenant on or about May 20, 2007, thereby bypassing the Appellant. (Stipulated Fact)
9. On or about June 5, 2007, HRD notified the Appellant that it had approved the bypass reasons. (Stipulated Fact)

Appellant's Background

10. The Appellant has a Master's Degree in Criminal Justice (Testimony of Chief Buckley) He is the only firefighter with a master's degree; the other employee with a master's degree is a civilian. (Testimony of Chief Buckley)
11. The Appellant attended the Worcester Fire Academy (hereinafter "Academy"), graduating first in his class. (Testimony of Appellant)
12. The Appellant is a licensed paramedic with more than twenty-one (21) years of paramedic experience. He has extensive certifications and credentials in the area of emergency medicine. (Testimony of Appellant, Exhibit 13)
13. He is also a CPR instructor, instructor trainer, and affiliated faculty with the American Heart Association.

14. The Appellant is a Massachusetts OEMS instructor coordinator, which allows him to run his own Emergency Medical Technician (EMT) programs and teach paramedic programs. He has been teaching EMT skills since 1984. (Exhibit 13, Testimony of Appellant)
15. He has formerly served as the EMS Coordinator for the city of Cambridge, in this position he supervised the city's paramedics. (Testimony of Appellant) He teaches EMT courses at various hospitals, and established the EMT and continuing education program at Milford-Whitinsville Hospital. (Testimony of Appellant)
16. The Appellant provided EMT training to the Fire Department for at least six years before he became a firefighter. At one point, he trained at least seventy-five (75%) of the firefighters as EMTs. (Testimony of Appellant)
17. When the Appellant was teaching full time, the Office of Emergency Medical Services (hereinafter "OEMS") found that his classes had the highest passage rate in the state, at approximately 92%. (Testimony of Appellant)
18. The Appellant was asked to teach an EMT course to the other recruits while he was at the Academy. The Appellant's students achieved a 100% pass rate on the state EMT examination. (Testimony of Appellant)
19. He is a national registered paramedic, in addition to being a state registered paramedic.
20. Before he was a firefighter, the Appellant was a police officer for approximately 12 years. (Testimony of Appellant)
21. In 1995 he took a leave of absence from work as a police officer and volunteered in Haiti, training and teaching approximately 100 new police recruits. (Testimony of Appellant, Exhibit 13)

22. While still a police officer, the Appellant received a congratulatory resolution from the state Senate, citing him for his courage and bravery for intervening in an armed robbery – that occurred when he was off duty. (Testimony of Chief Buckley, Testimony of Appellant)
23. Before he became chief, Chief Buckley was the Appellant’s immediate supervisor, and wrote up his performance evaluations. Since becoming Chief, he has continued to sign each and every performance evaluation. (Testimony of Chief Buckley)
24. Performance evaluations cover emergency medical skills, fire ground skills, work group interaction, supervisory skills and overall work performance. (Testimony of Chief Buckley, Exhibit 16)
25. The Appellant is certified as a Firefighter I and Firefighter II, Fire Officer I and Fire Officer II, Inspector I and Inspector II, Fire Instructor I and Fire Instructor II, Fire Safety Officer I and Aerial Apparatus Officer. (Testimony of the Appellant, Exhibit 13)

The Interview

26. Shortly after the position for full-time permanent fire lieutenant became available, the Appellant heard several rumors that he was going to be bypassed. (Testimony of Appellant)
27. No candidate has ever been bypassed for promotion during the Appellant’s seven year tenure in the Fire Department. When he checked, he learned that the last known promotional bypass occurred some fifteen to twenty years ago. (Testimony of Appellant)
28. The Appellant prepared for the interview by doing practice interviews with some area chiefs. He also approached someone who had just made deputy chief in the Fire Department, his own deputy chief and his lieutenant – seeking advice from them and doing simulated questions and answers. (Testimony of Appellant)

29. He was informed by his deputy and his lieutenant that the interview was a very informal procedure, and that he should not worry given that he was number one on the list.
(Testimony of Appellant)
30. The interviews of the three candidates took place on or about May 9, 2007, and were conducted by Chief Paul F. Buckley (hereinafter “Chief Buckley”) and Deputy Chief Alfred DeIulio (hereinafter Dep. Chief DeIulio”). Chief Buckley did not consult with the candidates’ immediate supervisors before the interviews. He did not review the candidates’ performance evaluations as part of the selection process. Although he was the Appellant’s direct supervisor before he became chief, he has never directly supervised Dooher.
(Testimony of Chief Buckley)
31. The Appellant gave both Chief Buckley and Dep. Chief DeIulio an extensive package containing a cover letter, a resume, certifications, and other relevant documents before the interview began. Chief Buckley looked only at the first couple of pages, spending no more than two minutes in his review – although the Appellant’s packet numbered fifty-seven (57) pages. Dep. Chief DeIulio examined through the packet more intensively, he looked at about half of the pages. (Testimony of Chief Buckley, Testimony of Appellant, Exhibit 13)
32. The interview lasted forty-five (45) minutes. (Testimony of Appellant)
33. Dooher had given the Chief his packet the day before. His packet numbered twenty (20) pages. (Exhibit 5, Testimony of Chief Buckley)
34. The chief testified that he took no notes, did not record the candidates’ answers, and used no rating sheets in judging their performance. The interviews were neither recorded nor videotaped. Dep. Chief DeIulio also took no notes. The chief further testified that there were no model answers to the questions. (Testimony of Chief Buckley)

35. Immediately after the Appellant answered the last question, and without consulting with Dep. Chief DeIulio, Chief Buckley told the Appellant that he would be bypassed.

(Testimony of Chief Buckley, Testimony of Appellant)

36. The chief informed Dooher that he would be promoted the next day. (Testimony of Chief Buckley)

Bypass Reasons

37. Chief Buckley cited three reasons for the Appellant's bypass in the May 14, 2007 letter to HRD: (1) the Appellant's alleged sick time abuse, (2) the alleged swapping of his schedule that put the Fire Department's ambulance service in jeopardy, and (3) his failure to answer questions satisfactorily during the interview. (Exhibit 2) The Appellant learned of these reasons for the first time when he received his letter from HRD on or about June 5, 2007.

(Testimony of Appellant)

- Sick time

38. In the letter to HRD, Chief Buckley wrote that the Appellant's use of sick leave was "fairly substantial." (Exhibit 2) Chief Buckley did not know the departmental average for sick leave usage, he testified that he had done no research to ascertain it. (Testimony of Chief Buckley)

39. The Chief testified that approximately one to two years ago, the Appellant confided in him regarding family problems. The chief appeared supportive and said to the Appellant, "Your family comes first and the department comes second." The Appellant was a first responder to a fatal accident scene, where the victim was his sister-in-law. The Appellant had to take time off to attend to his wife who had recently given birth, and was suffering from severe postpartum depression. The Appellant, an asthmatic, also had pneumonia on two separate

occasions in the winter of 2005. That year, he also had to have surgery for a mass in his stomach. In 2006, he had to have emergency surgery on his appendix. (Testimony of Chief Buckley, Testimony of Appellant)

40. The Appellant did indeed leave work early numerous times on sick leave, but after completing at least half of his shift. (This was common practice in the Fire Department.) Pursuant to the terms of the collective bargaining agreement (“CBA”), he could not be charged for these absences. Article 16 of the applicable CBA *requires* the chief to investigate and ascertain the validity of any request for non-occupational sick leave, and specifically allows the chief to request doctor’s notes. According to the CBA, the Chief should only approve sick leave requests if he is satisfied that it is valid. (Testimony of Chief Buckley, Testimony of Appellant, Exhibit 12)
41. Although Chief Buckley testified that the number and timing of the Appellant’s absences were unacceptable, no one from the Fire Department ever requested a doctor’s note from or disapproved any of his sick leave requests. (Testimony of Chief Buckley, Testimony of Appellant)
42. Chief Buckley testified that he spoke to the Appellant about his sick leave usage in January of 2005. However, this conversation is not documented in the Appellant’s personnel file. (Testimony of Chief Buckley, Testimony of the Appellant)
- Understaffing of the Ambulance Service
43. The Fire Department handles approximately 3,200 calls per year, two-thirds of them Emergency Medical Service (“EMS”) calls. (Testimony of Chief Buckley, Testimony of Appellant)

44. Of the approximately 50 front line uniformed firefighters, 15-16 of them were paramedics at the time of the bypass. Paramedics are trained in more advanced life saving procedures than emergency medical technicians (hereinafter “EMTs”). (Testimony of Chief Buckley)
45. The Fire Department is licensed by the Executive Office of Health and Human Services, under OEMS to operate an advanced life support (hereinafter “ALS”) ambulance, staffed by paramedics. It also operates a basic life support (hereinafter “BLS”) ambulance, which can be staffed by EMTs. The BLS and ALS are billed at different rates. (Testimony of Chief Buckley)
46. In August 20, 2003, the OEMS conducted an inspection of the Fire Department. The OEMS found that only one paramedic was working, instead of the two as required by state regulations to staff an ALS. (Testimony of Chief Buckley, Exhibit 7)
47. The shortage happened because two of the three paramedics assigned to the ALS had been allowed to take vacation days at the same time. (Exhibit 7, Testimony of Chief Buckley)
48. OEMS sent a letter to the Town Manager directing an immediate plan of correction be implemented immediately. (Testimony of Chief Buckley)
49. On November 5, 2003, the then Fire Chief issued a memorandum stating that “paramedics are strongly encouraged to swap only with other paramedics in an effort to maintain that we always have two paramedics, a minimum of two paramedics on duty.” (Testimony of Chief Buckley)
50. In the letter to HRD, the chief wrote that the Appellant “repeated disregarded this memo and continued to swap with non-medics placing an unnecessary strain on the system, and his coworkers.” (Exhibit 2)

51. Chief Buckley initially testified that from November, 2003 to approximately September, 2005, the Appellant swapped with non paramedics 59 times, out of a total of approximately 160 work shifts. He testified that Dooher swapped with non paramedics 11-12 times during the same period. The chief then amended his testimony and stated that there were 320 and not 160 opportunities for the Appellant to have swapped during the above-mentioned time period. (Testimony of Chief Buckley)
52. The chief only examined data regarding swaps from the period of November, 2003 to September or October of 2005. Surprising, he did not consider swap data from the two year period *immediately preceding* the bypass, he did not present any swap data from that period to the Commission. (Testimony of Chief Buckley)
53. When asked if conduct or behavior closer in time to the selection process is more important than behavior which occurred two years prior to the selection, Chief Buckley stated, “I think it is all important” but agreed that it was at least equally important. (Testimony of Chief Buckley)
54. The chief could not identify a date or any time when the Appellant’s swaps strained the system and resulted in the ALS ambulance being taken out of service. During the period of Chief Buckley’s analysis: November, 2003 to September/October 2005, the Appellant’s swaps never directly resulted in the Fire Department not having the required minimum of two paramedics working. The chief testified that he did not know if the Appellant’s swaps resulted in the overtime hiring of a paramedic, something he could have easily researched.
55. Chief Buckley agreed that if the Appellant first tried to swap with paramedics, and then only swapped with non-paramedics if there were at least two paramedics working, he would have demonstrated responsibility on his part. He conceded that he could tell from

looking at work rosters whether the Appellant had acted thus responsibly.(Testimony of Chief Buckley)

56. On the occasions when he did swap, the Appellant did so in order to take classes at the academy. (Testimony of Appellant)
57. Deputy Chief James Benedict (hereinafter “Dep. Chief Benedict”) testified as to the Appellant’s responsible behavior when swapping. Dep. Chief Benedict has supervised the Appellant since he joined the Fire Department. They have the same work schedule. (Testimony of Dep. Chief Benedict)
58. Dep. Chief Benedict described the Appellant as very intelligent, a good worker who is not afraid to pull his load, and a good paramedic. (Testimony of Dep. Chief Benedict)
59. Dep. Chief Benedict testified that if the Appellant could not get a paramedic to swap with him, he would confirm with the other paramedics on the schedule that they would indeed show up, then notify him that he was unable to find a paramedic to swap with. Taking time off in this manner could not put a strain on the EMS system. (Testimony of Dep. Chief Benedict)
60. On at least one occasion, the Appellant cancelled his swap and reported for duty when a paramedic unexpectedly called in sick. (Testimony of Appellant)
61. In the seven years immediately preceding the bypass, Dooher swapped 108 more hours than the Appellant. (Testimony of Appellant, Exhibits 20 and 21)
62. The Fire Department has no written rule, regulation, policy, or procedure which prohibits paramedics from swapping with non-paramedics. However, Chief Buckley’s letter to HRD states that the Appellant’s swaps were a “Disregard for Department Policy.” (Testimony of Chief Buckley, Exhibit 2)

63. The CBA, which was in effect at all times relevant, does not prohibit paramedics from swapping with non-paramedics. (Testimony of Chief Buckley, Exhibits 8 and 9)
64. It is the Chief or the Deputy Chief's responsibility to approve or deny swaps. (Testimony of Chief Buckley, Exhibits 8 and 9) Neither the Chief nor the Deputy Chief has ever denied any of the Appellant's swap requests. (Testimony of Chief Buckley)

- Interview Questions

65. Chief Buckley wrote to HRD that when he posed the question, "Do you have any issues with any personnel if you were assigned on any shift at either station?" the Appellant's answer, suggesting that he would be respected due to his rank was inadequate. The chief continued, "[f]urther, in my opinion, believing that you would automatically gain respect of rank and position shows a lack of discretion and good judgment." (Exhibit 2). The chief testified that "You don't automatically get respect because you are put into a certain position and thinking that you do is, again, my professional opinion, wrong." (Testimony of Chief Buckley) Chief Buckley never voiced this opinion at the interview. (Testimony of Appellant)
66. In his testimony, Chief Buckley disagreed with the theory that it is possible for people to respect the position and not necessarily the person filling it. He testified that respect is not automatic and must be earned. (Testimony of Chief Buckley).
67. In his testimony, Chief Buckley did not appear familiar with the Fire and EMS Company Officer Book, although it was on the reading list for the promotional examination for the position at issue. That book states that, "[a] new officer should always remember that respect must be earned. However, it is also possible that members of the unit may decide to respect the position and not the person filling it." (Testimony of Chief Buckley, Exhibit 15)

68. Chief Buckley testified that part of the Appellant's answer was that the position and not the person filling it gets respect, but he was not sure of the Appellant's entire answer, had no notes regarding it, and did not remember it. (Testimony of Chief Buckley)
69. The Appellant testified that "I told him that I wouldn't have a problem gaining respect; that most of the members were fully aware of my knowledge and capabilities and they all respected it and they knew I had it because of all the schooling that I had been to, and that wouldn't be a problem. I also told him that the position comes with respect just by the uniform itself and that the respect of the other guys would have to be earned." (Testimony of Appellant)

Chief's Reasons for Choosing Dooher

70. In his letter to HRD, the chief listed five reasons for choosing Dooher over the Appellant. He stated that Dooher: (1) "willingly and enthusiastically assumed the role of mentor " for new firefighters/paramedics and "successfully prepared them to be the highly motivated coworkers they are today"; (2) "he displays the knowledge, skills and abilities that we look for when promoting a person... takes the lead in training drills ... even impromptu drills that are not scheduled... has readily accepted the position of "Acting Lieutenant" on numerous occasions"; (3) he " can be found daily going over apparatus and equipment to ensure proper condition and operation .. is done automatically ... motivates others to do so as well ... an exceptional case of "Leadership by Example"; (4) his volunteer service in the Muscular Dystrophy Association (MDA), annual WCVB Labor Day MDA Telethon, First Five Spinal Cord Rehabilitation Program and the Aquatic Program for the Boys and Girls Clubs, Boston; and (5) had an outstanding interview, and will "instantaneously gain the

respect of his subordinates, which is crucial to the success of a fire officer. (Testimony of Chief Buckley, Exhibit 2).

71. On cross examination, when Chief Buckley was asked if Dooher proactively volunteered to mentor new firefighters. He replied that Dooher would do so if the new paramedics happened to be assigned to his group. After initial disagreement, the chief testified that when new paramedics were assigned to his group, the Appellant also trained and mentored them, as is documented in his performance evaluations. (Exhibit 16, Testimony of Chief Buckley)
72. Dep. Chief Benedict testified that he has taken the Appellant's EMT Course and found the Appellant to be a very good teacher. (Testimony of Dep. Chief Benedict)
73. Although Chief Buckley relied upon Dooher's participation in impromptu drills as a bypass reason, they were not mentioned in his performance evaluations. (Testimony of Chief Buckley) The Appellant never saw Dooher perform these drills and heard from no one but Chief Buckley that he has conducted them. (Testimony of Appellant)
74. The Appellant testified that he also conducts impromptu drills and goes over apparatus. (Testimony of Appellant) He testified that "on any given day, you know, I am approached by senior and junior members to me and asked about different pieces of equipment where we will go down to the apparatus floor, pull a piece of equipment off the truck, go over the different dynamics of it, the operation of it, and then move on to another piece of equipment. So it is quite-- it happens quite often." The Appellant further testified that he not only checks his equipment every day, but that he also checks other equipment. (Testimony of Appellant)

75. The Appellant created inventory lists for each piece of apparatus and all the equipment that is supposed to be on that apparatus. Chief Buckley testified that he saw him working on this project. (Testimony of Chief Buckley)
76. The Appellant also testified that he trained new firefighters on the operation of Engine 3, which is a “quint” fire truck, meaning that it functions both as a pumper and a ladder. The Appellant described, in detail, how he would thoroughly demonstrate how to operate the truck. (Testimony of Appellant)
77. Because he is a licensed plumber, the other firefighters frequently seek out the Appellant for advice on water problems, boiler backfires, and subjects of that nature. For example, when there was a fire at the Needham Post Office, he was summonsed by the captain on scene to the boiler room in order to give plumbing advice. The Appellant advised the captain that the boiler was firing properly, so that the problem was one of venting. With the captain’s permission, the Appellant went up to the top of the chimney and found that it was indeed blocked. After the chimney was cleared, the building was vented. (Testimony of Appellant, Exhibit 13)
78. The Appellant also sought out Dep. Chief Benedict and asked for instruction on various subjects such as fire alarm panels. He also expressed interest in learning about sprinkler systems and various alarms. (Testimony of Dep. Chief Benedict)
79. The position of Acting Lieutenant is a desirable position, those filling it receive financial compensation, and the most senior firefighters in a group are given the first right of refusal for the position. (Testimony of Chief Buckley, Testimony of Appellant)
80. There are two senior officers assigned to Dooher’s group, while there are four senior officers assigned to the Appellant’s group. Due to the lesser number of senior officers in

Dooher's group, the laws of probability give him more opportunities to serve as Acting Lieutenant. (Testimony of Appellant)

81. Dooher served as Acting Lieutenant seven times. The Appellant served approximately four or five times. (Testimony of Chief Buckley, Testimony of Appellant)
82. Chief Buckley testified that the Appellant should have transferred to another group so that he could have more or at least the same opportunities as Dooher to serve as Acting Lieutenant. (Testimony of Chief Buckley) This scenario is untenable: it would require that the Appellant give up the camaraderie of his group to transfer to another group for a chance of being Acting Lieutenant once a year.
83. The chief noted Dooher's volunteer work in his May 14, 2007 letter to HRD. (Exhibit 2)
84. The Appellant has raised over \$10,000 for brittle bone disease. (Testimony of Chief Buckley, Testimony of Appellant)
85. The Appellant proactively volunteered his time to work with the People's Burn Foundation, a non-profit organization. (Testimony of Chief Buckley, Testimony of Appellant)
86. The Appellant's work with the People's Burn Foundation began in the spring of 2006. It consisted of showing testing or "pilot" videos to both firefighters and civilians, and giving tests before and after the showing of the video. Based on the feedback submitted by the Appellant and other testers, the video would be edited before release to the general public. The Appellant conducted this extensive project in the spring of 2006. The Chief was aware of the Appellant's hard work on the video project because the Appellant had to get his permission before showing it to his coworkers at the station. (Testimony of Appellant)

87. The Appellant voluntarily went to New York City to assist in the September 11th rescue and recovery efforts. He did not request or receive compensation for this. (Testimony of Chief Buckley, Testimony of Appellant)
88. The Appellant organized and participated in a September 11th related event at the Esplanade in Boston. This event took place just two days after the fatal accident of his sister-in-law. (Testimony of Chief Buckley, Testimony of Appellant)
89. The Appellant is a licensed plumber and he has voluntarily, at no charge, performed numerous plumbing tasks at the Fire Station. (Testimony of Chief Buckley, Testimony of Appellant, Exhibit 13)
90. The Appellant did plumbing work without compensation for the Extreme Home Makeover television program. (Testimony of Appellant)
91. The Appellant gave seven or eight lectures at schools on the topics of fire safety and the September 11th tragedy. A letter of appreciation was placed into his personnel file for his work in this area. (Testimony of Chief Buckley, Testimony of Appellant)
92. The Appellant has voluntarily served on the Fire Department's Honor Guard since he first became a firefighter in 2000. (Testimony of Chief Buckley, Testimony of Appellant)
93. The Appellant used his advanced education to write grant applications for the Fire Department. He wrote the Massachusetts Firefighter Grant (due on or around January 12, 2007) and the Fire Prevention and Safety Grant (due on or around February 23, 2007). The Fire Department was awarded the Massachusetts Firefighter Grant in the amount of \$7,800.00. Due to the competitiveness of the Fire Prevention and Safety Grant, the Fire Department was not successful, but the Fire Department received access to a fire

prevention website for a year. (Testimony of Chief Buckley, Testimony of Appellant, Exhibit 17)

94. The Appellant spent six (6) to eight (8) on duty hours working on the grant, but twenty (20) to thirty (30) hours of his own time working on the Massachusetts Firefighting Grant. He did not seek compensation for the time spent working on the grant outside of work. (Testimony of Appellant)

95. With Chief Buckley's permission, the Appellant began the Homeland Security Assistance to Firefighter's Grant application. Ten (10) days before the lieutenant interviews, Dep. Chief Dilulio approached him and asked him if he had started work on the grant. When the Appellant replied that he had already engaged in significant research, Dep. Chief Dilulio told the Appellant that henceforth he and the Chief would be doing the work and to turn over all his materials. No reason was given for this decision. The grant, practically finished by the Appellant, was finalized by Chief Buckley, Dep. Chief Iulio and the Fire Department financial analyst. (Testimony of Appellant)

96. A fourth grant, a so-called SAFE grant, was also taken away from the Appellant. That grant was issued on a point system, and gave an automatic additional thirty (30) points to the applicant fire department if the grant writer had taken the Academy's forty (40) hour Public Fire and Life Safety Educator class. At the time, the Appellant was the only firefighter that had taken that class. The grant was neither completed nor submitted. (Testimony of Appellant)

97. The Appellant voluntarily upgraded all of the Department's CPR Instructors to the Defibrillator Instructor level and voluntarily trained at least a dozen firefighters, so that they could be certified at the CRR Instructor level. On multiple occasions, he submitted

documentation to OEMS so that Department members would receive OEMS credit.

(Testimony of Chief Buckley, Testimony of Appellant, Testimony of Dep. Chief Benedict)

98. Chief Buckley testified that Dooher performed better in the interview, and “had great confidence answering any of the questions that were posed to him or scenarios that he was put in as part of the question.” In his May 14, 2008 letter to HRD, he documents a question posed to Dooher and his ensuing answer as a reason for his selection. (Testimony of Chief Buckley)
99. As a bypass reason, the chief stated that the Appellant provided an incorrect answer to a question. The Appellant’s answer was the correct one per the Fire and EMS Company Officer Book. (Exhibit 15) The chief testified that he had no knowledge of this book, even though promotional exams questions are based on its contents. (Testimony of Chief Buckley)
100. Chief Buckley testified that he “somewhat” considered certifications held by the candidates as part of the promotional process, but assigned less weight to certificates awarded after the list is certified - given that is the time that candidates are more likely to volunteer and take classes. (Testimony of Chief Buckley)
101. With the exception of his certificates from the Academy, the majority of the Dooher’s certificates were obtained *after* the eligible list was certified. (Testimony of Chief Buckley, Exhibits 5 and 13)
102. A comparison of each candidates certifications shows that the Appellant has twice the specialized training of Dooher. The chief testified that the Appellant has more education in the field of Fire Science than Dooher. (Testimony of Chief Buckley, Exhibits 5 and 13)

103. On June 5, 2007, HRD sent the Appellant a letter approving the reasons for bypass and the reasons for his non selection. The Appellant filed an appeal with the Commission on June 14, 2007. (Exhibits 2 and 3)

CONCLUSION

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "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." *Id.* at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

The issue before 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 at 334. *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton at 727.

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its

truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). 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. Civ. Serv. Comm'n, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission 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). Also, basic merit principles, as defined in c. 31, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Dep't, 6 MCSR 145 (1993).

In addition to determining whether the Appointing Authority has sustained its burden, as described above, it is also the Commission's role, as the administrative agency conducting the hearing, to determine what degree of credibility should be attached to a witness' testimony. School Comm.of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978); Doherty v. Retirement Bd. of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Bd. of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Appointing Authority has not met its burden of proving that the bypass of the Appellant was reasonably justified. . Based on a careful review of the testimony and exhibits, it appears

that the Town, prior to establishing what was a flawed interview process, had already determined that it would not choose the Appellant for the promotion in question, despite his superior qualifications. This is contrary to basic merit principles and warrants the Commission's intervention in the instant matter.

This hearing officer listened to two days of testimony. The Appellant was very earnest and very credible. He described his responsibilities at the Fire Department and his duties to his family. He described his diligence in training his fellow firefighters, in seeking OEMS certification for them, using his plumbing expertise at fire scenes, making plumbing repairs at the Fire Station, and his myriad volunteer duties. He described his wife's severe postpartum depression and his attendance as a first-responder to the scene where his sister-in-law was the victim. He described that Chief Buckley as his direct supervisor - and later his chief - was always aware of his obligations, and had advised him to put his family first.

Dep. Chief Benedict was also a credible witness. I gave considerable weight to his positive testimony on behalf of the Appellant.

Dep. Chief Benedict's testimony appeared to be geared toward portraying the Appellant in the least favorable light. He admitted favorable testimony only upon cross examination or when faced with evidence in the form of the exhibits.

Although Dep. Chief Iulio had sat in on the interviews -ostensibly as a participant - the Chief informed the Appellant *immediately* after he answered the last question that he would be bypassed. The Chief did not consult with Dep. Chief Iulio. The Chief had not consulted with the Appellant's immediate supervisor beforehand. He also had not checked his performance evaluations.

The Chief testified that he had not read the Appellant's application package in its entirety before the interview began. He testified that he looked at the Appellant's thick application for about two minutes, glancing only at the beginning pages. Although he was in charge of the selection process, when asked if he reviewed the documents when making his decision, Chief Buckley stated, "[t]he ones that I had the opportunity to." When asked how thoroughly he reviewed them, he stated, "to the point I could."

Although he could not show how it diminished his work performance, in his testimony the Chief appeared overly preoccupied with the Appellant's plumbing work, although the Fire Department benefited from his training at fire scenes and free repairs to the fire house. Although he alluded to it multiple times, the Chief could not state definitively that the Appellant had ever called in sick so that he could do plumbing work.

Although the Chief testified that he did not consider any training or skills gained after the position for lieutenant was posted, *all* of Dooher's training occurred after the list was certified. In contrast, the Appellant's training and teaching experience reached back more than twenty years, and are well documented in the findings of fact. When the Chief examined scheduling swaps, he examined the Appellant's swaps before the list came out, but compared them with Dooher's *after* the list had come out. Dooher's swaps were greater than the Appellant's before the list was posted.

Throughout his testimony, the Chief minimized the Appellant's accomplishments, including his advanced education.

The Chief provided both positive reasons and negative reasons for choosing Dooher over the Appellant. He found that Dooher mentored new firefighters; had the leadership skills for the position, which he has displayed on occasion by serving as Acting Lieutenant and by leading

impromptu drills; went over apparatus and equipment daily; volunteered for various charities and community events, and had an outstanding interview. These reasons apply at least equally to the Appellant. In fact, Dooher was one of the firefighters trained by the Appellant in EMS. The Chief himself testified that the Appellant had much more specialized training than Dooher. Although the Chief testified that he assigned less weight to certifications obtained after lists were posted, when candidates would be more likely to increase their activities, *all* of Dooher's certifications occurred after the list was posted. The reasons given by the Chief for the bypass: the Appellant's misuse of sick time, his disregard of department policy, and his substandard answers to interview questions - do not hold up. The Appellant was never disciplined for the alleged sick time abuse or violation of departmental policy. The Fire Department never raised these issues with the Appellant in person or in his performance evaluations. The Appellant was first made aware of these issues when he received the June 5, 2007 letter from HRD. The Commission conducted a de novo hearing on these issues and found that the Appointing Authority had not provided sound and sufficient reasons for its decision to bypass the Appellant.

The Appointing Authority has not demonstrated by a preponderance of the evidence that there was reasonable justification for the promotional bypass of the Appellant. The evidence shows inappropriate motivations or objectives on the part of the Appointing Authority.

Therefore the Appellant's appeal filed under Docket No. G2-07-210 is *allowed* and the Commission, pursuant to Chapter 310 of the Acts of 1993 orders the state's Human Resources Division to take the following actions:

The Civil Service Commission directs HRD to place the Appellant's name at the top of the current eligibility list for appointment to the position of permanent full time fire lieutenant so that his name appears at the top of the existing certification list, or the next certification list if the

current one has expired, requested by the Town of Needham Fire Department from the Human Resources Division and from which the next promotional appointment to the position of Permanent Full Time Fire Lieutenant shall be made. The Appellant shall receive at least one opportunity for consideration and appointment; the Town shall not use the same reasons for bypassing him that were used in the events noted in this case. Upon appointment, the Appellant shall receive additional relief consisting of retroactive seniority from the date of the improper bypass.

Civil Service Commission

Angela C. McConney, Esq.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 30, 2008.

A true record. Attest:

Commissioner

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

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

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