

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 4/8/11
Civil Service Commission
03

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

JUAN ROSARIO,
Appellant

v.

Case No.: G2-10-33

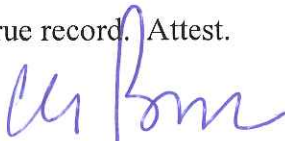
SPRINGFIELD POLICE
DEPARTMENT,
Respondent

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on April 7, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated February 24, 2011. Neither party submitted written objections. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [McDowell – Absent]) on April 7, 2011.

A true record. Attest.



Christopher C. Bowman
Chairman

**Commissioner Marquis was
absent on April 7, 2011**

Either party may file a motion for reconsideration within ten days of the receipt of this 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.

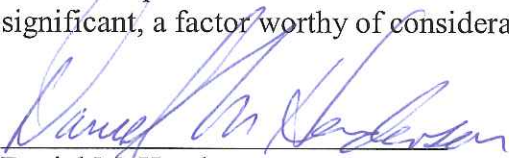
Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall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

Notice to:

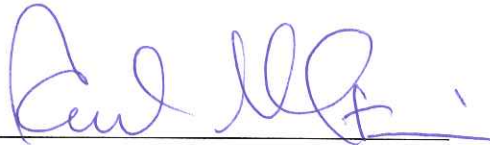
Thomas J. Rooke, Esq. (for Appellant)
William Mahoney, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

Juan Rosario v Springfield Police Department, Docket No. G2-10-33

We, Commissioners Daniel M. Henderson and Paul M. Stein concur with the result in this recommended decision. Yet, we disagree with the language in the Conclusion and Recommendation of “wide discretion” being attributed to the appointing authority in the process of selection of candidates for appointment from an eligibility list, rather than “sound discretion”, especially in the situation of a promotional appointment. We also find the omission of the actual exam scores of the competing candidates to be troubling, as the relative disparities of exam scores among the competing candidates are potentially significant, a factor worthy of consideration.



Daniel M. Henderson,
Commissioner



Paul M. Stein,
Commissioner



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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February 24, 2011

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Juan Rosario v. City of Springfield Police Department
DALA Docket No. CS-10-718
CSC Docket No. G2-10-33

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Thomas John Rooke, Esq.
William Mahoney, Esq.
Suzanne L. Shaw, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Juan Rosario,
Appellant

v.

Docket Nos. G2-10-33;
CS-10-718 (DALA)

City of Springfield-Police Dept.,
Appointing Authority

Dated:

Appearance for Appellant:

Thomas John Rooke, Esq.
73 Chestnut Street
Springfield, MA 01103

Appearance for Appointing Authority:

William Mahoney, Esq.
Suzanne L. Shaw, Esq.
Labor Relations
City of Springfield
36 Court Street
Springfield, MA 01103

Administrative Magistrate:

Sarah H. Luick, Esq.

SUMMARY OF RECOMMENDED DECISION

The Appointing Authority had reasonable justification for bypassing the Appellant for promotion to Sergeant based on the qualifications and records of the candidates in the running for the promotion as shown by a preponderance of the evidence. The screening process was fair, appropriate and reasonable.

RECOMMENDED DECISION

Pursuant to M.G.L. c. 31, § 2(b), the Appellant, Juan Rosario, is appealing the decision of the Appointing Authority's Human Resources Division (HRD) approving the reasons of the Appointing Authority, the City of Springfield-Police Department, for bypassing him for promotion to Sergeant.¹ (Ex. 1) The appeal was timely filed with the

¹ As of September 1, 2009, the Commonwealth's Human Resources Division has delegated the responsibility of reviewing the reasons offered by an Appointing Authority to support a bypass to

Civil Service Commission. (Ex. 2) A hearing was held for the Civil Service Commission on October 4, 2010, at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, 4th Floor, Boston, MA 02114.

Various documents are in evidence. (Exhibits 1 – 17.) Three (3) tapes were used. The Appointing Authority presented the testimony of: Springfield Police Commissioner William J. Fitchet; Deputy Chief William Cochrane; and, Deputy Chief John Barbieri. The Appellant testified on his own behalf. Both parties made arguments on the record.

FINDINGS OF FACT

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Juan A. Rosario is a tenured Civil Service employee who has been a Springfield Police Officer from October 15, 1996. On May 27, 2010, he was promoted to Sergeant. (Ex. 9. Testimony.)

2. From August 2005 until his promotion to Sergeant, Sgt. Rosario was in the Youth Aid Bureau as part of the “School Squad.” In that work he was a mentor and instructor to students about various life matters. He ensured the safety of the students and school staff within the school setting. He enforced state and federal laws so that there was order, safety and harmony within the school setting. He provided advice to school staff and to parents regarding the laws that pertain to juveniles and students. (Ex. 9. Testimony.)

3. Sgt. Rosario received good performance reviews for his “School Squad” work from his Commanding Officer, Captain William Noonan. Capt. Noonan found Sgt.

the Appointing Authority’s Human Resources office. Bypassed candidates continue to have a right to appeal to the Civil Service Commission.

Rosario worked “quietly and with due diligence.” He considered the school work to be a “difficult assignment managing a school building as a single officer, in a school that is filled with special needs students.” He found Sgt. Rosario was able to counsel students with “compassion and ... sensitivity.” He found Sgt. Rosario had an “ability to reasonably think, act quickly in critical situations, make appropriate decisions that result in proper police procedures being followed and he knows the consequences of his actions.” Capt. Noonan has known Sgt. Rosario as a police officer since 1996, and finds him to be “a good communicator and a good listener who has earned the respect of his peers, fellow workers at school and his immediate supervisors in the police department.” (Ex. 14.)

4. In connection with his “School Squad” work, Sgt. Rosario was never removed from his post for any reason. No ongoing or significant complaints were received from school administrators or teachers or parents about his work in the school. Police Commissioner William J. Fitchet found his work to be challenging and important police work. (Testimony.)

5. Sgt. Rosario had prior experience from September 2004 until August 2005 as a member of the Squad “C” Uniform Division. He performed patrol work in assigned areas where he had to maintain order, issue citations, and make arrests. He had to perform preliminary crime scene investigations involving persons and property. He had to perform traffic control work and investigate motor vehicle accidents. He had to perform “first responder” duties at the scenes of emergencies. He had to testify in court cases. From the start of his police career in 1996 until September 2004, he was a Police Officer in the Squad “A” Uniform Division. Sgt. Rosario had prior employment as a

machine operator assistant for a paper company from April 1994 until his police officer appointment. He earned a Bachelor of Arts in Criminal Justice in 2000 and a Master of Arts in Criminal Justice in 2002. He is fluent in Spanish. (Ex. 9.)

6. Sgt. Rosario began a career in August 1987 with the U.S. Army. By March 1994, he was in the U.S. Army Reserves where he continues to serve. He is proud of his achievements in the military, and feels this service has enhanced his police career in many ways, particularly in terms of trainings that address how to supervise others, to maintain professionalism, and to be a role model for others. He has received various awards and special assignments in connection with his military service, and has attended various trainings to advance his status within the military. Capt. Noonan agrees that Sgt. Rosario's military service, with the rank of E8 Master Sergeant by December 2009, "has proven extremely beneficial to the performance of his duties within the Springfield Police Department." While in the U.S. Army Reserves, it is possible that Sgt. Rosario could be deployed to active service taking him away from his police work for a long time. (Exs. 3, 9, 13 & 14.)

7. Because of his misconduct in November 1997 when he was a "rookie" police officer, Sgt. Rosario received a twenty day suspension for turning off his radio and falling asleep while on duty, and for his conduct thereafter in how he addressed the charges. He was also suspended for ten days in connection with his conduct in the summer of 1999. The 1999 suspension was later overturned by a December 13, 2000 decision of an arbitrator. Nevertheless, through 2009, this second suspension, the result of the combination of two claimed misconducts, was not removed from Sgt. Rosario's record, and the Springfield Police Dept. records showed Sgt. Rosario had three

suspensions on his record. (Exs. 3, 16 & 17. Testimony.)

8. In March 2002, Sgt. Rosario and a fellow police officer responded to a call. Upon arriving, they “found themselves confronted with a depressed male, who having consumed alcohol and having used cocaine, had armed himself with a 10” butcher knife, threatening suicide.” Sgt. Rosario tried to calm the man and was able to use his fluency in Spanish to effectively communicate with the man. When the man appeared to be pre-occupied and listening, Sgt. Rosario lunged for the weapon. This resulted in a “violent struggle,” but with help from his fellow officer, Sgt. Rosario was able to secure the weapon. The man was sent by ambulance to receive psychiatric care. Both officers received a commendation from then Police Chief Paula C. Meara. (Ex. 13.)

9. In and around 2005, Sgt. Rosario was bypassed when he tried to gain a promotion to Sergeant. Although he felt he had deserved the appointment, he tried not to let being bypassed negatively impact his police work. (Ex. 9. Testimony.)

10. In connection with his “School Squad” work, Sgt. Rosario attended “12 hours of instruction at the Juvenile Issues Seminar” in December 2007 conducted by the Massachusetts Juvenile Police Officers’ Association. (Ex. 13.)

11. During the summer of 2009, Police Commissioner Fitchet had 3 Sergeant slot openings. He completed a Civil Service Requisition (Form 13) to fill these slots as soon as possible. He sought a certified list of candidates. A promotional exam had already been given. (Ex. 4. Testimony.)

12. On October 19, 2009, Police Commissioner Fitchet had a list of 7 candidates for the 3 Sergeant slots. The names on the list included Juan Rosario who ranked third on the list along with John Kent. Julio Toledo ranked fourth on the list. All

7 candidates were willing to accept the promotion. These rankings were based on their examination scores. (Ex. 5.)

13. Police Commissioner Fitchet has been involved in about 20 first time appointments and about 10 promotional appointments within the Springfield Police Dept. He has served on the force for 38 years with experience as a Patrol Officer, Sergeant, Lieutenant, Captain, Deputy Chief, and Acting Police Commissioner before becoming Police Commissioner in and around 2008. He has experience working on various shifts, in the uniform and in the plains clothes units, and with narcotics work. He views the Sergeant position as a first-line supervisory position that carries with it a great deal of responsibility. He believes a Sergeant can have a great influence on the police officers supervised. He finds that good and effective communications skills are needed as is possessing sound judgment in making assessments of situations. Involved is work with patrolling areas and with the incidents encountered, addressing the conduct of Patrol Officers, booking and lock-up matters, dispatch functions, performing specialized assignments, conducting investigations of incidents and of police officers, and filing useful and proper police reports. To Police Commissioner Fitchet, the position involves very comprehensive work. His practice with new Sergeants is to put them in the Uniform Division on the night shift. (Testimony.)

14. Police Commissioner Fitchet decided to have 3 Deputy Chiefs conduct interviews of the 7 candidates for Sergeant with each candidate answering the same questions. He had each Deputy Chief independently rate the answers given by each candidate to each question, including providing comments on their answers. No standard responses were required. The ratings on each candidate were summarized and the

interview performance results were ranked. Police Commissioner Fitchet then met with the Deputy Chiefs to discuss the interviews. Police Commissioner Fitchet had developed the questions asked at the interviews. The candidates were told to take their time in providing their verbal responses. (Testimony.) The 6 questions were:

1. What is the greatest challenge you have dealt with while on duty this last year? How did you deal with this challenge and what was the outcome?
2. As a Sergeant, how would you handle Officers that you suspect may be abusing the Department's sick and injured on duty status? In your answer, please cite examples that you feel are abuses.
3. Describe your most significant contribution to this organization.
4. In general, how qualified do you feel you are to perform in the position of Sergeant?
5. What would you consider your greatest strength if you became a Sergeant? Your greatest shortcoming?
6. What steps have you taken to enhance your professional development?

(Exs. 9, 10, 11 & 12.) The rating system was: Excellent, 5 points; Good, 4 points; Acceptable, 3 points; Poor, 2 points; and, Unacceptable, 0 points. Each interview lasted 20-30 minutes. (Exs. 9, 10, 11 & 12. Testimony.)

15. The Deputy Chiefs conducting the interviews all had prior experience with the selection processes for original and for promotional appointments within the Springfield Police Department. Some of them were aware of the backgrounds of the candidates through viewing their resumes and personnel files, but no assessment of the candidates' backgrounds was involved in the interview process. (Testimony.)

16. The interviews were held in December 2009 over 2 days. The summary of ratings for the 7 candidates resulted in Sgt. Rosario ranking last at #7 with an overall

score of 67. The first ranked candidate, Officer Kent, had a score of 82. The second ranked candidate, Officer McBride, had a score of 81. There were 2 third ranked candidates, Officer Barton and Officer Toledo, with scores of 76. The fifth ranked candidate, Officer Martucci, had a score of 73. The sixth ranked candidate, Officer Russell, had a score of 69. (Exs. 7 & 8.)

17. On the first question, Sgt. Rosario earned ratings of 2, 3 and 3. He raised the fact of being bypassed for promotion to Sergeant previously and not letting that impact the quality of his police work. On the second question, he earned ratings of 4, 4 and 4. On the third question, he earned ratings of 4, 4 and 4. On the fourth question, he earned ratings of 3, 5 and 4. Sgt. Rosario mentioned his advancement to Sergeant in the military. On the fifth question, he earned ratings of 4, 4 and 5. Sgt. Rosario stated it was important to lead from the front and not from the back, and to be willing to do the task he asks others to do. He noted a shortcoming that he can be hard-headed at times. On the sixth question, he earned ratings of 3, 3 and 4. Sgt. Rosario noted his masters degree in criminal justice and his military trainings, but he did not focus on his police department trainings and experiences. (Ex. 9. Testimony.)

18. Officer Toledo earned ratings of 5, 5 and 5 on the first question. He explained that he was able to talk his way out of being suspected by drug dealers of being a police officer when he was doing undercover narcotics work. He earned ratings of 3, 3 and 4 on the second question about dealing with abuse in use of sick and injured leave. He earned ratings of 5, 4 and 4 on the third question, noting his undercover drug work has led to arrests and to the closure of drug operations, and that is he proud of this work. He earned ratings of 4, 4 and 4 on the fourth question as to how he found himself

qualified to be a Sergeant, noting his education and his leadership work including founding a community non-profit. He earned ratings of 5, 4 and 5 on the fifth question. He noted his strengths include his leadership and communications skills, and his community involvement. He noted his shortcomings as not always asking for help and spreading himself too thin at times. He earned ratings of 4, 4 and 4 on the sixth question. He noted since he was last interviewed for Sergeant and did not receive the promotion, that he has obtained a masters degree in criminal justice and has done undercover police work. (Ex. 12.)

19. Officer Toledo has a masters degree in criminal justice and a graduate certificate in forensic criminology. He has been a Springfield Police Officer from October 1996. In January 2009, he began working as an undercover narcotics Detective. He completed the U.S. Department of Justice Drug Enforcement Administration Basic Narcotics School in October 2009. He founded and is president of the non-profit, Minorities in Law Enforcement, Inc., which has a mission to strengthen police and community relations, to raise anti-drug and anti-gang awareness, and to protect affirmative action goals while encouraging minorities to enter the law enforcement field. He is fluent in Spanish. (Ex. 12.)

20. In addition to the interview process, Police Commissioner Fitchet examined the work performance records of each candidate, solicited opinion letters from each candidate's Commanding Officer, and examined the discipline records of the candidates with an attention to the amount of discipline and to how long ago the discipline occurred. He examined each candidate's personnel file and internal investigations file. He considered the education and training backgrounds of the

candidates. He examined their use of sick leave while looking for patterns of abuse of sick time. He told his interviewers to be fair. He did not have his mind made up before this promotional process as to who would be appointed Sergeant. He did not find any one issue controlling in his selection process. (Exs. 1, 14, 15 & 16. Testimony.)

21. When Police Commissioner Fitchet spoke with the 3 Deputy Chiefs about the interview of Sgt. Rosario, they all agreed that he had not done well at the interview although he had provided acceptable level answers to the questions. They noted all the candidates had provided at least acceptable level answers to the questions. Police Commissioner Fitchet was impressed by Sgt. Rosario's military record and trainings, but other candidates also had military backgrounds and he was more interested in what the candidates had done in their careers as police officers. At the time of his evaluation of the candidates, Police Commissioner Fitchet understood that Sgt. Rosario had been suspended 3 times as he did not find the overturning of the 1999 suspension by the arbitrator in the personnel file. Although a factor, he did not find Sgt. Rosario's prior disciplines to be a controlling factor as the suspensions were not recent. He does not tend to hold against a candidate for promotion, a discipline leveled a long time ago. He found Sgt. Rosario had good attendance. He was impressed by Capt. Noonan's support of Sgt. Rosario's candidacy for Sergeant. (Testimony.)

22. The officers chosen by Police Commissioner Fitchet for Sergeant were: Officer Martucci, Officer Kent and Officer Toledo. Bypassed was the top ranking Officer from the certified list, Officer Barton, as well as Sgt. Rosario. Police Commissioner Fitchet produced a set of reasons to show why he selected the officers he did and why he bypassed Officer Barton and Sgt. Rosario. These reasons were forwarded

for review to the Springfield Human Resources office. (Ex. 1. Testimony.)

23. The reasons offered by Police Commissioner Fitchet to explain why Officer Barton was bypassed included his record of a prior suspension and a poor recommendation from his Commanding Officer. His work record was found to show a lack of “ability to work well with others and ... poor choices involving problem solving.” He was found to write reports without sufficient details and without including all pertinent information. He was not found to have the skills needed by a supervisor in the Springfield Police Department. (Ex. 1. Testimony.)

24. The reasons offered by Police Commissioner Fitchet to explain why Sgt. Rosario was bypassed included his three prior suspensions and a poor interview process as “the weakest of all the candidates” interviewed as confirmed by the 3 Deputy Chiefs. (Ex. 1. Testimony.)

25. The reasons offered by Police Commissioner Fitchet to explain why Officer Toledo was selected included the strong support he had from his Commanding Officer in the Narcotics Division that found him to be “focused and calm under stressful conditions accomplishing the task at hand.” Officer Toledo was also found to have “the presence of command that enables him to direct the other officers in an operation to efficiently and safely complete their goals.” Police Commissioner Fitchet noted Officer Toledo’s many “search warrants ... obtained and testimony given [in court] through his vast knowledge of the law resulting in the many convictions he has acquired.” He was noted to have “earned the confidence and trust of his fellow Officers as well as his supervisors.” His prior discipline was also noted of a written reprimand, although it was not found to prevent the promotion. (Ex. 1. Testimony.)

26. In terms of the reasons for selecting Officer Martucci and Officer Kent, Police Commissioner Fitchet noted that neither has a disciplinary history and both have support for the promotion to Sergeant from their Commanding Officers. As to Officer Martucci, he was found to be “competent and thorough, has been a lead investigator numerous times and responsible for maintaining major crimes scenes ... a team player who works effectively with minimum supervision ... respected by fellow workers as well as supervisors.” As to Officer Kent, he was found to show “initiative and leadership ... requests more challenging positions and routinely gets involved with arrests and assists other bureaus with difficult calls ... mentors younger Officers for training ... works well with others and has the tact that a good Sergeant needs ... is not afraid to make command decisions but is still respectful of the chain of command and does not hesitate to inform his supervisors of what is going on out on the street.” (Ex. 1. Testimony.)

27. By letter of December 22, 2009, Officer Rosario was informed that he had been bypassed for promotion to Sergeant. He was provided with his right to appeal to the Civil Service Commission within the next sixty days. He was provided with Police Commissioner Fitchet’s written reasons why he and Officer Barton were bypassed and why the 3 other Officers were selected. (Ex. 1.)

28. Sgt. Rosario filed a timely appeal to the Civil Service Commission by appeal form of February 9, 2010, received February 11, 2010. (Ex. 2.)

29. The 3 appointments to Sergeant were approved to be effective December 26, 2009. All 3 selected candidates accepted the promotion to Sergeant. (Ex. 6.)

30. When Sgt. Rosario was selected for promotion to Sergeant in May 2010, he went through an interview process with different questions by different interviewers.

By that time the correction was made to his disciplinary record so that he was found then to have only one prior suspension from 1997. His assignment upon becoming Sergeant has been to work in the Central District, Sectors E and F, which are very busy police work areas where many arrests are made. It includes the entertainment areas of the City. Sgt. Rosario has taken trainings on bookings, narcotics and detective work to help him perform his Sergeant's duties. (Testimony.)

31. Sgt. Toledo's prior discipline was a letter of reprimand involving poor attendance. By letter of March 17, 2005, he was informed by prior Police Chief Meara that from 1999, he had an average absentee rate of 33.6%. His absenteeism rate for 2003 through March 2005 was found to be 47.7%, and his absenteeism rate for the first two months of 2005 was 43%. This was found to show he was not meeting the minimum allowable attendance requirement for the job. This information was presented to him, "not as punishment, but as an intended notice and opportunity for you to take whatever action you can in order to correct your attendance in the future." There was no charge of misconduct but of an "inability on your part, to be able to meet acceptable attendance and performance standards." This was a matter of importance to Police Commissioner Fitchet in the selection process for Sergeant, but was not reflecting a current attendance situation for Officer Toledo at the time of the promotion process. (Ex. 15. Testimony.)

Conclusion and Recommendation

There must be a justifiable reason on the part of the Appointing Authority to support a bypass. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2006). In *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997), the Appeals Court explained to be justifiable, the bypass must be "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.” *Wakefield v. First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Ct. of Boston*, 359 Mass. 214 (1971). M.G.L.c.31, §2(b) requires that bypass decisions be supported by a preponderance of the evidence. This burden of proof calls for the Civil Service Commission “to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned by the bypass of the Appellant were more probably than not sound and sufficient.” *Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315 (1991).

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission is not to decide a bypass appeal based on its own preferences about candidates, but to determine if the facts show a reasonable justification for the decision made about the candidate based on the information the Appointing Authority had at the time of its decision. *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334 (1983). See, *Civil Service Commission v. Municipal Ct. of Boston*, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727-728 (2003). Personnel decisions that are not grounded in sound reasons represent occasions for the Civil Service Commission to overturn a bypass decision, “to protect against overtones of political control, objectives unrelated to merit standards, and assure neutrally applied public policy.” *Cambridge, supra* at 304; *Revere, supra* at 321; and, *Watertown v. Arria, supra* at 334.

Police Commissioner Fitchet bypassed Sgt. Rosario and selected Officer Toledo because he found Officer Toledo to have done very well during his interview and because

of his impressive police work record. He considered the prior problem with low attendance that Officer Toledo had by March 2005, but he did not find that to be a reason to avoid selecting him for the Sergeant position. No evidence showed that Officer Toledo continued to have a problem attendance record by the time he was under consideration for the Sergeant position.

Although Sgt. Rosario had an acceptable record for consideration for the Sergeant position including a good recommendation from his Commanding Officer, Police Commissioner Fitchet found to be a significant factor against his appointment, the fact that he did the poorest of the 7 candidates in the interview process. In terms of the prior discipline Sgt. Rosario had, Police Commissioner Fitchet was credible in explaining that it was just one factor and not a decisive one against his appointment in light of the fact that it was not recent discipline. The record does not show that Police Commissioner Fitchet's error in not realizing the 1999 suspension had been overturned in December 2000 by an arbitrator, led to a decision to bypass Sgt. Rosario. This is consistent with Police Commissioner Fitchet's view that long ago and not repeated suspensions should not hold up advancements in a Police Officer's career. Police Commissioner Fitchet was questioned at the hearing on why Sgt. Rosario's military background and accomplishments were not key reasons for promoting him. Sgt. Rosario argued that Police Commissioner Fitchet was concerned he might be called to active duty for a long time taking him out of the force. But, Police Commissioner Fitchet explained credibly that the military experience and accomplishments were factors in Sgt. Rosario's favor. Since he also found that other candidates had good military service backgrounds, this factor did not outweigh in the selection process, the accomplishments and trainings

candidates had as police officers.

The other candidate not chosen was Officer Barton who was actually first on the list of candidates with the highest examination score, along with an interview rank that was third. He also had poor support for promotion from his Commanding Officer. He was found not to possess sufficient skills to be an effective Sergeant. Both Officer Martucci and Officer Kent had no disciplinary records and strong recommendations from their Commanding Officers in support of their promotion to Sergeant. This was sufficient for Officer Martucci's appointment although he ranked fifth in the interview process. Officer Kent ranked first in the interview process.

What emerges from the record is that Sgt. Rosario was an acceptable candidate for promotion to Sergeant, but was outshined by Officer Toledo. The fact that he was found to be an acceptable candidate for Sergeant was borne out by his appointment in May 2010 to Sergeant by Police Commissioner Fitchet and by the challenging Sergeant assignment he is currently working. Although the reasons for the bypass of Sgt. Rosario and the reasons for the appointments of Officer Martucci, Officer Kent and Officer Toledo, were enhanced by the evidence presented at the hearing, the core reasons for these appointments and for Sgt. Rosario's bypass were made clear in the "reasons" letter that Police Commissioner Fitchet produced to justify his selections for Sergeant.

The record shows that the process undertaken by Police Commissioner Fitchet to arrive at his selections for Sergeant was adequate and fair. It shows that he had not made up his mind in advance of the selection process. His interview questions were reasonable and useful to select a Sergeant based on what the record presented as the requirements for a first line supervisor in the Springfield Police Department. The interviewers were

Deputy Chiefs who had experience with the promotional selection process. They rated the answers independently and without consideration to any background knowledge they had about the candidates. The credible testimony of Deputy Chief Cochrane and of Deputy Chief Barbieri show the interview process was effectively and properly conducted. The record shows Police Commissioner Fitchet considered fully the work done by the Deputy Chiefs. The interview process was not faulty or arbitrary in any way, and the questions were pertinent to the skills needed by a Springfield Police Sergeant.

This course of events passes the standard set forth for a fair selection process for Police Sergeant as discussed in the recent decision of *Town of Reading v. Civil Service Commission (Matthew Edson)*, Mass. App. Ct., Rule 1:28, Docket No. 09-P-2221, (November 4, 2010). The Civil Service Commission had found the decision of the Appointing Authority to bypass the candidate to be arbitrary because the Appointing Authority was the only entity reviewing the candidates' employment records, because the interview process was too subjective with the responses not measured against any standard responses, and because one Officer on the interview panel had been a Commanding Officer of the candidate who was selected. The Appeals Court disagreed and found there were justifiable reasons to support the bypass. The review of the candidates' work records and the interview questions and process were all found to be sufficiently reasonable and justifiable. The Appeals Court found no substantial evidence of bias by the Commanding Officer, and recognized that standard responses to questions during an interview process may not be sufficient for the position of Police Sergeant where there is a need to be skilled with interactions with fellow Officers and a need to be

an able supervisor. The Appeals Court found no policy controlling the interview process for Police Sergeant to require standard questions. The Appeals Court concluded that the Civil Service Commission had substituted its judgment for who it viewed as the best candidate when the Appointing Authority had justified by a preponderance of the evidence a sufficient and fair reason for its bypass decision.

For these reasons, I recommend that the Civil Service Commission affirm the bypass decision of the Appointing Authority regarding the Appellant.

DIVISION OF ADMINISTRATIVE
LAW APPEALS



Sarah H. Luick, Esq.
Administrative Magistrate

Dated: **FEB 24 2011**