

**THE COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108  
(617) 727 – 2293**

**CARLA SULLIVAN,**  
*Appellant*

**CASE NO: G2-15-109**

*v.*

**BOSTON POLICE DEPARTMENT**  
and  
**HUMAN RESOURCES DIVISION,**  
*Respondents*

Appearance for Appellant:

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Appearance for Boston Police  
Department:

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Appearance for Human Resources  
Division:

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Commissioner:

Paul M. Stein

**DECISION ON MOTION TO DISMISS AND MOTION FOR SUMMARY DECISION**

The Appellant, Carla Sullivan, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from decisions by the Respondent, Boston Police Department (BPD), as the Appointing Authority, acting as the delegated authority of the Massachusetts Personnel Administrator (HRD), to bypass her for promotion to BPD Sergeant, based on her alleged inability to perform all essential functions of the position or any other sworn position at the time of her consideration. This appeal follows four prior unsuccessful appeals challenging BPD’s

bypass of the Appellant for promotion to Sergeant which the Commission dismissed after a consolidated evidentiary hearing of the four appeals. See Sullivan v. Boston Police Dep't, 28 MCSR 280 (2015) (Sullivan I).

On August 14, 2015, HRD moved to dismiss this appeal as to any claims against HRD on the grounds that HRD had delegated the responsibility for the promotional selection to BPD and HRD's only function was the ministerial act of receiving the bypass reasons as approved by BPD. The Appellant opposed the Motion to Dismiss on the grounds that HRD lacked the legal authority to delegate responsibility for approving reasons for a bypass and, even if the delegation was permitted, HRD had not, in fact, properly delegated such authority to BPD in this instance.

On August 14, 2015, and amended on October 21, 2015, BPD moved for Summary Decision on the grounds that there have been no material changes in the relevant facts that BPD asserts as the reasonable justification for bypassing Det. Sullivan, i.e., she continued to be limited to light duty status, she was still not cleared to carry a firearm, and BPD had never promoted any officer to a supervisory position who was not able to perform at a full duty status. Det. Sullivan opposed BPD's motion on the grounds that there was no proof that she remained on light duty, that there was no rule prohibiting promotion of an officer on light duty, and that she was hampered by a medical condition that required treatment during her prior appeal and "even on her best days, she was not fully alert or lucid", but the situation would be different in the present appeal, where she was prepared to "testify in a more convincing manner."

A hearing on the motions was held on October 6, 2015 and was digitally recorded. After considering the argument of counsel and the submissions of the parties, and for the reasons set forth below, HRD's Motion to Dismiss and BPD's Motion for Summary Disposition, as amended, are allowed, and the Appellant's appeal is dismissed.

## **FINDINGS OF FACT**

Based on the submission of the parties, and viewing the evidence in the light most favorable to the Appellant, I find the following undisputed material facts:

1. The Appellant, Carla Sullivan, is a tenured civil service employee who has been a sworn police officer with the BPD since 1996. She currently holds the designation of Detective. (*Claim of Appeal; Administrative Notice [Sullivan I]; BPD Amended Motion, Exh. 5 [Callahan Aff't]*)

2. On or about February 19, 2015, Det. Sullivan's name appeared on Certification #S001-15 issued (from the now-expired 2009 eligible list) for selection of candidates for promotion to the rank of BPD Police Sergeant, which is a first-line supervisory position within the BPD. (*BPD Motion & Exh. 1 [Certification]; BPD Amended Motion, Exh 5 {Callahan Aff't}; Sullivan I*)

3. In March 2015, BPD established a new eligible list containing the names of 559 candidates who took and passed the competitive examination for BPD Police Sergeant held in the second half of 2014. Det. Sullivan's name does not appear on the new eligible list from which future Certifications for promotion to BPD Sergeant will be issued. (*Undisputed Facts; Administrative Notice*)

4. By letter dated April 7, 2015, BPD informed Det. Sullivan that she was being bypassed for promotion for the following reason: "Currently, you are on light duty status and are unable to perform the essential functions of your current position or any other sworn position." (*BPD Motion, Exh. 2*)

5. On May 28, 2015, after four days of evidentiary hearings, the Commission dismissed the pending appeals brought by Det. Sullivan from prior decisions by BPD to bypass her for promotion to Sergeant in 2013 and 2014, finding that BPD had reasonable justification for the prior bypass, based on proof that Det. Sullivan was not cleared for full duty status, was not

authorized to carry a firearm, and, therefore, was not fit to perform the duties of a Police Sergeant. (*Sullivan I*)

6. Det. Sullivan’s duty status has not changed since the prior bypass appeals were filed and decided. (*BPD Amended Motion, Exh. 5 [Callahan Aff’t]*)

7. In accordance with a long-standing policy, BPD does not promote an officer to Sergeant who is not cleared for full duty and capable of performing the duties of a first-level line supervisor. (*BPD Amended Motion, Exh. 5 [Callahan Aff’t]; Sullivan I*)

### **STANDARD OF REVIEW**

An appeal before the Commission may be adjudicated summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., *Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005)

### **APPLICABLE CIVIL SERVICE LAW**

This appeal involves a bypass of the Appellant for promotional appointment to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

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

When a candidate for appointment appeals from a bypass, the Commission's role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines whether, by a preponderance of the evidence, the decision to bypass the candidate was made after a “thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31,§ 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010)

“Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited; 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). In determining whether the department has shown a reasonable justification for a bypass, the Commission's primary concern is to ensure that the department's action comports with “[b]asic merit principles,” as defined in G.L.c.31,§1. See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, 748 N.E.2d 455 (2001); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991)

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

Especially when it comes to selecting an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority’s] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182, 190-91 (2010); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission must not substitute its judgment for a “valid” exercise of appointing authority discretion, but civil service law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”) See also Town of Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004) (rescript opinion); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008). This principle is particularly apt when the applicant is under consideration for a promotion to a superior position.

## ANALYSIS

### HRD’s Motion to Dismiss

The question of law as to whether BPD was required to obtain HRD’s prior “review” and “approval” of reasons for bypassing a candidate for promotion has now been definitively decided by the Supreme Judicial Court’s recent opinion in Malloch v. Town of Hanover, 472 Mass. 783 (2015). In holding that the Town of Hanover was duly authorized to bypass a candidate for police sergeant without such prior approval from HRD, the SJC noted that the statutory scheme

of the civil service law was consistent with the practice adopted by HRD to delegate its role in the promotional bypass process to the appointing authority and such practice fully preserved a candidate's rights under "basic merit principles" to a hearing on the reasonable justification for a bypass by the Commission:

"Malloch argues that [the bypass statute] requires the administrator to review and approve statements of reasons for a bypass. We do not agree . . . and we make explicit today that the statute contains no such requirement.

. . .

According to the record, the administrator trained appointing authorities, provided each authority with a manual detailing acceptable and unacceptable reasons for a bypass, and retained the authority to audit appointing authorities to ensure compliance with basic merit principles. These efforts make it practicable for appointing authorities to create statements of bypass reasons and send them to bypassed candidates, safeguarding basic merit principles, and allowing aggrieved candidates to obtain review by the commission."

Thus, Det. Sullivan's claim that the BPD was required to seek HRD's prior approval of its reasons for bypassing her fails as a matter of law. HRD's role in the process is merely to serve the ministerial function of receiving (and publishing) the bypass reasons and, having delegated this ministerial function to BPD, it played no substantive role in the merits of the decision. Det. Sullivan has no claim upon which relief may be granted as to any alleged violation of civil service law by HRD and, therefore, HRD's Motion To Dismiss shall be granted.

#### BPD's Motion for Summary Decision

The undisputed facts presented in the current appeal show that the reasons upon which BPD based its decision to bypass the Appellant are precisely the same reasons that the Commission found to be a reasonably justified basis for bypassing the Appellant in 2013 and 2014. The sworn testimony of BPD's Chief of Administration and Technology Edward Callahan makes clear that the material facts upon which the BPD made its prior bypass decisions have not changed. The Appellant remains on light duty and cannot carry a firearm. BPD has continued to follow its policy that no sworn officer who is not fit for full duty is promotable to a first-line

supervisory position as Sergeant. For the reasons set forth in Sullivan I and reiterated in the BPD's motion herein, those undisputed facts remain sufficient to conclude that a full evidentiary hearing into alleged other "new evidence" would be a futile exercise and is not required to justify the current bypass. Although the Appellant vaguely argues that she would be a better witness this time around, she does not controvert the essential facts that justified her bypass, then and now. Although the Appellant is correct that evidence of a change in circumstances may warrant the Commission taking a fresh look at an appellant's claims, when the record is not fairly controverted and is devoid of any reasonable expectation that the material and enduring reasons which justify the bypass have not changed, as here, summary decision on that record is the appropriate disposition of the appeal.

For all of the above reasons, the appeal of the Appellant, Carla Sullivan, under Docket No. G2-15-109 is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman [Absent]; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 21, 2016.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:  
Galen Gilbert, Esq. [for Appellant]  
Nicole I. Taub, Esq. [for Appointing Authority]  
Wendy Chu, Esq. [for HRD]