

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

KIMBERLY SHOREY,
Appellant

v.

Case No. G2-12-277

CITY OF LEOMINSTER,
Respondent

Appearance for Appellant:

Kimberly Shorey
Pro Se

Appearances for Respondent:

Brian M. Maser, Esq.
Kopelman and Paige, PC
101 Arch Street
Boston, MA 02110

Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Ms. Kimberly Shorey (“Appellant” or “Officer Shorey”), filed a timely appeal with the Civil Service Commission (“Commission”) on September 28, 2012, contesting the decision of the City of Leominster (“City” or “Appointing Authority”) to bypass her for a promotional appointment to the position of Police Sergeant. A pre-hearing conference was held on November 6, 2012, at the offices of the Commission. Three (3) days of full hearing were held at the same location on the following dates: December 18, 2012; December 19, 2012; and January 4, 2013. The witnesses were sequestered, except for Officer Shorey, who represented herself, and Chief Healey, who was the City’s first witness. The Appellant did not testify, from which I draw a negative inference. The hearing was

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Carey, Esq., in the drafting of this decision.

digitally recorded and the parties were provided with copies of the CD of the hearing. The parties submitted post-hearing memoranda on or before February 1, 2013.

FINDINGS OF FACT

Based on the forty-two (42) exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the City:

- Robert Healey, then-Interim Chief of Police, Leominster Police Department (“LPD” or “Department”);
- Michael Goldman, Lieutenant, LPD;
- Robert Dupuis, Sergeant, LPD;
- John Fraher, Patrolman, LPD;
- Randy Osborne, Patrolman, LPD;
- Michael Deluca, Patrolman, LPD;
- Robert Quirk, Patrolman, LPD;

Called by Officer Shorey:

- Shawn Phillips, Fire Fighter, Leominster Fire Department;
- George Beauvais, Patrolman, LPD;
- Robert Kinney, Sergeant, LPD;
- Michael Ciccolini, Lieutenant, LPD;
- Francis Hazelrigg, Patrolman, LPD;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, a preponderance of the evidence and reasonable inferences therefrom, establishes the following findings of fact:

1. Officer Shorey was appointed to the LPD as a full-time police officer or about 2001. (Ex. 23)
2. Officer Shorey took the promotional Civil Service Exam for Sergeant in or about October 2008 and September 2009. An eligible list was established on or about November 5, 2009. Officer Shorey’s name appeared first on certification 290862, from which one (1) officer would be promoted. (Stipulated Facts)

3. At some point prior to January 2011, Officer Shorey served as a temporary sergeant at the LPD for a period of six (6) to ten (10) months. (Testimony of Chief Healey)
4. As of approximately February 2012, Officer Shorey was the only female officer in the LPD. (Testimony of Chief Healey)

Whiteboard Incident

5. On or about February 15, 2011, another LPD officer reported seeing a Latin phrase on the whiteboard on Officer Shorey's locker. Lt. Goldman observed the phrase that was written, "*de inimico non loquaris male, sed cogites,*" and understood it to mean "don't speak (or wish) ill of your enemy, plan for it." Lt. Goldman took photographs of the phrase on the whiteboard and reported the incident to then-Capt. Healey. (Ex. 22)

Union Meeting

6. Officer Hazelrigg had been union steward, then Vice President, then President of the union.² (Testimony of Officer Hazelrigg)
7. Shortly before a union meeting on or about May 13, 2011, on the same day, two (2) officers, Officer Michael Deluca and Officer Robert Quirk, addressed the union body. They were not union stewards, nor were they on the union Executive Board at the time. (Testimony of Officer Hazelrigg)
8. During his speech, Officer Deluca expressed his displeasure with at least some union members and their behavior. He also stated that he did not like the direction that the union was going in. Officer Deluca expressed his opinion that union members were being "run ragged" in the midst of a contract dispute, which was taking focus from the more important

² At the time of the Commission hearing, Officer Hazelrigg was no longer President of the union.

issues.³ Officer Deluca did not mention any individuals by name. (Testimony of Officer Deluca; Ex. 36)

9. Officer Quirk spoke after Officer Deluca, prior to the union meeting. In his speech, which he prepared ahead of time, Officer Quirk addressed morale issues and said that “people were pushing the boundary” and were “pot stirrers.” Officer Quirk did not mention anyone specifically by name. Officer Quirk’s speech was intended to express his concerns about morale. (Testimony of Officer Quirk)
10. Officer Hazelrigg was troubled by the state of the union around this time. (Testimony of Hazelrigg)
11. A few days or weeks following the union meeting, Officer Deluca had lunch with Officer Hazelrigg. Officer Hazelrigg informed Officer Deluca that Officer Shorey was very displeased with Officer Deluca’s and Officer Quirk’s speeches prior to the union meeting on or about May 13, 2011, and had made a statement to the effect of “they are not going to say things like that about me without repercussions.” Officer Deluca shared this comment with both Officer Quirk and Police Chief Healey. (Testimony of Officer Deluca; Ex. 36)
12. Officer Deluca felt threatened by Officer Shorey’s statement regarding “repercussions” following the union meeting. Officer Deluca was concerned that if Officer Shorey became his supervisor, he might be the subject of unwarranted discipline or sanctions, based on her open-ended statement about “repercussions.” (Testimony of Officer Deluca)
13. In an email message sent to Chief Healey on or about October 26, 2012, Officer Quirk mentioned the speech that he made prior to the union meeting on or about May 13, 2011 and the comments made by Officer Shorey about his and Officer Deluca’s speeches shortly

³ The implication was that certain officers had filed grievances that were taking too much time in light of other issues facing the union but this was not proved.

thereafter. Officer Quirk felt that Officer Shorey's statement about "repercussions" would be "the gateway to a premeditated act of revenge/retaliation towards Officer Deluca and myself in the near future (especially if or when she made rank)." (Ex. 41)

Domestic Violence Incident Involving a Couple

14. On or about July 25, 2011, at approximately 12:22 AM, Officer Shorey was dispatched to the lobby of the LPD for a reported domestic violence incident involving "Ms. A." Ms. A was with her infant son. Ms. A reported to Officer Shorey that her boyfriend returned home late that night drunk with his friend. Ms. A asked the friend to leave, as she was worried that he and her boyfriend would wake the baby. After the friend left, Ms. A and her boyfriend began arguing. The boyfriend threw a bowl at the TV and then left the apartment. Ms. A locked the door behind him. The boyfriend then attempted to get back into the apartment, pushing and bending the door. Ms. A reported that she opened the door to let him back in, she took the baby and went to the LPD station. (Ex. 3)
15. While Officer Shorey was speaking to Ms. A, Ms. A's boyfriend arrived in the lobby at the LPD. The boyfriend claimed that after Ms. A "kicked his friend out," she began yelling at him for being drunk. He stated that he went into another room and heard a smash, then discovered that the TV was broken. The boyfriend reported that he became angry and told Ms. A to get out. She left with her son, but returned shortly after. He then stated that Ms. A locked him out and he tried to get back in to the apartment by pushing the door. The boyfriend informed Officer Shorey that he walked to the LPD to report what Ms. A had done to his TV, where he observed her in the lobby. He advised Officer Shorey that he did not call the police to report what had happened because he could not find the house phone

and his cell phone was out of batteries. Officer Shorey observed that the boyfriend's cell phone failed to turn on. (Ex. 3)

16. Officer Shorey spoke with both parties and neither wanted to pursue a restraining order.

The boyfriend agreed to go to another location for the night and Ms. A was to return home with the child. Both parties were advised to stay away from each other for the evening and agreed that the boyfriend could return the next morning, around 8:00 AM, to get clothes for work. Officer Shorey also went to the apartment and observed damage to the front door, TV, and bedroom door. (Ex. 3)

17. On or about July 25, 2011, at approximately 8:39 AM, Officer Quirk was dispatched to the lobby of the LPD for a reported past domestic violence incident. In the lobby, Officer Quirk met with a female, Ms. A, who was accompanied by her son. Ms. A reported to Officer Quirk that she had gotten into a fight with her boyfriend the previous night and the police had been involved. According to Ms. A, her boyfriend had been drunk and grabbed her arm. Officer Quirk observed bruising on Ms. A's arm. Ms. A also informed Officer Quirk that her boyfriend had not been arrested. When asked if Ms. A told the police about the injury the night before, she responded that she did so inform the police about it the night before. Officer Quirk asked Ms. A again if she was positive that she had told the officer, later identified as Officer Shorey (see Ex. 3), that she had been assaulted and Ms. A stated again that she did so inform the officer about it the night before. When asked what had happened this morning that led to her returning to the LPD, Ms. A explained that her boyfriend had come home at approximately 8:00 AM. Ms. A stated that her boyfriend was upset that she had gone to the police to report what had happened and started to argue with her and get upset and "act crazy." He picked up a laptop computer and threw it towards Ms.

A, hitting the bottom of the bed. Ms. A was not sure if she wanted to pursue a restraining order against her boyfriend at the time she reported the incident to Officer Quirk, although Officer Quirk told her that it would be a good idea to get one. Officer Quirk documented the injuries to Ms. A's arm. Officer Quirk asked Ms. A about her boyfriend's whereabouts and he was subsequently arrested and charged with domestic assault and battery and assault by means of a dangerous weapon (laptop computer). (Ex. 10)

Domestic Violence Incident Allegedly Involving Illegal Firearms

18. On or about August 26, 2011, Officer Shorey was dispatched to the lobby of the LPD for a past assault. The victim, "Mr. B," had gotten into a fight with his brother. Officer Shorey observed that Mr. B's shirt was ripped and stretched out, consistent with an altercation. When at another person's house, in the garage, Mr. B's brother came after him holding a two (2) to four (4) inch long knife. Mr. B reported that his brother started to grab at him, ripping his shirt, and placed him in a choke hold, squeezing Mr. B's neck. Mr. B managed to break free from his brother and ran towards his vehicle. Mr. B's necklace was broken during the struggle and its whereabouts was unknown. Mr. B reported that his brother continued to come after him, yelling and screaming, and reached through the rear passenger side window and stole Mr. B's bottle of prescription Oxycodone. The prescription had just been filled earlier in the day and Mr. B stated that he had taken two (2) pills out of 150. Mr. B also mentioned that his brother had three (3) illegal firearms at the house, under his bed. Officers were unable to locate Mr. B's brother and Officer Shorey noted that a warrant would be requested. (Ex. 11)

Letter to Police Chief Healey

19. On or about December 5, 2011, approximately twenty-seven (27) police officers at the LPD signed a letter addressed to Chief Healey.⁴ In the letter, the police officers expressed their concerns regarding Ms. Shorey and another officer, asking Chief Healey to remove the two officers from patrol, alleging that “... they are not fit for duty as police officers” The concerns addressed in the letter generally involved officer safety, Department morale, and the reputation of the LPD. The letter blames Officer Shorey and the other officer for an investigation of the LPD by an “independent agency” but offers no proof thereof and Officer Shorey’s and the other officer’s actions, but stating that, “[t]here are a number of the undersigned who are willing to furnish any and all types of isolated incidents pertaining to what has been written here.” The letter further alleges that “a hostile work environment has been created” by Officer Shorey and the other officer. (Ex. 2)

20. As of December 2011, there were approximately fifty-five (55) police officers at the LPD.
(Testimony of Chief Healey)

Domestic Violence Incident Involving Son

21. On or about December 14, 2011, at approximately 7:57 PM, Officer Shorey responded to a call from an individual claiming that his son was destroying the house and threatening him. When Officer Shorey arrived at the residence, she was met at the door by the caller. Officer Shorey was then informed that the son had left the residence without further incident. Both parents requested that the police take no further action. Officer Shorey left the scene and no further action was taken after completing her report on the incident. (Ex. 13)

⁴ With a couple of exceptions, the signatures are not legible. Nearly all of the signatures appear to include badge numbers, although the badge numbers were not identified at the hearing.

Domestic Violence Incident Involving Juvenile Siblings

22. On or about December 24, 2011, at approximately 2:39 PM, the LPD dispatch received a report of a possible domestic assault involving two siblings. Officer Shorey was dispatched to the residence. She spoke to the caller, a nine (9) year old girl, who told Officer Shorey that her brother had pushed her against a wall, hurting her back. Officer Shorey spoke to the fifteen (15) year old brother, who confirmed that he had pushed his sister. Officer Shorey spoke to the children's mother and learned that the boy had been arrested six (6) months ago for assaulting the mother and that he was on probation and house arrest. Officer Shorey discussed various options with the mother regarding her son, but the mother only wanted a report on file at the time and did not want any other action taken against her son. She also advised Officer Shorey that she did not want her daughter to have to go through court proceedings regarding the incident. Officer Shorey then spoke to the son and advised him of the consequences he could face and that if such behavior continued, he would be arrested. He stated that he understood and agreed to try to get his behavior under control. No arrest was made. (Ex. 16)

Disparaging Statements Regarding Chief Healey

23. A few days prior to December 25, 2011, Officer Osborne was working a detail with Officer Shorey. An FBI investigation into the LPD had recently been concluded and it was determined that the allegations against the LPD were unfounded.⁵ During the detail, Officer Osborne asked Officer Shorey if she minded discussing the FBI investigation, to which Officer Shorey responded that she did not mind. During the conversation, Officer Osborne commented that he was glad that the FBI investigation was complete. Chief Healey had

⁵ There were allegations at the LPD that Officer Shorey joined a couple of other officers to report the LPD to the FBI but the allegations of Officer Shorey's involvement were not proved here. (Testimony of Chief Healey; Ex. 26)

sent an email message to Officers regarding the FBI investigation. Officer Shorey became angry and upset when discussing Chief Healey's email message to the Officers and stated that it was "unprofessional" and she "hoped he would die." When Officer Osborne remarked that Chief Healey's email message was only letting everyone know that the FBI investigation was over, Officer Shorey continued, making statements to the effect she "hopes he [Chief Healey] fucking dies" and "hopes he [Chief Healey] gets hit by a car." (Testimony of Officer Osborne; Ex. 35)

24. During the conversation with Officer Osborne, Officer Shorey made additional statements about Chief Healey, implying that he was "dirty" based on his involvement in drug raids. (Testimony of Officer Osborne; Ex. 35)

25. Officer Osborne kept Officer Shorey's statements about Chief Healey to himself for approximately four (4) months. While Officer Osborne did not believe that Officer Shorey's statements constituted a direct threat to Chief Healey's safety, he did feel they were inappropriate and he eventually reported the statements to another officer. On or about May 24, 2012, in response to a request, Officer Osborne prepared a written report for Chief Healey concerning Officer Shorey's statements about the Chief in December 2011. (Testimony of Officer Osborne; Ex. 35).

Motor Vehicle Accident

26. On or about the evening of December 24, 2011, at approximately 9:30 PM, a female driver was involved in a motor vehicle accident in Leominster. The driver's motor vehicle struck a utility pole. (Ex. 18)

27. Prior to the accident, there had been numerous 911 calls to the LPD dispatch regarding the driver of the vehicle involved in the accident. One caller described the driver as "obviously

shitfaced,” and stated that she was driving all over the place, weaving over the center line and driving at erratic speeds. Another caller reported the accident as his wife checked on the driver. The caller’s wife then called to report that “[the driver] had most definitely been drinking” and when she approached the car to check on the driver, following the accident, the driver admitted that she had been drinking. (Ex. 34)

28. Officer Shorey was the primary contact for the call and Officer Fraher served as backup.

Officer Fraher arrived on the scene of the car accident first and observed a strong odor of alcohol on the operator’s breath and that her speech was slurred. Firefighters that were on scene approached Officer Fraher to inform him they believed the driver was “highly intoxicated.” Officer Fraher directed traffic around the accident until Officer Shorey arrived on scene. (Testimony of Officer Fraher)

29. Officer Shorey did not perform a field sobriety test on the driver. The driver of the vehicle was taken to the hospital in an ambulance and the car was towed. (Testimony of Officer Fraher)

30. Officer Shorey issued a citation to the driver in the form of a warning for a marked lanes violation. No arrest was made. (Exs. 18 & 19)

31. The driver’s possible intoxication and/or whether it was a contributing factor to the accident is not mentioned anywhere in Officer Shorey’s motor vehicle accident report. (Ex. 18)

32. On or about December 27, 2011, Chief Healey sent an email message to approximately thirteen (13) supervisors at the LPD. In this email, Chief Healey expressed concerns about Officer Shorey, following several complaints he had received about her from patrol officers, such as being “inattentive to duty.” As a result of these complaints, Chief Healey requested that a supervisor respond to each service call to which Officer Shorey was dispatched in

order to observe her. If any supervisor observed a violation of a department rule or regulation, Chief Healey requested that the supervisor send him a written report in that regard. (Ex. 33)

LPD Domestic Violence Policy and State Guidelines

33. The LPD's Policy and Procedure Number 500 ("DV Policy"), effective July 18, 2003, sets forth the Department's policy and procedures relating to domestic violence. According to the LPD DV Policy, an officer shall "[a]rrest any person the officer witnesses or has probable cause to believe has violated a temporary or permanent vacate, restraining, or no-contact order or judgment." LPD DV Policy, § IV(A)(7). In addition, the LPD DV Policy, § IV(A)(8) states:

Where there are not any vacate, restraining or no-contact orders or judgments in effect, arrest shall be the preferred response whenever an officer witnesses or has probable cause to believe that a person: has committed a felony; or has committed an assault and battery in violation of G.L. ch. 265, s. 13A; or has committed a misdemeanor involving abuse.

(Ex. 4)

34. Officers on the LPD were kept apprised of changes to the Massachusetts Domestic Violence Law Enforcement Guidelines ("State DV Guidelines") via email. (Exs. 5a & 5b)

35. Within the State DV Guidelines, § 3.3(B) sets forth when arrest is mandatory or preferred.

The State DV Guidelines state, in pertinent part:

In the interest of immediacy, and the statutory **mandate** to arrest, officers shall make a warrantless arrest of any person the officers witness or have probable cause to believe has violated an emergency, temporary or permanent vacate, refrain from abuse, stay away or no-contact order or judgment, a suspension and surrender order, or protection order issued by any jurisdiction.

State DV Guidelines, § 3.3(B)(1)(emphasis added). In addition, State DV Guidelines, § 3.3(B)(2) states:

When there are no refrain from abuse, vacate, stay-away or no-contact orders or judgments in effect, arrest shall be the **preferred** response whenever officers witness or have probable cause to believe that a person:

- a) Has committed a felony; or
- b) Has committed a misdemeanor involving abuse, as defined in M.G.L. c. 209A; or
- c) [h]as committed an assault and battery or permits another to commit an assault and battery upon an elder or a person with a disability in violation of M.G.L. c. 265, § 13K.

(Id.)(emphasis added). State DV Guidelines, § 3.3(A)(3), similar to LPD Policy §

IV(D)(Ex. 4), provides:

The decision to arrest must be based on whether probable cause exists that the crime occurred, not on whether the victim wishes to seek complaints or wishes to testify at a future date.

(Ex. 5b)⁶

36. LPD DV Policy, § 4(B)(2) provides, in part,

While traveling to the scene of a domestic violence dispute, the officers should request and be provided with the following information: ...

d. Any other relevant information the department is aware of, especially regarding a history of incidents involving the particular address, or the parties, and the likelihood of firearms being present

(Ex. 4)

37. In accordance with LPD DV Policy, officers are required to complete a Domestic Violence Dangerousness Worksheet for all domestic violence calls involving “an arrest, a summons, or a restraining order.” (Ex. 6b; see also Ex. 6a; Testimony of Lt. Goldman)

38. LPD DV Policy, § IV(B)(d), provides, “Officers should be mindful that an abuser who is under the influence of drugs or alcohol, or who suffers from mental illness, may pose a greater risk to the victim’s and officers’ safety[.]” (Ex. 4) The State DV Guidelines have a similar provision. (Ex. 5b at § 3.3E(4))

⁶ State DV Guidelines, § 3.8(F) contains a similar provision to §3.3(A)(3).

39. LPD DV Policy, § IV(I), provides that,

The reporting procedures of any other crime scene should be applied to domestic violence incidents. Prosecution and subsequent legal action can be greatly helped by documentation and description of physical injuries, photographs of the injuries, and/or noting the presence of children in the household, and other information specified under Section IV(C).

(Ex. 4)

The State DV Guidelines, § 3.2(C) similarly provides,

Properly document important information ... In collecting evidence of domestic abuse, law enforcement officers are strongly encouraged to use photographs to document injuries sustained by the victim and the condition of the crime scene. Contemporaneous records of injuries and crime scene condition are critical to the prosecution of alleged abusers.

(Ex. 5b)

Courtesy Policy

40. Rule 6.3 of the LPD discusses courtesy:

Officers shall not be discourteous or inconsiderate to the public, to their superior officers, and to their fellow officers and employees of the police Department as well as other law enforcement and governmental agencies. They shall refrain from the use of profanity, derogatory comments, ethnic or racial slurs or any other type of demeaning statements or comments. They shall be tactful in the performance of their duties and are expected to exercise the utmost patience and discretion even under the most trying circumstances.

(Ex. 21)

January 2012 Meeting with Chief

41. On or about January 4, 2012, Chief Healey met with Officer Shorey to address various concerns that he had regarding Officer Shorey's behavior, job performance, and response to specific calls. (Testimony of Chief Healey)

42. Officer Fraher and Officer Viola were also present at the January 2012 meeting, as union representatives, in addition to Lt. Goldman and Lt. Bernier. (Testimony of Chief Healey)

At pertinent times, Lt. Goldman oversaw domestic violence cases at LPD and was assigned to work with the Domestic Violence Advocate who was associated with the LPD. (Testimony of Lt. Goldman)

43. During the same meeting, Chief Healey mentioned the December 5, 2011 letter signed by approximately twenty-seven (27) patrolmen at the LPD that expressed concerns about working with Officer Shorey. (Testimony of Chief Healey)

44. During the January 2012 meeting, Chief Healey also mentioned police calls that he believed that Officer Shorey failed to properly address. With regard to the domestic violence call involving a couple, Ms. A and her boyfriend, Chief Healey stated that Officer Shorey failed to properly document injuries suffered by Ms. A. (Testimony of Chief Healey; Exs. 4, 5a, and 5b).

45. Also at the January 2012 meeting, Chief Healey mentioned the domestic violence call involving two brothers and a report by one of the brothers that the other brother had illegal handguns. (See Ex. 11) Chief Healey stated that the investigation did not properly address whether there were illegal firearms present, which were, in essence, “unaccounted for.” (Ex. 12) Furthermore, Chief Healey stated that an arrest should have been made in the case involving the two brothers. When Officer Shorey was asked why she did not make an arrest in the case, she stated that the brothers were “cracked out.” Chief Healey stated that this case was not investigated properly, nor did Officer Shorey provide a sufficient explanation for the reason it was not handled properly. (Testimony of Chief Healey; Exs. 4, 5a, 5b and 12)

46. The domestic violence incident involving a juvenile brother and sister (see Ex. 16) was also discussed during the January 4, 2012 meeting. (Testimony of Chief Healey) Chief

Healey stated that Officer Shorey did not properly investigate this case. Even though the brother told Officer Shorey that he had pushed his sister, she made no determination whether an assault and battery took place. In addition, Officer Shorey did not arrest the brother. Officer Shorey told the brother's mother that her son could be arrested immediately; however, the mother did not want her son to be arrested. Furthermore, Officer Shorey did not look at the injuries that the boy's sister sustained. During the January 4, 2012 meeting with the Chief, when asked if Officer Shorey understood that she should have arrested the boy, she answered "yes." When asked why she failed to do so, Officer Shorey stated that she did not know. (Ex. 17)

47. None of the domestic violence calls at issue involving Officer Shorey required a "mandatory" arrest, pursuant to the state DV guidelines and the LPD's DV policy but it is the preferred response in similar circumstances. (Testimony of Chief Healey; Exs. 4, 5a, and 5b) None of these calls involved a restraining order that had been violated. (Lt. Goldman)

48. The motor vehicle accident (see Ex. 18) to which Officer Shorey responded was also discussed at the January 4, 2012 meeting. Chief Healey played the 911 recording (see Ex. 34) and asked Officer Shorey why she did not prepare a better report. For instance, there is no mention of alcohol in the report. Officer Shorey stated that the driver was drunk and impaired by alcohol but she wanted to give the driver a break since it was near Christmas and because the operator of the vehicle was the ex-wife of a police chief from another town who had been involved in a previous OUI that also involved an accident. (Testimony of Chief Healey)

49. At the January 4, 2012 meeting, Chief Healey told Officer Shorey that he was very disappointed with her “body of work” and that he wanted to further investigate certain incidents. Chief Healey told Officer Shorey to expect to meet with him again and that disciplinary action may be taken against her. (Testimony of Chief Healey)
50. Lt. Goldman, who was present during the January 4, 2012 meeting, stated in an email message to Chief Healey, on or about January 6, 2012, that he was “seriously alarmed and concerned” by Officer Shorey’s handling of domestic violence calls. Lt. Goldman was particularly concerned that Officer Shorey did not take the history of domestic violence into consideration in those cases and, instead, wished to make her own judgments without it. This goes against the LPD’s DV Policy and domestic violence training, as well as the State DV Guidelines. (Exs. 4, 5a, 5b and 29)
51. In addition, Lt. Goldman was concerned about Officer Shorey’s failure to make an arrest in the domestic violence call involving Ms. A and her boyfriend and the call involving a domestic violence incident between the juvenile siblings. In both of these cases, Officer Shorey did not make arrests after the victim or the parents said that they did not want the alleged perpetrator to be arrested, which is contrary to the LPD’s DV Policy and domestic violence training, as well as the State DV Guidelines. (Exs. 4, 5a, 5b and 29)
52. Lt. Goldman did not know about the cited domestic violence cases handled by Officer Shorey until the January 4, 2012 meeting. (Testimony of Lt. Goldman)

May 2012 Meeting with Chief

53. The next meeting between Chief Healey and Officer Shorey took place on or about May 21, 2012. (Testimony of Chief Healey)

54. Prior to the May 21, 2012 meeting, Chief Healey became aware of disparaging comments made about him by Officer Shorey to Officer Osborne. (see Ex. 35) (Testimony of Chief Healey)
55. During this meeting, Chief Healey mentioned comments made by Officer Shorey that were directed towards Officer Deluca and Officer Quirk, stating that Officer Deluca and Officer Quirk would face “repercussions” for making disparaging statements she believed they made about her right before the May 13, 2011 union meeting. (Testimony of Chief Healey)
56. During the meeting, Chief Healey also mentioned a claim made by Officer Shorey that another officer had pointed a gun at her. Following an investigation, the claim was determined to be unfounded. (Testimony of Chief Healey)
57. The Latin phrase on Officer Shorey’s whiteboard in the locker room and observed by Lt. Goldman on or about February 15, 2011 was also discussed at the Chief’s meeting with Officer Shorey in May 2012. (See Ex. 22). Chief Healey accepted Officer Shorey’s explanation for the Latin phrase, which involved an officer who had passed away. (Testimony of Chief Healey)
58. Based on the comments made by Officer Shorey and the totality of the situation, and to protect himself, Officer Shorey, and the City, Chief Healey sent Officer Shorey for a fitness for duty evaluation. Officer Shorey was placed on paid administrative leave in this regard, beginning on May 21, 2012. (Testimony of Chief Healey)
59. There is no documentation indicating that Officer Shorey was disciplined or sent to training for her responses to the domestic violence calls or for her failure to arrest the driver involved in the motor vehicle crash and documentation of the incident at the time of these events or thereafter. (Testimony of Chief Healey; Administrative Notice)

Psychological Fitness for Duty Report

60. On or about May 30, 2012, a licensed psychologist met with Officer Shorey and prepared a psychological test report regarding Officer Shorey's fitness for duty. The psychologist found, *inter alia*, that Officer Shorey was under a great deal of stress and that there "appears to be a major problem for her in working at the Leominster Police Department under these conditions." Until the issues mentioned in the report were resolved, the psychologist reported that there was a risk that the issues could pose a problem that could endanger Officer Shorey and others. The psychiatrist recommended that Officer Shorey attend individual therapy and have a psychiatric evaluation. The report states that until further information is obtained, Officer Shorey is not considered fit for duty. (Ex. 23)⁷

61. As of February 26, 2014, Officer Shorey was employed by the City as "full duty status," with no restrictions. (Administrative Notice)⁸

Bypass Letter

62. Officer Shorey was informed of the City's decision to bypass her for the position of permanent police sergeant by letter on or about July 31, 2012. The reasons provided by the City for Officer Shorey's bypass are as follows, as set forth in the letter:

1. You have made various comments about the Police Chief and exhibited behavior in the workplace that evidence[s] you are not fit to serve in a supervisory capacity. On May 21, 2012, you were interviewed regarding disparaging remarks you made in violation of department rules and regulations. It was alleged that you made a statement out of anger wishing the Police Chief would "die" and "hope he gets hit by a car." You also made several disparaging remarks about the Police Chief to another City employee, prompting that person to come forward. You also made a statement directed at your colleagues that "nobody makes comments like that about me without repercussions." As you are aware, I also received a letter signed by your

⁷ An evaluation on September 18, 2012 stated that the evaluator would leave the Appellant's return to duty up to a treating therapist. (Ex. 24)

⁸ Prior to issuing this decision, in an email message, I asked the parties Officer Shorey's status and the Respondent provided this information.

colleagues alleging that your actions as a patrol officer and your demeanor in the workplace has contributed to a hostile working environment.

2. You have historically and routinely exhibited poor performance in your duties as a patrolman. You have been called by administration on numerous occasions since 2011 regarding your performance. Most recently, on January 4, 2012 you attended a meeting regarding repeated instances of poor job performance, violations of Department Policies and Procedures and Massachusetts law. The meeting concerned: (1) your violating Department Policy and Procedures and Massachusetts law by not arresting a domestic violence suspect, thereby putting the victim in continued jeopardy; (2) your violating Department Policy and Procedure by not arresting a suspect and completing a report as required; (3) you poorly investigated a domestic violence incident and did not communicate with your back up officers any information in violation of Department Policies and Procedures; (4) another incident of domestic violence involving a possible handgun was poorly investigated and poorly documented in your report; and (5) you failed to follow Department Policy and Procedure with a proper investigation regarding an incident involved [*sic*] a reported intoxicated driver who had caused a traffic accident....

(Ex. 1)

63. Officer Marois, whose name appeared below Officer Shorey's name on certification 290862, was promoted to Sergeant. (Stipulation of Facts; Ex. 1)

Other Matters

64. Officer Frank Hazelrigg, who testified on Officer Shorey's behalf, credited Officer Shorey with saving his life in or about 2010, when someone was coming at Officer Hazelrigg with a knife. Officer Shorey was named Employee of the Year for her actions. (Testimony of Officer Hazelrigg)
65. Officers are supposed to submit reports to their Officers in Charge ("OIC") by the end of their shifts regarding events that occurred during their shifts. OICs are supposed to sign off

on the Officers' reports. The pertinent domestic violence reports of Officer Shorey were signed off by an OIC.⁹ (Testimony of Chief Healey)

66. At an unspecified time, Chief Healey saw that someone had written "whore" on the Appellant's office in-box. (Testimony of Chief Healey)

67. Officer Shorey filed three (3) claims at the Massachusetts Commission Against Discrimination ("MCAD") against the City of Leominster between 2009 and 2013. On October 31, 2012, the MCAD found that one of the claims was supported by probable cause and the case regarding that claim remains open. The MCAD did not find probable cause to support the two (2) other claims filed by Officer Shorey. (Administrative Notice)¹⁰

DISCUSSION

Applicable Law

The authority to bypass a candidate for original appointment to a permanent civil service position is set forth in G.L. c. 31, § 27, which states, in pertinent 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.

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an

⁹ Officer Fraher testified that he mentioned his concerns to an unnamed OIC about the manner in which Officer Shorey handled the car accident case and stated that he did not know how the OIC handled it. Therefore, it is not clear if the OIC that day signed off on Officer Shorey's report about the accident.

¹⁰ The Appellant submitted this document to the Civil Service Commission earlier in our proceedings. On May 12 and 13, 2014, I emailed the parties to ask the status of any claim/s Officer Shorey may have at MCAD and obtained the information indicated in this Fact in response to my inquiry.

unprejudiced mind; guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)). An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 189 (2010).

“In its review, the commission is to find the facts afresh, and in doing so, the [C]ommission is not limited to examining the evidence that was before the appointing authority.” City of Beverly, 78 Mass.App.Ct. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev. den., 390 Mass. 1102 (1983). As a result, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” City of Beverly, 78 Mass.App.Ct. at 188.

“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” City of Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304, rev. den., 426 Mass. 1102 (1997) (citing Murray v. Second Dist. Court of E. 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 Bos. v. Civil Serv. Comm’n, 22 Mass.App. Ct. 364, 370, rev. den., 398 Mass. 1103 (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. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” City of Cambridge, 43 Mass.App.Ct. at 304 (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987)).

The Respondent’s Argument

The City submits that it had sound and sufficient reasons for bypassing Officer Shorey. The City points to Officer Shorey’s alleged failure to comply with the LPD DV Policy and State DV Guidelines when responding to domestic violence calls, her failure to arrest a driver who was suspected of being under the influence of alcohol at the scene of a motor vehicle accident, and Officer Shorey’s “disruptive and derisive” behavior that violated the LPD’s Courtesy Rule 6.3 when she made disparaging statements about the Chief, calling into question her competency and ability to serve as a supervisor.

The Appellant’s Argument

Officer Shorey argues that the amount of time that elapsed between the incidents discussed with Chief Healey shows that these incidents did not become an issue until the City needed to provide a reason for bypassing her. In addition, Officer Shorey argues that the DV Policy does not *require* an arrest, it is “preferred,” under the circumstances and that she

appropriately exercised her discretion. Officer Shorey contends that her supervisors did not criticize her work in these instances. Furthermore, Officer Shorey submits that she had temporarily served as a Sergeant previously without incident.

Analysis

One of the reasons the July 31, 2012 letter states for bypassing the Appellant involves the comments she made about Chief Healey to others. Specifically, a preponderance of the evidence indicates that Officer Shorey stated, in sum and substance, that she wished the Chief would “die” and “hope[s] he gets hit by a car.” Such a statement is extremely inappropriate for any police officer to make, under any circumstances, not to mention ill-advised when seeking a promotion, and violated the LPD Courtesy Rule 6.3. In addition, the City bypassed Officer Shorey because of her statement directed at colleagues who spoke just prior to a union meeting, to the effect that “nobody makes comments like that about me without repercussions.” A preponderance of the evidence indicates that the Appellant made this or a similar statement, which was unprofessional and inappropriate and violated the LPD Courtesy Rule 6.3. These comments, particularly the ones directed at Chief Healey, provided the City with legitimate doubt as to Officer Shorey’s suitability for the position of sergeant. For these reasons, the City has demonstrated that it had reasonable justification to bypass Officer Shorey.

Another reason provided by the City for Officer Shorey’s bypass was the letter Chief Healey received from approximately half of Officer Shorey’s colleagues alleging, *inter alia*, that her actions as a patrol officer and her demeanor in the workplace contributed¹¹ to a hostile working environment (see Ex. 2). Other than implying that the Appellant was involved in initiating the FBI investigation, which was not proved, this letter fails to mention any specific

¹¹ I note that Chief Healey’s bypass letter stated that the Appellant “contributed” to a hostile working environment, whereas the letter signed by the twenty-seven (27) officers stated that the Appellant “created” such an environment. (Ex. 2)

incidents in which Officer Shorey's behavior contributed to a hostile working environment and is essentially the opinion of the officers who signed it. The signers offer to provide further information but none was disclosed as such in this case. As a result, I give this document little weight. There is evidence of tension between Officer Shorey and certain officers but insufficient evidence to prove that Officer Shorey contributed to a hostile working environment. Therefore, I find that the City did not have reasonable justification to bypass Officer Shorey based on the letter from some of the Appellant's colleagues.

The next reason given for Officer Shorey's bypass was that she "historically and routinely exhibited poor performance" in her duties as a police officer and that she had been called by administration on numerous occasions, citing the January 4, 2012 meeting with Chief Healey. More specifically, the City states that Officer Shorey: (1) violated the LPD's DV Policy by failing to arrest a domestic violence suspect; (2) violated the LPD's DV Policy by not arresting a suspect and completing a report as required; (3) poorly investigated a domestic violence incident and did not communicate information with her back up officers, in violation of the LPD's DV Policy; (4) poorly investigated and documented another domestic violence incident involving a possible handgun; and (5) failed to follow LPD policies and procedures when responding to a motor vehicle accident involving a suspected intoxicated driver.

While there were concerns about Officer Shorey's performance at some periods, it is not accurate to state that she "historically and routinely exhibited poor performance." That sweeping assertion is undermined by the fact that the City is relying on a handful of cases, that the Appellant was previously appointed temporary sergeant, and she was given the Officer of the Year award (relating to the incident involving Officer Hazelrigg in 2010).

Both the LPD's DV Policy and the State DV Guidelines delineate specific circumstances in which an arrest is "mandatory" and when an arrest is the "preferred" response. None of the domestic violence incidents relied upon by the City to which Officer Shorey responded required a mandatory arrest under the LPD's DV Policy or the State DV Guidelines. Yet the City argues that Officer Shorey did not handle these domestic incidents in an appropriate manner because arrest was the preferred response. The domestic violence incidents, some of which occurred in July and August of 2011, were not even addressed with Officer Shorey until her meeting with Chief Healey on January 4, 2012. The City also alleges that the Appellant's failure to arrest the alleged intoxicated driver involved in a car accident violated LPD policy. The City does not cite any LPD documentation in this regard but City witnesses testified about the LPD practice in this regard. There is no evidence that Officer Shorey received any discipline or remedial training relating to her conduct in the cited domestic violence cases or the car accident case. However, the essence of the reasons for the City's bypass is that the Appellant exercised poor judgment in the cited cases. It is within the Appointing Authority's discretion to bypass a promotional candidate based on its valid concern about his or her judgment. Therefore, the City had reasonable justification to bypass the Appellant for promotion for failing to arrest the alleged perpetrators in the cited domestic violence calls and in the cited motor vehicle accident.

A preponderance of the evidence also establishes that the Appellant failed to adhere to the cited LPD DV Policies and State Guidelines in the course of responding to, investigating, and reporting the pertinent domestic violence calls. A preponderance of the evidence further establishes that the Appellant failed to adequately investigate the alleged OUI car accident and report on it as required by LPD policy. Therefore, the City had reasonable justification to bypass the Appellant on these grounds. However, the City did not establish, by a

preponderance of the evidence, that the Appellant failed to communicate information to her back up officers with regard to the domestic violence cases at issue pursuant to an existing policy or practice.

Conclusion

For the foregoing reasons, the City's Decision to bypass the Appellant is affirmed and Officer Shorey's appeal under Docket Number G2-12-277 is hereby *denied*.

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Civil Service Commission

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on May 29, 2014.

A True Record. Attest:

Commissioner

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:

Kimberly Shorey (Appellant)
Brian M. Maser, Esq. (for the Respondent)
John Marra, Esq. (HRD)