

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

SCOTT SHERMAN,
Appellant

v.

TOWN OF RANDOLPH,
Respondent

Case No.: G2-10-192

DECISION

The Civil Service Commission voted at an executive session on April 19, 2012 to acknowledge receipt of the report of the Administrative Law Magistrate dated February 2, 2012, the written objections of the Appellant dated March 20, 2012 and the response of the Respondent dated April 5, 2012. After careful review and consideration, 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.

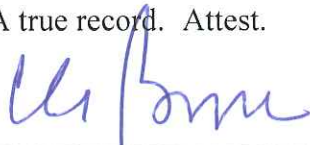
While the Commission adopts the findings of fact and recommended decision, we believe that the interview process was flawed and does not satisfy the standard we expect should be required to assure a properly reviewable "level playing field" which "protect[s] candidates from arbitrary action and undue subjectivity on the part of the interviewers", which is the lynch-pin to the basic merit principle of the Civil Service Law. E.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983).

However, we also agree that the independent judgment of the Randolph Police Department's senior commanders, including the former and current Police Chief about the Appellant's need to improve certain aspects of his job performance that would seem essential to the duties at a supervisory level, as well as the strong positive opinions about the ability of the selected candidates, provides sufficient independent and reasonable justification to bypass the Appellant at this time. No substantial evidence appears to have been presented that these judgments were formed out of bias or other unlawful predisposition against the Appellant. We accept the statement of the Town Manager that the Appellant's management deficiencies are not permanently disqualifying and, therefore, that there is every reason to believe the Appellant will improve these skills to the point where they will no longer be an impediment to his promotion to a management position in the future.

For all of the above reasons, the Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on April 19, 2012.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Frank J. McGee, Esq. (for Appellant)

Robert F. Sullivan, Esq. (for Respondent)

John Marra, Esq. (HRD)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

<p>SCOTT SHERMAN, <i>Appellant</i> v. TOWN OF RANDOLPH, <i>Respondent</i></p>

Case No.: G2-10-192

CONCURRING STATEMENT (COMMISSIONER STEIN)

I agree with the conclusion of the DALA Magistrate, to whom the Commission assigned this appeal for evidentiary hearing, that the Commission need not address the Appellant's non-dispositive legal argument that failure of the Personnel Administrator (HRD) to "review and approve" the reasons proffered for bypassing the Appellant violated the requirements of G.L.c.31,§27, and therefore, invalidated the bypass decision.

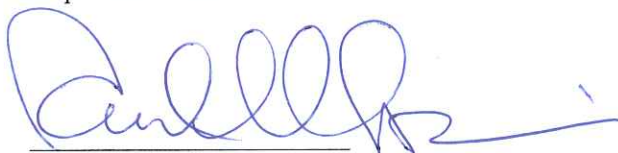
I do believe, however, it is worth noting that the Appellant's legal challenge of the procedure at issue is an important matter of public policy and statutory construction and that HRD, not the Commission, is its' main proponent. HRD originally announced the plan to "delegate" essentially all the functions associated with the appointment and promotion of public safety personnel in 2009, arguably dictated by fiscal restraints that compelled significant cuts to HRD's Civil Service Unit, the administrative unit that conducts civil service examinations and performs related statutory duties of the Personnel Administrator, as well as provides guidance to civil service appointing authorities to assure compliance with the civil service law. Thus, any adjudication of the scope of HRD's power to delegate G.L.c.31, §27 responsibility, would necessarily require that HRD be a necessary party so that it would be allowed to defend its position directly.

That is not to say that the Commission does not have a stake in the issue. As the process has played out, it has plainly shifted the civil service landscape. Without appointing authority and civil service employee access to the administrative support of the Civil Service Unit, the Commission has seen the number of direct inquiries it receives grow considerably. As the quasi-judicial appeals board – staffed with three working commissioners (out of five authorized) and one administrative employee – the Commission works hard to fulfill its statutory functions in a timely manner, let alone fill in the gaps of the diminished administrative role formerly performed by HRD’s Civil Service Unit. More importantly, in the Commission’s experience, without HRD’s initial “review and approval” process of bypass decisions, the Commission becomes the first, not the last, line of review. See generally, MacHenry v. Civil Service Comm’n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

In sum, problematic bypass issues that might have been cured through HRD screening now come to light only after, and only if, the Commission receives a formal appeal. As to the impact on appointing authorities, the Commission has only anecdotal experience, but there has been some perception that even three years later, uniformity in how cases are handled is still something of a work in process. I believe that, in addition to the core legal issues, notice

should be taken of some of these unintended consequences of “delegation” as originally implemented, which do, in my opinion factor into the ultimate issue of legislative intent.¹

While these comments represent my views, and are not necessarily the views of the Commission as a whole, I set them down in the hope it will help inform the debate on this important issue.

A handwritten signature in blue ink, appearing to read 'Paul M. Stein', with a long horizontal flourish extending to the right.

Paul M. Stein, Commissioner

¹Historically, the legislature created the Department of Personnel Administration (now HRD) to spin off the administration of the civil service system from the quasi-judicial appellate function, so that the Commission would be able to concentrate its resources on the latter, while professional Human Resources personnel would handle day-to-day implementation matters and provide appropriate guidance and resources to appointing authorities that were more appropriately handled outside of the adversarial, adjudicatory process.



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248
WEBSITE: www.mass.gov/dala

February 2, 2012

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

Re: Scott Sherman v. Town of Randolph
DALA Docket No. CS-11-135
CSC Docket No. G2-10-192

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: Frank J. McGee, Esq.
Robert F. Sullivan, Esq.

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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Scott Sherman,
Appellant

v.

Docket No. G2-10-192
DALA No. CS-11-135

Town of Randolph,
Appointing Authority

Appearance for Petitioner:

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050

Appearance for Respondent:

Robert F. Sullivan, Esq.
Town Counsel
Town Hall
41 South Main Street
Randolph, MA 02368

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

Based on the Appellant's interview and his job performance, the appointing authority was reasonably justified in bypassing the appellant for promotion to sergeant in the Randolph Police Department. I therefore recommend that the Civil Service Commission dismiss the appeal.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Scott C. Sherman, appeals the decision of the Respondent, Town of Randolph, to bypass him for promotion to sergeant in the Randolph Police Department. Specialist Sherman filed a timely appeal. I

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conducted a hearing on April 4, 2011 at the Division of Administrative Law Appeals, 98 North Washington Street, Boston. There are three (3) cassette tapes of the hearing. Both parties filed proposed decisions.

I admitted seventeen (17) exhibits into evidence. I also marked the parties' joint hearing memorandum "A" for identification. Specialist Sherman testified and was the only witness on his behalf. The Town of Randolph presented eight (8) witnesses. The first seven were from its police department, and the eighth was the town manager, who is the appointing authority: Paul Porter; William Pace; Lieutenant John Hamelburg; Officer Jeff Chaplin; Detective-Lieutenant Arthur Sullivan; Detective-Sergeant David Avery; Detective-Sergeant Anthony Marag; and Town Manager David C. Murphy.

Paul Porter was the police chief on June 25, 2010, the date of the panel interviews, which are discussed below. He retired a week later, on July 2, 2010. William Pace, who was a sergeant at the time of the panel interview, succeeded Porter on July 2, 2010 and was police chief on July 7, 2010, when the town sent its bypass letter to Specialist Sherman. To avoid terms such as "then-Chief Porter," this decision does not use any ranks when referring to Porter and Pace, and intends no disrespect.

At the conclusion of the hearing, I agreed to keep the record open until June 6, 2011 to accept post-hearing briefs from the parties. The filing deadline was extended until August 22, 2011. Both parties filed briefs. Upon receipt of the Town of Randolph's brief, which was mailed on August 22, 2011 and received two days later, the administrative record was closed.

FINDINGS OF FACT

Based on the parties' stipulations, exhibits, and testimony, I find the following facts:

1. On June 17, 2010, the Town of Randolph filed a Civil Service Requisition (Form 13) with the Human Resources Division (HRD) for three permanent full-time police sergeants. The sergeants were to be certified based on an existing list established by a promotional examination, promoted within the department, and to begin on July 1, 2010. (Ex. 13.)

2. Nine candidates were certified. For the purposes of this decision, four candidates are significant: Specialist Sherman, who was ultimately bypassed; and James P. Hayward, Richard T. Hughes, and Robert C. LeGrice, who were ultimately promoted to sergeant. (Ex. 4.)

3. The four significant candidates' Civil Service examination scores were as follows: Specialist Sherman, 91; Officer Hayward, 90; Officer Hughes, 82; and Officer LeGrice, 81. (Stipulation.)

4. Specialist Sherman and the three candidates who were ultimately promoted to sergeant submitted to the police chief resumes and cover letters (called letters of interest). (Exs. 7, 8.) The resumes are significant because they were a factor in the Town's selection process. (Ex. 7.) Officers Sherman and LeGrice wrote relatively short, almost pro forma, cover letters, while Officer Hayward wrote more than five single-spaced pages and Officer Hughes more than one single-spaced page. (Exs. 8, 17.)

5. Another factor in the selection process was an interview panel's scoring of candidates. Porter, the police chief at the time, chose the panel's four members. He chose himself and three others: William Pace, who was Porter's designated successor, and, as a sergeant, in effect represented the police department's sergeants in the selection process; Lieutenant Hamelburg, who in effect represented the department's lieutenants; and Officer Chaplin, who in effect represented his fellow officers. (Ex. 8.)

6. The Town of Randolph and the Randolph Police Department had used panel interviews before. Porter himself was selected through a process that included a panel interview. He had previously used four-member panels to help select police officers to fill non-civil service / specialist positions. When he selected school resource officers, Porter had included on the panels "the principals from the schools" where the officers would be assigned. Specialist Sherman, who was a school resource officer at Randolph's middle school, had been selected through a process that included an interview panel. (Testimony Porter, Pace, Sherman, Murphy.)

7. Before the panel conducted interviews, its members suggested potential questions. The four panelists picked eight questions (Testimony Porter, Pace), although it may have been Pace who picked (Testimony Chaplin). Ultimately, the panel asked questions that its members had proposed. (Ex. 17.)

8. The interview panel interviewed the nine candidates on June 25, 2010 for approximately 30 minutes each. They appeared before the panel in the order of their civil service examination scores, with the candidate who had the highest score, Specialist Sherman, receiving the first interview. (Testimony Porter; Ex. 12.) Porter apparently knew the examination scores, but the other panelists did not. (Testimony Pace.) The record does not reveal whether the other panelists knew that the order of interviews was based on the examination scores.

9. Each candidate was allowed a two-minute opening statement and a closing statement whose length is not part of the record. Each was asked the same eight questions, two questions by each of the four panelists. (Testimony Porter, Hamelburg; Ex.12).

10. The candidates knew the format of the interviews, but not the eight questions. (Testimony Porter, Pace, Hamelburg, Chaplain; Exs. 10, 12.) The questions were:

- a. What personality traits and work ethic would you model for your subordinates? Which trait/ethics are most important and why?
- b. You are the newly appointed sergeant of the Any Town Department. The chief would like to see an effort to increase courtesy and civility in an attempt to reduce citizen complaints and increase satisfaction with the police department. How would you as sergeant further this objective?
- c. If you witnessed an officer using excessive force how would you handle it?
- d. Tell me about a situation where you displayed an ability to lead.
- e. How would you apply the community policing model and philosophy to Randolph, taking into account the demographics of the town and the concepts of multicultural law enforcement and the 2004 Northeastern report regarding the Randolph Police bias-based policing, traffic stop data collection[?] As a set, how would you address these issues?
- f. Do you envision yourself as a leader or supervisor[?] . . . Elaborate."
- g. Integrity is doing the right thing when no one else is watching. How would you handle an officer's transgression that could be dealt with at your level?
- h. There is a saying which goes, If you tell the truth, it becomes part of your past; if you lie, then it becomes part of your future. How would you handle an officer that lies to you?"

William Pace wrote in an undated letter to Town Counsel Robert Sullivan that he would "submit . . . the questions . . . under separate cover." (Ex. 10.) That letter was not entered into evidence, so I have compiled the list of questions from various documents included in Ex. 17 and Officer Chaplin's testimony.

11. Each panelist scored candidates (not their individual answers) on the totality of their interview performance, zero through five, with five being the highest. Each panelist was assigned 15 points and had to assign a "5" to one candidate, a "4" to another candidate, down to a "1" for a fifth candidate, with four candidates to receive zeroes. After the panelists had concluded interviewing all nine candidates, they scored each one. The four panelists' scores were then added for each candidate. (Testimony Porter, Pace, Hamelburg, Chaplain).

12. The panel's scores were: Officer Hughes, 19; Officer Hayward, 14; Officer LeGrice, 13; Marc A. Abramson, 6; Specialist Sherman, 4; Melissa McCormick, 3; Richard Lucey, 1; Cirino, 0; and Gabriel Pantazelos, 0. (Exs. 11, 17.) Cirino is apparently Penny L. Silvia, *see* Ex. 15, whose name appears on other documents. (Exs. 2, 3, 4.)

13. Paul Porter gave Specialist Sherman a zero. (Testimony Porter.) Although he took extensive notes on other interviewees, he did not do so regarding Specialist Sherman. (Porter Testimony; Ex. 17.) Porter's stated reason was that Specialist Sherman was the first interviewee, his answers probably did not "jump[] out," and as the interviews progressed, he decided that he should take more notes. (Testimony Porter.)

14. On his notes, Pace listed Specialist Sherman's "strengths" as being "well spoken," having "speaking ability," "understanding cultural differences," and having "leadership . . . innovation & knowledge of community." Under "weakness," Pace wrote "vague answers," although Pace did not identify the questions that he thought Specialist Sherman answered vaguely, and Pace wrote ambiguously, "Command presence?" (Exs. 11, 17.) The bottom of Pace's notes are cut off in both exhibits and neither party

provided a complete document. Pace gave Specialist Sherman a "2," and testified that other candidates "were able to express their ideas better." (Testimony Pace.)

15. Lt. Hamelburg gave Specialist Sherman a zero based on "just his performance at the interview itself." (Testimony Hamelburg; Ex. 16.)

16. For some reason, Officer Chaplin assigned candidates letter grades and not scores from zero to five. He gave Specialist Sherman an "A," and ultimately ranked him third, he believed. He described his role as "minor." Officer Chaplin began ranking candidates after five interviews and changed the rankings after Officer Abramson's interview. (Testimony Chaplin; Ex. 17.)

17. Paul Porter took notes on some of Officer Hayward's substantive answers, and noted that his "answers [were] too lengthy" and that he "did not answer questions as a set." The bottom of his notes on Officer Hayward are cut off. (Ex. 17.) He did not remember what score he gave to Officer Hayward other than that he rated him "highly." (Testimony Porter.) He almost certainly gave Officer Hayward a "3," as Porter's notes listed Hayward's scores as one 5 and three 3s. (Ex. 17.)

18. William Pace took notes on some of Officer Hayward's substantive answers and identified his strengths as "command presence," "reasoned approach to problem solving," and recognition about "uniform standards throughout"—the rest of the observation is cut off. (Ex. 17.)

19. Lt. Hamelburg gave Officer Hayward 3 points. (Ex. 16.)

20. Officer Chaplin gave Officer Hayward an "A+." (Testimony Chaplin; Ex. 17.) Orally, Officer Chaplin almost certainly gave a "5." (Ex. 17.)

21. Paul Porter took notes on the substance of Officer Hughes's answers. He listed nine questions, not eight. He noted that six answers were "excellent," two were

“very good,” and one was “good.” He characterized Officer Hughes as “confident, very comfortable, sincere [illegible].” (Ex. 17.) He did not remember what score he gave to Officer Hughes, other than that he rated him “highly.” (Testimony Porter.) However, because Officer Hughes received a total of 19 points, Porter had to have given him a “4” or “5.” (Ex. 17.)

22. William Pace took notes on some of Officer Hughes’s substantive answers and identified his strengths as “commitment to community policing,” “dedication [and] loyalty,” “understands leadership requires examples,” “well spoken, well reasoned,” “understands cultural barriers in policing & ways to reach out,” “knowledge of community,” and “positive community relations.” (Ex. 17.)

23. Lt. Hamelburg gave Officer Hughes 5 points. (Ex. 16.)

24. Officer Chaplin gave Officer Hughes an “A+.” (Testimony Chaplin; Ex. 17.)

25. Paul Porter took notes on the substance of Officer LeGrice’s answers. (He listed nine questions, not eight.) He characterized six answers as “excellent” and two as “very good,” and did not characterize one. (Ex. 17.)

26. William Pace took notes on some of Officer LeGrice’s substantive answers and identified his strengths as “command presence,” “realizes that discipline is part of his duties – sees need to mentor,” “decisive – self control,” “clear concise answers,” “inclusiveness both up/down chain of command,” and “multicultural awareness & willing to reach out.” (Ex. 17.)

27. Lt. Hamelburg gave Officer LeGrice a “4.” (Ex. 16.)

28. Officer Chaplin gave Officer LeGrice an "A-." Orally, he almost certainly gave Officer LeGrice a "4." Paul Porter's notes list three 4s and one 1 for LeGrice. (Ex. 17.)

29. The interviews were not the only "criteri[on] for selection," William Pace wrote in an undated post-interview letter to Town Counsel Sullivan. (Ex. 5.) "Personnel files and resumes were read, past job performances evaluated, community involvement and professionalism were weighed." (Ex. 5.)

30. Regarding "community involvement and professionalism," more specifically, Paul Porter assessed the candidates according to his personal and informal list of 10 to 14 factors, some of which overlapped with interview questions: leadership by example, which he considered the most important factor (Testimony Porter); civil service examination score; departmental seniority; experience; ranks and positions held; arrest and citation statistics; education; military background; "discipline issues" (which I understand to mean the applicant's record of discipline); "sick leave"; command presence; community policing philosophy; dedication to and involvement in the community; and dedication and loyalty to the police department. (Testimony Porter; Ex. 17.)

31. Regarding personnel files, the Randolph Police Department does not evaluate its employees in writing. (Testimony Porter, Sherman.)

32. Regarding reports by supervisors and commanding officers, Paul Porter and Sergeant Pace conferred about Specialist Sherman's performance as a school resource officer with Lieutenant-Detective Arthur Sullivan, who in turn had talked with two sergeants who worked with Specialist Sherman, Detective-Sergeant David Avery and Detective-Sergeant Anthony Marag. (Testimony Porter, Pace, Sullivan.) Porter learned

that Specialist Sherman had difficulty in following through on cases and needed supervision. (Testimony Porter, Exs. 12, 13.) Paul Porter knew personally about only one example: During one school vacation, Specialist Sherman "was in the office all day . . . almost every day that week . . . getting caught up on a multitude of reports" (Testimony Porter.)

33. William Pace's personal knowledge was apparently that Specialist Sherman functioned very well technically: "making arrests, all those things," doing everything he was supposed to do, but had demeanor issues. When responding to calls, "[h]e talked to people in a demeaning way," which Pace called "superiority complex": "he is the police officer and acting like he's better than others." (Testimony Pace.) I do not consider this testimony in my decision because the record does not indicate that it entered into the bypass decision.

34. Detective-Sergeant Avery told Lieutenant-Detective Sullivan that Specialist Sherman had "some issues with timely reports being done, timely charges being taken out on individuals and/or arrests being produced in a timely manner" – and that Specialist Sherman had addressed those issues. (Testimony Avery.)

35. Specialist Sherman did have ongoing issues with "log items," namely, "incomplete log items" for roll call purposes. (Testimony Avery). Specialist Sherman was responsible for a case involving a person with mental health issues that "time lapsed." Some "student issues" were not "brought into court in a timely manner." (Testimony Avery.) The record does not reveal whether Detective-Sergeant Avery discussed log items, the case involving a person with mental health issues, and the student issues with Detective-Lieutenant Sullivan, but I am satisfied that Detective-Sergeant Avery had specific incidents to support his assessment to Lieutenant Sullivan.

36. Pace asked Detective-Sergeant Marag whom he thought the top candidates would be and Avery gave him "a few names off the list that I thought would make good sergeants," namely Jim Haywood and Richie Hughes. (Testimony Marag.)

37. Sherman had difficulty following through on cases. Avery "had to talk to Sherman about "taking those extra steps in an investigation" three or four times. (Testimony Marag.) He saw some immediate improvement "but [it was] not sustained; he would fall back." (Testimony Marag.)

38. In addition to the three sub-processes that Paul Porter used to assess candidates—the interview panel; conformance to the fourteen or so factors that he valued; and their job performance as reported by commanding officers or supervisors—Porter spoke with William Pace and solicited his input. Although he was recommending the appointments, Chief Porter recognized that because he was retiring seven days later, these were "going to be his (Pace's) sergeants." Porter retired on July 2, 2010. (Testimony Porter.)

39. Town Manager David Murphy was the appointing authority under the town charter. (Ex. 1; Testimony Murphy.) In bypassing Specialist Sherman, Town Manager Murphy primarily relied on his discussions with Paul Porter, William Pace, and Detective-Lieutenant Sullivan, though he gave more weight to Porter's opinions. Murphy reviewed Sherman's personnel file, but nothing there made a strong impression on him (Testimony Murphy), possibly because the police department does not conduct annual performance reviews.

40. Because the promotion of Officers Hayward, Hughes, and LeGrice involved a bypass of Specialist Sherman, Town Manager Murphy "wanted to dig a little bit" deeper: "I think the feedback I got on Specialist Sherman was that he's a good police

officer, will be a good sergeant, but not yet.” He heard “some concerns with follow through, et cetera.” (Testimony Murphy.)

41. Town Manager Murphy was more concerned about leadership in the department than the difference between Specialist Sherman’s civil service examination score of 91 and Officer LeGrice’s score of 81. He was cognizant of Specialist Sherman’s score, but also respectful of the police department’s chain of command. (Testimony Murphy.)

42. William Pace wrote to Town Manager Murphy on July 6, 2010 that he was not recommending Specialist Sherman for promotion to sergeant. Pace wrote that the interview panel did not highly rank Specialist Sherman, identifying some weaknesses in Sherman’s interview: “several answers were vague;” “he did not have a clear understanding of basic leadership qualities” in some areas, “such as leading by example and command presence.” Apart from the interview, Pace stated that Specialist Sherman’s supervisor had reported that he “has difficulty in following through on cases and . . . needs supervision.” (Ex. 12.)

43. On the same date, William Pace wrote to Town Manager Murphy recommending Officer Hayward for promotion to sergeant. The letter listed Officer Hayward’s experience. Pace wrote that the interview panel gave Officer Hayward “very high marks.” He “demonstrated . . . an excellent understanding . . . of the use of progressive discipline in the supervision of police personnel”; “exhibited a truly unique understanding of the use of mentoring and counseling in the role of police sergeant”; and “was able to cite specific examples of how he has led . . . when a police supervisor was not immediately available.” Pace’s two concluding paragraphs reported, “All panelists agreed that James Hayward performed very well and was one of the clear choices” and

cited Officer Hayward's "overall work ethic and his solid command presence." These two concluding paragraphs also appeared, with the appropriate change of names, in Pace's letters about Officers Hughes and LeGrice. (Ex. 12.)

44. On the same date, William Pace wrote to Town Manager Murphy recommending Officer Hughes for promotion to sergeant. The letter listed Officer Hughes's experience. Pace wrote that in the interview, "Officer Hughes displayed an excellent knowledge" of "use of force issues and the role of the police sergeant" He "impressed the panel with some innovative and creative ideas" about community policing." Pace seemed to report that the interview reinforced Officer Hughes's record within the police department. As noted above, Pace's two concluding paragraphs cited Officer Hughes's performance at the interview, work ethic, and command presence. (Ex. 12.)

45. On the same date, William Pace wrote to Town Manager Murphy recommending Officer LeGrice for promotion to sergeant. The letter listed Officer LeGrice's experience. Pace wrote that in the interview, "Officer LeGrice an excellent knowledge" of "use of force issues and the role of the police sergeant" He "impressed the panel with some innovative and creative ideas" about community policing and apparently with his understanding of the police's need "to be compassionate and work with the community in problem solving." He "understood and could cite specific examples of leading by example" Pace seemed to report that the interview reinforced Officer LeGrice's record within the police department. As noted above, Pace's two concluding paragraphs cited Officer LeGrice's performance at the interview, work ethic, and command presence. (Ex. 12.)

46. On the next day, July 7, 2010, Town Manager Murphy wrote to Specialist Sherman informing him that he had been bypassed and that Officers Hayward, Hughes, and LeGrice had been promoted to sergeant. He drew on William Pace's letters to him about the four significant candidates. He characterized all three promotees' careers as "distinguished." Before passing on William Pace's specific comments to Specialist Sherman, Town Manager Murphy wrote, "The reasons for your non selection include the totality of the review process including the interview, review of your personnel file and discussion with your immediate supervisor." He continued: "Specifically, the committee found that some of your answers were vague. You did not demonstrate a clear understanding of basic leadership qualities such as leading by example and command presence. Your supervisor noted that you had difficulty following through on cases and that you needed supervision." (Ex. 13.)

47. Specialist Sherman filed his timely appeal of the Appointing Authority's decision with the Civil Service Commission on July 29, 2010. (Stipulation.)

RECOMMENDED CONCLUSION

After reviewing the evidence presented in this matter, I conclude that the Appointing Authority has proven by a preponderance of the evidence that there was a reasonable justification to bypass the Appellant.

The authority to bypass a candidate for permanent promotion or original appointment to a civil service position is governed by G.L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.

PAR.08(3) of the Personnel Administration Rules promulgated by the Human Resources Division provides further that, when a candidate is to be bypassed, the appointing authority must make a full and complete statement of all the reasons to justify the bypass. “No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed . . . shall later be admissible as reasons for selection or bypass in any proceeding before . . . the Civil Service Commission.” PAR.08(3).

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for bypass are justified. *Brackett v. Civil Service Comm’n*, 447 Mass. 233, 241 (2006). The Commission should apply *de novo* review and determine “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.” *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003).

Reasonable justification is established when such action is “done upon adequate reasons sufficiently established by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *See Commissioners of Civil Service v. Municipal Ct.*, 359 Mass. 211, 214 (1971), citing *Selectmen of Wakefield v. Judge of First Dist. Ct.*, 262 Mass. 477, 482 (1928). “[T]o show that an Appointing Authority’s decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons.” *Horte v. Hingham Police Department*, 20 MSCR 185, 187 (2007) (citations omitted) (upholding bypass).

An appointing authority may use as a basis for bypass any information it has obtained through an impartial and reasonably thorough independent review, including allegations of misconduct, as long as there is a credible basis for its consideration. *City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 189 (2010). When considering allegations of misconduct, there must be a “credible basis for the allegations” that presents a “legitimate doubt” about a candidate’s suitability, but the appointing authority is not required “to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct” *Id.* at 189-90.

Although the commission makes the findings of fact anew, substantial deference should be given “to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” *Id.* at 189. Substantial deference is especially appropriate in cases dealing with the appointment of public safety officers, given the sensitive nature of their position and the high standards to which they are held. *Id.* “It is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997).

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *Murray v. Second Dist. Court of East. Middlesex*, 389 Mass. 508, 514 (1983); *Kelleher v. Personnel Adm’r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm’r of Boston v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 370 (1986). “When there are, in

connection with personnel decisions, 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304, citing *School Comm. of Salem v. Civil Serv. Comm’n*, 348 Mass. 696, 698-99 (1965); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Commissioner of Health & Hosps. of Boston v. Civil Serv. Comm’n*, 23 Mass. App. Ct. 410, 413 (1987).

In this case, the Appointing Authority informed the Appellant that he was bypassed because of his interview performance, as some of his answers were vague and he did not demonstrate a clear understanding of basic leadership qualities such as leading by example and command presence; a review of his personnel files; and discussion with his immediate supervisor, who noted that Sherman had difficulty following through on cases and that Sherman needed supervision.

Sherman argues that the use of the word “including” along with the reasons for bypass in Town Manager Murphy’s letter to him indicates that Sherman was bypassed for unspecified or undisclosed reasons. I cannot reach this same conclusion. I make this finding based on the logic of language and my review of the evidence, which does not allude to unspecified or undisclosed reasons.

Interviews

The interview process followed by the Appointing Authority was not exactly a model to be followed. For example, interviews were not recorded, meaning that I was “asked to rely on faded memories,” not “a complete and contemporaneous record of the interviewees’ evaluations and scoring.” *Moses v. Town of Winthrop*, 21 MCSR 420, 426 (2008). After asking candidates a uniform set of questions, the interview panel did not objectively determine that the “candidates’ respective answers . . . were right or wrong or

better or worse, comparatively.” *MacMillan v. Town of Plymouth*, 21 MCSR 446, 448 (2008). And, the Town of Randolph was not overly concerned about “the wide disparity in civil service scores,” *Cronin v. Town of Arlington*, 22 MCSR 26, 30 (2009) (overturning bypass), between Specialist Sherman on one hand and Officers Hughes and LeGrice on the other.

Nonetheless, “interview panels are given discretion to question candidates and latitude to score their responses.” *Spicuzza v. Dep’t of Correction*, 12 MCSR 187, 188 (1999). An interview process need not be “based on objective criteria.” *Cronin v. Town of Arlington*, 22 MCSR 26, 29 (2009) (overturning bypass). “Subjectivity is inherent in the evaluation of interviews.” *Id.* (citation omitted).

In *Rainville v. Massachusetts Rehabilitation Commission*, 19 MSCR 386 (2006), the Civil Service Commission dismissed a bypass appeal, relying in part on the respondent agency’s decision to bypass the appellant in order to choose a “candidate who received the highest score in the interview process.” *Id.* at 387. In *Peavey v. Town of Plainville*, 11 MCSR 103 (1998), it appeared “from the record and the hearing” that the Appellant was “well qualified for the position” and had “the necessary experience.” *Id.* at 104. However, “he was not successful in the interview process in relation to those chosen His failure in the interview process, however, does not equate to . . . a violation of the standards required to by-pass a candidate” *Id.*

As in *MacMillan*, the Town, after asking candidates a uniform set of questions, did not objectively determine that the “candidates’ respective answers . . . were right or wrong or better or worse, comparatively. The answers were judged on impression and consensus, not clearly stated right and wrong answers as would be found on a civil service exam. The interview process seems to have been overly subjective in its design

and scoring.” *Id.* at 448. Yet by 3 to 2, the Commission upheld the Town of Plymouth, finding that it “provided sound and sufficient reasons to justify the bypass...based on merit and policy considerations.” *Id.* at 452. The Commission so found even though it found some facts in Plymouth that could *not* be fairly found in this case. The interview process in Plymouth “was closer to a personality contest or the hiring of a salesman.” It “did not measure the knowledge, abilities and skills [that] are rationally related to the position of police sergeant.” *Id.* at 448.

Job Performance

The evaluation of Specialist Sherman’s job performance, while possibly flawed, was a reasonable justification to bypass him for promotion. Again, I would not consider the Randolph Police Department’s absence of an annual job performance review as a model to be followed. Just as the issue is not whether I, now, and the Commission, later, “would have acted as the appointing authority had acted,” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983), the issue is not whether I would have implemented an annual and written process of evaluating job performance.

The Appointing Authority presented ample credible evidence that Specialist Sherman had several problems with his job performance that are relevant to the Sergeant’s job. Lt. Sullivan testified that between January 2010 and December 2010, Sherman fell significantly behind on his case follow-up, including filing necessary reports. Sherman’s direct supervisor, Sgt. Avery, testified that Sherman had difficulty timely filing certain reports and also did not file charges and complete arrests timely either. Sherman admits that Sgt. Avery pulled him aside on occasion and had to ask him to keep up with his reports.

Moreover, in this case as in *Cronin*, “the Appellant at no time introduced any evidence, or even suggested, that the Town’s decision to bypass him for promotion was politically motivated, either against the Appellant or in the favor of the candidates [who] were promoted.” *Cronin v. Town of Arlington*, 22 MCSR 26, 30 (2009) (overturning bypass).

Appellant’s Legal Arguments

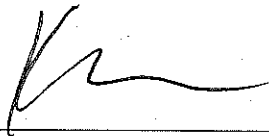
Specialist Sherman does not dispute these legal conclusions. Rather, the arguments in his brief focus overwhelming on the promotion process’ supposed non-compliance with G.L. c. 31, § 27.¹ I now briefly consider this argument. Sometime before September 2009, the Human Resources Division (HRD) delegated its authority to accept bypass reasons to appointing authorities: thus appointing authorities did not need to submit to HRD their reasons for bypass decisions, as a literal reading of § 27 appears to require. *See also* pre-2009 cases interpreting § 27. In September 2009, HRD began conducting training sessions to this effect. *E.g.*, Ex. 16, *Certification Delegation Information Session*, Human Resources Division (Fall 2009). HRD’s legal authority to delegate this function to the appointing authorities may be grounded in G.L. c. 31, § 5(I), which gives HRD the power “[t]o delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth.” But that issue is not before me.

¹ It reads, in relevant part, “If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.” G.L. c. 31, § 27.

To the extent that Specialist Sherman argues that the bypass was illegal because the appointing authority did not comply with § 27, I note the following. The appointing authority acted at HRD's direction; the appointing authority, to be cautious, *confirmed* that it was acting at HRD's direction (Ex. 16); and "since the same promotions would have been made had" § 27 been "meticulously followed . . . any infraction cannot be considered material insofar as the plaintiffs are concerned." *Flynn v. Civil Serv. Comm'n*, 15 Mass. App. Ct. 206, 209, *further appellate review denied*, 388 Mass. 1105 (1983) (In that case, the appellant raised § 27, but focused on a Civil Service Commission rule, which the court addressed. The principle is apt nonetheless.) To the extent that Specialist Sherman argues that HRD's interpretation of § 27 is invalid and *ultra vires*, I note that under his argument every, or almost every, bypass in Massachusetts since September 2009 is likely to have been invalid.

Based upon a preponderance of the credible evidence presented at the hearing, I conclude that the Appointing Authority has proven that it was reasonably justified in bypassing the Appellant. Accordingly, I recommend that the appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

DATED: **FEB - 2 2012**