COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAUL TUROWSKI,
Appellant

v. G2-05-362

CITY OF QUINCY,
Respondent

Appellant's Attorney: Mark A. Hickernell, Atty.
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Quincy City Hall
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Commissioner: Daniel M. Henderson[1]

DECISION

Pursuant to the provisions of G.L. c. 31, sec. 2(b), the Appellant, Sgt. Paul Turowski (hereinafter, "Turowski" or "Appellant") seeks review of the Personnel Administrator's decision to accept the reasons given by the City of Quincy (hereinafter "Appointing Authority" or "The City"), for bypassing him for a promotional appointment to the position of police lieutenant in the City of Quincy Police Department. The Appellant filed a timely appeal. The Civil Service

[1] The Commission acknowledges the assistance of Legal Intern Zareena Javed in the preparation of this Decision.

Commission held a full hearing on April 22, 2008, and on May 23, 2008 at the offices of the Civil Service Commission. Four audio tapes of the hearings were made.

FINDINGS OF FACT

A total of twenty-six (26) exhibits were offered into evidence by the parties and 26 Exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the **following witnesses:**

For the Appointing Authority:

- Chief Robert Crowley, Quincy Police Department
- Chief Paul Frazer, Braintree Police Department
- Chief Terrence Cunningham, Wellesley Police Department
- Captain Duggan, Quincy Police Department

For the Appellant:

- Sgt. Paul Turowski, Quincy Police Department
- Lt. Peter Turowski of the Quincy Police Department

I make the following findings of fact:

1. The appellant, Paul Turowski, a tenured civil service employee, has been a Quincy Police Department (hereinafter, "QPD" or "Department") Police Officer since 1983. In 1993, he was promoted to the position of sergeant. (Testimony of Turowski)
2. In 2003, the Appellant took a civil service examination (hereinafter, "examination") for the position of police lieutenant. (Testimony of Turowski)
3. Mayor William Phelan, (hereinafter, "Mayor Phelan" or "Mayor") was the Appointing Authority for the Town of Quincy, at the time of this bypass.(Testimony of Chief Crowley, Exhibits 1, 2, 8 & 9)

4. In December of 2003, the Appellant received a five (5) day suspension for insubordination. (Testimony of Chief Crowley)

5. On or around March 14, 2005, Phelan notified the Human Resources Division of a need for and made a requisition for seven promotional appointments to the position of police lieutenant within the Police Department. (Testimony of Chief Crowley, Exhibit 1)

6. HRD issued a certified eligibility list for these promotional appointments, (certification #250300), dated 4/05/2005. The City was instructed: "selection must be of 7 of the first 15 highest who will accept" appointment. (Exhibit 2)

7. However Mayor Phelan actually made eight promotions to the rank of lieutenant from the list (certification no. 250300). The Appointing Authority promoted Donald Greenwood, John Steele, Jeffrey Burrell, Kevin Tobin, Daniel Minton, Brian Tobin, Patrick Glynn, and Charles Santoro. Six of the candidates selected for appointment were ranked below the Appellant on the above-referenced Certification. (Exhibits 2, 8, Testimony of Chief Crowley)

8. The **Appellant** was third on the certified promotional list, (certification #250300) behind Donald Greenwood and John Steele, but **ahead of Jeffrey Burrell, Edward Kusser, Kevin Tobin, Daniel Minton, Brian Tobin, Patrick Glynn, Charles Santoro, Steve Kring, and Susan Perch.** (Testimony of Chief Crowley, Exhibit 2)

9. **Donald Greenwood is the brother-in-law of Mayor Phelan's wife; Kevin Tobin is the cousin of Phelan's wife and Brian Tobin is Phelan's brother-in-law. (Oral stipulation) It is noted however, that Greenwood did not bypass any candidate as he was in the number one position on the certification.**

10. Candidates were first interviewed by a panel consisting of Mayor Phelan, Chief Robert Crowley (hereinafter, "Crowley") and the Personnel Director, Roberta Kety (hereinafter,

"Kety"). Mayor Phelan had appointed Crowley as Police Chief; the Mayor chose Crowley and his employee Kety for this panel. However, Mayor Phelan as the appointing authority had the sole right to make these promotional appointments. (Testimony of Chief Crowley, Exhibits 1 & 2)

11. On April 27, 2005, the Appellant was initially interviewed as part of the promotional process set up by Appointing Authority Mayor William Phelan in which he participated and which included, Police Chief Robert Crowley, and the City's Personnel Director, Roberta Kety. (Testimony of Chief Crowley, Exhibits 1 & 2)

12. Chief Crowley claimed that he could not remember what Mayor Phelan or Roberta Kety had said to the Appellant during the interview or any comments after the interview regarding his candidacy for promotion. (Testimony of Chief Crowley)

13. Chief Crowley did remember that Mayor Phelan did sit in on the first round interview of Brian Tobin, the Mayor's brother-in-law but could not remember what the Mayor had said regarding Tobin. (Testimony of Chief Crowley)

14. On or around May 19, 2005, Chief Crowley phoned the Appellant to tell him that he would be bypassed by the Mayor. The Appellant then telephoned his brother Lt. Peter Turowski, who was friendly with Chief Crowley, to see if he could intervene and rectify the situation. Peter Turowski did immediately contact Chief Crowley by telephone and in person at Crowley's home regarding this matter. Chief Crowley reluctantly confirmed to Peter that the Appellant would be bypassed. Peter felt that the Chief was backtracking on prior statements and comments, that Crowley was being pressured and that the Appellant's would be bypassed. Peter Turowski felt very strongly that Chief Crowley was contradicting previous

statements he had made to him regarding the Appellant. (Testimony of Appellant and Peter Turowski)

15. On or about December 22, 2004, Peter Turowski asked Chief Robert Crowley if the Appellant would be promoted. Crowley responded that yes, he would be promoted, just make sure he comes to work. Peter Turowski responded that the Appellant does come to work, and asked Crowley if the Appellant's recent suspension would be used against him in the promotional process. Crowley responded that they can't – he himself had been suspended, and had been subsequently made Chief. Chief Crowley also volunteered the statement that: "Your brother is the only one around here who can get anyone to do anything." (Testimony of Peter Turowski)

16. The City has a history of making promotional appointments of individuals with past disciplinary suspensions. At least the following individuals have been promoted within the Quincy Police Department despite having been given a suspension of some length: Chief Robert Crowley (5 day suspension); Lt. Corliss (5 days); Lt. Timothy Sorgie (10 days); Sgt. Sean Duggan (15 days); Sgt. Steven Igo (30 days) and Daniel Flaherty (60 days). (Testimony of Crowley)

17. There was a well publicized incident at Marina Bay in Quincy, in 2002 involving charges of very serious police misconduct, which resulted in serious discipline for several officers. Two patrol officers who had been assessed, respectively 90 and 45 day suspensions were subsequently promoted to sergeant in 2004 and 2005. Another officer who received a 90 day suspension for that incident was appointed by Chief Crowley on March 23, 2005, as the school resource officer. Another officer who was assessed a 90 day suspension for that incident was appointed by Chief Crowley on February 1, 2005 to the juvenile unit. *See*

Edward Kusser v City of Quincy, Docket No. G2-05-318, decision- *allowed* on January 7, 2010, p. 7 findings #23 and #24. (administrative notice)

18. By letter dated May 25, 2005, the City Solicitor on behalf of Mayor Phelan, the Appointing Authority requested an opinion from the State Ethics Commission as to whether the Mayor could participate in the promotional process. The reason stated was the potential conflict of interest: "The brother of the Mayor's wife is a sergeant in the QPD and has taken the civil service examination to be promoted to lieutenant." **However, that letter did not mention the Mayor's other two relatives, who were also under consideration for promotion to lieutenant.** Subsequently, on May 26, 2005, the Mayor asked Human Resources Division for an extension of the existing promotional list until June 30, 2005, on the ground that the City was in the process of seeking guidance from the State Ethics Commission. Human Resources Division approved the request on June 3, 2005. (Testimony of Chief Crowley, Exhibits 4 & 5)

19. On June 14, 2005, the State Ethics Commission issued a letter in which contained "…we informally conclude that the Mayor may invoke the rule of necessity in order to participate in the promotion process to the extent legally necessary." The necessity claimed by the Mayor was that any delay in the promotional process would in turn delay promotion of lower ranks, as well as the hiring of new recruits. The Ethics Commission repeatedly cautioned and informed the Mayor of his obligation and responsibility to avoid unwarranted exemption, privilege or giving a "leg up" in the process; stating; **"the scope of the Mayor's participation in the particular matter should be as narrow as is legally required."** (Exhibit 6)

20. Ironically, Chief Crowley had composed at the Mayor's instruction, another interview panel of himself, and Police Chief Terrence Cunningham of Wellesley and Police Chief Paul Frazier of Braintree and conducted a second round of interviews. They interviewed the Appellant on June 14, 2005, the same day as the Ethics Commission letter. (Testimony of Chief Crowley, Exhibit 6)

21. The Appellant had previously been informed by Chief Crowley directly and through his brother Lt. Peter Turowski that the Mayor would bypass him for promotion. Based on this information the Appellant sought an injunction in Superior Court to prevent the completion of the process including the second panel interview on June 14, 2005. The Appellant was not successful in obtaining the injunction. (Testimony of Appellant)

22. This second interview panel did not have a set of questions to uniformly ask each candidate. The panel had no prepared answers for the questions asked each candidate so that they could gauge their answers. There was no numerical or other grading system used so that the panel could objectively assess the competing candidates. None of these three panel members had their written interview notes available when they testified at this hearing. The panel only interviewed 10 of the eligible 15 candidates. None of the interviews were audio or video recorded. (Testimony of Crowley, Frazier, and Cunningham)

23. Some of the candidates had resumes and other documentation which they presented to the panel at their interview. These resumes and other documentation were considered by the interview panel, despite there being no prior notice to the competing candidates that resumes and other documentation would be received and considered by the panel. (Testimony of Crowley, Frazier, and Cunningham)

24. Chief Crowley, although present, did not participate directly in the interview but he did prepare the other panel members prior to the interview regarding issues and questions to ask the Appellant. (Testimony of Crowley, Frazier, and Cunningham)

25. Chief Crowley, Chief Frazier, and Chief Cunningham knew the identity of the Mayor's relatives on the promotional list. (Testimony of Crowley, Frazier, and Cunningham)

26. Chief Crowley provided Chief Frazier and Chief Cunningham with annotated records of the Appellant's attendance, but did not provide such any records for the other interviewed candidates. (Testimony of Crowley, Frazier, and Cunningham)

27. Chief Crowley testified that the purpose of the interview was to give the Appellant an opportunity to explain his past use of sick leave and the disciplinary incident. (Testimony of Crowley)

28. Chief Crowley knew or should have known that the Appellant would react negatively to the pressure of an interview examination focused on the issue of his past medical problems and sick leave use. He is a private person and thought the issue should have been off-limits. This is not a subject matter for a promotional interview since there had never been even an insinuation of the Appellant's misuse of sick leave, and the open ended time-frame covered more than several decades. The Appellant's long term medical problems had been well known to Chief Crowley and the rest of the Department. The Department had all of the Appellant's medical and personal documentation in its files. Chief Crowley deliberately created this uncomfortable situation and as would be expected, the Appellant did react negatively to the repeated questions regarding his past medical problems and his medical leave. The interview went down hill from the beginning. (Exhibits, testimony and demeanor of Appellant, Crowley, Frazier, and Cunningham, reasonable inferences)

29. During this second interview the Appellant was repeatedly questioned about his prior use of sick leave, including his use prior to his first bout of cancer in 1990. The Appellant declined to go into detail about the medical circumstances for his absences. The Appellant declined based on the "Stipulation of confidentiality" agreement he had signed in an MCAD complaint he had filed against the QPD. He reasonably believed, in good faith that this agreement prohibited him from disclosing the requested information. The Appellant also felt that there were privacy and personal matters regarding him and his wife that he did not want to get into and this was not the right time to be questioning him on this matter. His refusal to discuss his past medical information irritated the two outside panel members, to the point that they became irretrievably negative in their view of the Appellant. (Exhibit 24, Testimony of Appellant, Crowley, Frazier, and Cunningham, reasonable inferences)

30. Prior to his bypass, the Appellant has never been accused of or disciplined for sick leave abuse. However, there have been other officers of the QPD who have been disciplined for sick leave abuse, including those receiving suspensions and one being terminated. (Testimony of Appellant and Crowley)

31. The Appellant testified that he never used sick leave or no-pay sick leave except when he or his wife were actually sick or receiving surgery or some other medical treatment. (Testimony of Appellant)

32. The sick leave use at the QPD is proscribed in the collective bargained agreement (CBA) and requires medical documentation for sick leave taken beyond a certain amount. The Appellant complied with all of the requirements for his past sick leave use and all said use, including FMLA, had been previously approved by the Department. (Testimony of Appellant and Crowley)

33. The Appellant did have a long history of medical problems, surgery and other treatment, including for two bouts of cancer, the first in 1990. Prior to that; from 1983-90 he had some unused sick leave which he carried over from year to year. At various times the Appellant used up all of his sick time and other available time and then took no-pay sick days for his medical difficulties. His wife also had medical problems resulting in surgery and follow-up treatment for which the Appellant took FMLA leave to help care for her. The FMLA forms were completed, submitted and approved by the Department. These medical problems took a physical and emotional toll on the Appellant and his wife. The Appellant exhibited the results of this emotional stress at several junctures during his testimony, due to the subject matter. His wife, while observing the hearing also showed strong emotional effects at the same juncture of the Appellant's testimony. (Testimony and demeanor of Appellant)

34. The Appellant worked 2186 hours in 2000; 1783 hours in 2001; 1690 hours in 2002; 1693 hours in 2003; and 2212 hours in 2004. (Testimony of Appellant, Exhibits 11-21)

35. The Appellant received good past performance evaluations, including a positive evaluation in 1999 from [Chief] then Captain Robert Crowley. Crowley rated the Appellant as "distinguished" in the areas of "accepts responsibility and works independently"; "organizes personnel effectively"; "initiates timely corrective action"; "initiates disciplinary actions as necessary"; and "adheres to progressive discipline policy." Crowley rated the Appellant as "accomplished" in the areas of "mental alertness and physical fitness"; "works well with supervisors"; "displays positive attitude towards police service"; "professional knowledge of department policies, practices & rules"; "professional knowledge of criminal statutes & criminal procedures"; "communicates departmental objectives"; "accepts leadership responsibilities"; "organizes departmental resources

efficiently"; and "recognizes strengths and weaknesses in subordinates." These ratings were in line with other supervisors' ratings for the Appellant. (Testimony of Appellant and Crowley, Exhibit 10).

36. On July 15, 2005, the panel (only Frazier and Cunningham) submitted its written recommendations for promotions to Chief Crowley. The panel recommended eight (8) of the candidates for promotion to lieutenant; thereby bypassing the Appellant and one other, Edward Kusser. The name of Edward Kusser also appeared ahead of Kevin Tobin and Brian Tobin on the certified eligibility list. (Exhibits 2 & 8, Testimony of Crowley)

37. On July 15, 2005, by letter the panel (only Frazier and Cunningham) recommended to Chief Crowley that the Appellant be bypassed for promotion.(Exhibit 8 Testimony of Crowley)

38. On July 29, 2005, Chief Crowley sent a memo to Mayor Phelan with his recommendations for promotional appointment and the bypass of the Appellant and Edward Kusser for appointment. Chief Crowley's recommendations referred to the recommendations of the two panel members, Chief Frazier and Chief Cunningham. Chief Crowley's memo regarding the Appellant's bypass is 4-5 pages single spaced with excoriating detail of his past sick leave use, his interview performance and the disciplinary incident of December, 2003. There is not one positive reference in the 4-5 pages for the Appellant, despite his nearly 22 year career at the QPD. For example: Chief Crowley proclaimed therein, quoting from the panel's report his "obvious abuse of Sick Leave erodes the respect and loyalty of his subordinates and leads to the inability to build credibility within the agency". However, the Appellant had never been cited, counseled, cautioned or disciplined for sick leave abuse in his entire career and Chief Crowley admitted this fact in his testimony. The negative reference to subordinates'

respect and loyalty is pure conjecture. This was a false or pretextual issue raised by Chief Crowley. This was a set-up by Chief Crowley; he poisoned the well. The sick leave and disciplinary issues were injected into the interview process by Chief Crowley which surprised and upset the Appellant and severely prejudiced his performance with the other two panel members. (Exhibit 8, Testimony of Crowley, reasonable inference)

39. By contrast, Mayor Phelan's three family members received virtual free passes from the panel and were either "highly recommended" or recommended for promotion and unsurprisingly were selected for promotion. The panel's appraisals of these three candidates were subjective, highly complementary and effusive and seem to derive much of the supposed factual background information from other sources, possibly resumes and other documentation presented at the interview. (Exhibit 8, Testimony of Crowley, Frazier and Cunningham reasonable inference)

40. Mayor Phelan followed Chief Crowley's recommendation and made the eight (8) lieutenant promotional appointments and bypassed the Appellant and Edward Kusser for appointment. Six of the selected candidates were ranked below the Appellant on certification #250300. (Exhibits 2 & 8, Testimony of Crowley)

41. Edward Kusser, the other candidate bypassed for promotional appointment in this process, also filed a bypass appeal at the Commission. That appeal had factual similarities to this present appeal. The Kusser appeal was decided in Kusser's favor. See Edward Kusser v City of Quincy, Docket No. G2-05-318, decision- *allowed* on January 7, 2010. (administrative notice)

42. The Appointing Authority sent bypass reasons regarding the Appellant to HRD. The reasons given in summary were Sgt. Turowski's use of sick time that he interviewed poorly,

and had a five (5) day suspension for insubordination, which incident occurred on December 4, 2003. The City's reasons for bypass were accepted by HRD. (Exhibit 8, Testimony of Crowley)

43. The authorization for employment (FORM 14) for those promoted was sent to HRD from the City, dated August 1, 2005. This Form was received by HRD on August 8, 2005. HRD approved these appointments on August 16, 2005. The Appellant was notified by HRD, by letter dated August 16, 2005 that he had been bypassed for promotional appointment and that the appointing authority's "reasons are acceptable for appointing the individuals ranked lower on this certification."(Exhibit 8, HRD document packet in case file, administrative notice)

44. The Appellant Paul Turowski is married and has been in the QPD since 1983. He is of average height with a medium to wiry build. He views himself as assertive, a fighter and a "cancer survivor". He has to be strong, persistent and resilient to have survived his long term medical ordeals. His wife has also had some medical problems. The physical and emotional stress and strain of their medical problems have been dealt with but have left him with an edge and an expectation of fighting for everything, especially for what he feels is fair. This expectation has become a personality trait probably familiar to people who know him well. Chief Crowley was certainly aware of it. The referenced disciplinary incident was at least partly attributable to the Appellant's personality and attitude. He has to learn to better control his attitude and edge. His interview performance was also predictable based on his personality and the unfair focus on legitimate and stale sick leave usage. The interview was a set-up against the Appellant. The Appellant is straight forward and sincere in his responses to questions. He makes good eye contact and did not show any signs of

equivocation, even under cross-examination. His answers, demeanor, body language and show of emotion rang true. I find him to be an honest and credible witness. (Exhibits and testimony, testimony and demeanor of Appellant)

45. Chief Crowley did not want to hurt the Appellant. He projected the impression that he was in a difficult personal and political position at the time of this bypass. Simply put, the Mayor was his employer and he knew what the Mayor wanted. His poor memory was helpful in attempting to preserve his impartiality. Motivation and purpose can be difficult to nail down but the strong direct and circumstantial evidence here indicate that this was a selection process tainted by considerations other than basic merit principles. The Chief had to play the role of buffer for the Mayor. His testimony is not considered to be accurate or reliable due to the above cited factors and circumstances. (Exhibits and testimony, testimony and demeanor of Chief Crowley)

CONCLUSION:

This case involves the bypass of the Appellant for promotion to a permanent civil service position. This action is governed by G.L.c.31, Section 27 provides:

> "If an appointing authority makes an original or promotional appointment from certification of any 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 with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest."

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

> "A bypass will not be permitted unless HRD had received a "complete statement . . .that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process

will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass."

These requirements create the rule that that, in the normal course, candidates should be selected according to their relative placement on the eligibility list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) ("A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.").

In order to deviate from this general rule, the appointing authority must show specific reasons, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., 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); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). See also Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles. . . . the commission acted well within its discretion."); 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 [all] basic merit principles").

All candidates are entitled to be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988). See Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) ("An Appointing Authority must proffer objectively legitimate reasons for the bypass")

The task of the Commission on hearing a bypass appeal is "to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . 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.

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 of an appellant 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*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of

Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Appointing Authorities are charged with the responsibility of exercising sound discretion[2] and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. The courts have addressed this issue and stated the following: "On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of **a sound discretion**, among persons eligible for promotion or may decline to make any appointment. (Emphasis added) See the following line of cases as quoted in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971); Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv.348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs.242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272."

[2] The commission regularly receives proposed decisions from parties, which rely on the oft-cited precedent for such alleged wide discretion and purportedly limited commission oversight found in City of Cambridge, 43 Mass.App.Ct. at 304-05, quoting from Callanan v. Personnel Adm'r, 400 Mass. 597, 601 (1987). The quotation from the Callanan opinion, however, was made in the entirely different context of considering the statutory discretion of the *Personnel Administrator [HRD]* to *establish* eligible lists, and had nothing to do with the standard applicable to bypass decisions by appointing authorities from those lists. This quotation, actually dicta, must be taken in context with the established requirements for "sound and sufficient" reasons that must be provided to "justify" a "valid" bypass, acknowledged by the rest of the opinion in City of Cambridge and the other authority it cites (especially the "sound and sufficient reasons" in the Mayor of Revere case, which was a bypass appeal), and which are described elsewhere in this Decision. This erroneous reference to the appointing authority's "wide" or "broad" discretion in the place of the correct, "sound" or "valid" discretion in hiring or promotional selection has subsequently infected numerous commission and superior court decisions and at least one Appeals Court decision. For an example of erroneous citation of "broad discretion" through City of Cambridge *See* Town of Burlington & another vs. James McCarthy, 60 Mass. App. Ct. 914, (2004) For an example of accurate citation of "sound discretion" *See* Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971) and *Goldblatt* cited in Charles W. Flynn & others vs. Civil Service Commission & others 15 Mass. App. Ct. 206, 209 (1983)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'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.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's proof of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony rebutting that evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority's

justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn there from.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 242-42 (2006) and cases cited.

The Appointing Authority in the present matter submitted in summary, the following bypass reasons to HRD: 1) that the Appellant used sick leave excessively; 2) the Appellant interviewed poorly; and 3) the Appellant had received a five (5) day suspension for insubordination. I find that all of these reasons are pretextual. Each of these will be discussed in turn.

The Appointing Authority claimed that the Appellant had taken an excessive number of sick days in the years 1999-2004. The allegation of sick leave abuse is disingenuous and pretextual. Chief Crowley also cited the Appellant's tendency to use sick time in conjunction with his days off. This is an attempt by Chief Crowley to improperly infer by this that there was an impermissible "pattern" to his sick leave use. Yet, neither Chief Crowley nor the Department had ever broached this subject with the Appellant before. It was common knowledge in the Department that the Appellant had regularly used up every bit of his available leave time, mainly

for medical reasons. The Appellant, did in fact, use a great deal of sick time, in addition to personal time, vacation time and "sick no pay" time. This sick time was used legitimately, during his treatment for two bouts of cancer, resulting in missed time for surgery, recovery, continuing treatment and secondary illnesses and injuries derived as a result of the cancer and treatment. In addition to his two bouts of cancer, he took time off to care for his wife following a surgery, and also during other specialized treatments. The Appellant supplied medical documentation for every absence in a timely fashion. The Appellant further stresses that his absences were all approved by the department and that some were explicitly designated as under the Family Medical Leave Act (FMLA). The Appellant did show that to the extent the bypass was due to past use of approved leave, it would interfere with his substantive employment rights, including use of FMLA rights. The Appellant's prior absences were all approved by the department; some of the absences were explicitly designated as FMLA leave. The Appellant has been, at least since 2000, eligible for the protection of the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. See particularly 29 U.S.C. § 2611(2) (defining "eligible employee" as one who has been employed for at least 12 months and who has worked at least 1,250 hours in the preceding 12 month period) and 29 U.S.C. § 2611(11) (defining "serious health condition" as illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider). The Appellant took leave due to his cancer and other illnesses and injuries, and his wife's physical condition, all of which qualify as "serious health conditions" under the FMLA.[3] The FMLA makes it unlawful for any employer to interfere with the exercise of FMLA rights. I find that, to the extent that the Appointing

[3] While the total leave taken by the Appellant exceed that to which he would have been entitled at the time under the FMLA, the burden is on the employer to designate leave as FMLA leave, and the Appointing Authority did not differentiate between the Appellant's FMLA leave and non-FMLA leave in its decision to bypass the Appellant.

Authority's true reason for bypassing the Appellant was his past use of approved leave, the bypass interferes with the Appellant's exercise of FMLA rights.

Thus, the Appointing Authority's first bypass reason of sick leave abuse is completely unsound and insufficient and pretextual on its face.

The Appointing Authority's second bypass reason presented to HRD was that the Appellant had interviewed poorly. The Appellant has shown that this is an invalid reason and a pretextual one. During the interview, the Appellant said that he would use psychology to motivate employees. The Chiefs found this to be an inadequate response. Appellant also showed, citing the training manual, that it mentions use of psychology for motivational purposes, and that the claimed poor interview reason is pretextual. The panel had been briefed and prepared by Chief Crowley regarding the specific subject matter for the Appellant's interview, namely past sick leave usage and the single disciplinary incident. The Appointing Authority, relying on the testimony of the interview panel, stated that Turowski was defensive and argumentative during the interview, yet this was attributable to the panel's improper focus on his decades old use of sick time, which Chief Crowley admitted had been legitimate and had been appropriately and timely approved by the Department. The panel also wanted the Appellant to address the issue of his "pre-cancer" sick leave usage. However, the Appellant was first diagnosed with cancer in 1990 and the need to respond to this fifteen plus years old inquiry in a promotional interview setting strongly indicates an ulterior or pretextual motivation on the part of the panel.

The Appellant also presented sufficient evidence to show that the three chiefs sitting on the interview panel were biased or unduly influenced by Chief Crowley because they knew that the mayor's relatives were on the certification list and followed Crowley's lead. They were aware that a second round of interviews had to be held because of the mayor's involvement in the first

round. It is true that Chief Crowley was a member of the panel was an employee of the Mayor, and that he was the one who selected the other two panelists. However, in testimony, all members of the interview panel testified that they could not recall the source of the favorable information they received regarding the selected candidates, including the Mayor's relatives. All of the panel members including Crowley exhibited poor memories on specifics which might have pointed to bias, favoritism, or nepotism in the selection process. None of the panel members had any notes of the various interviews with which to refresh their failed memories. There was no uniformity in the interview-evaluation process so that the competing candidates could be objectively and comparatively measured against a clear standard.

The reliance on an interview panel of outside members is of limited value in a promotional setting like this. It was only necessitated here, because of three of the Mayor's relatives being in the candidate pool. These long term employee-candidates should have been well known products. They should have been judged fairly on well recognized criteria. The City had all of the performance records of the candidates, with readily available supervisors to consult with.

The final bypass reason given to HRD is the Appellant's five (5) day suspension. The civil service test scores should have been the primary determining factor. Other well recognized factors such as seniority could have been employed Appellant was disciplined when he allegedly instigated a heated exchange with Cpt. Duggan and then swept several items from Duggan's desk to the floor. However, in sum the Appellant proved that the Appointing Authority has promoted many other officers who have also received similar suspensions and some with much more serious suspensions. The appointing authority's excessive focus on the Appellant's prior disciplinary matter resulting in a five day suspension; while virtually ignoring much more serious disciplinary matters resulting in up to 45, 60 and 90 day suspensions for other successful

candidates who were selected for promotion, indicates bias, favoritism and certainly disparate treatment of the Appellant. Although the Appointing Authority can argue that every suspension is different and must be considered separately, a marked deviation from its standard course of dealing is concerning and yet another indication of the Appellant's disparate treatment, a strong suggestion that this reason was essentially pretextual.

This entire selection process had numerous irregularities and exhibited a pervasiveness of political concerns, favoritism or nepotism. As mentioned above, bypass cases must be considered by a preponderance of the evidence to determine whether the reasons stated were more probably than not sufficient. The recommendation results from the interview panel were predetermined. The Appellant and his brother Peter had been informed by Chief Crowley that the Appellant would be bypassed for promotion on May 19, 2005, nearly a month before the interview. I believe that Chief Crowley felt pressured into his recommendation to bypass the Appellant and was giving him a heads-up due to his friendship with his brother Peter. From the testimony and evidence, it does not appear that the Appointing Authority's reasons were honest, fairly determined and free of prejudice or favoritism. In fact, it appears through strong circumstantial evidence that there was bias or political motive for bypassing the Appellant. This may be reasonably inferred from the 3 relatives of the Mayor who were promoted from this one certified eligibility list, two of whom were ranked below the Appellant on that list. The use of the two chiefs from other towns on the panel does not rehabilitate this tainted process as they were under the control and influence of Chief Crowley, the Mayor's appointee, with limited and selected access to information.

For all of the above, the appeal filed under Docket No. G2-05-362 is hereby ***allowed.***

Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Civil Service Commission directs that the Division of Human Resources (HRD) and the appointing authority place the Appellant's name at the top of the current eligibility list for appointment to the position of permanent full time lieutenant so that his name appears at the top of the existing certification list, and/ or the next certification list if the current one is not used, which is requested by the City or the City of Quincy Police Department from the Human Resources Division and from which the next promotional appointment to the position of permanent full time police lieutenant shall be made by the City of Quincy. The Appellant shall receive at least one opportunity for consideration and appointment and the City shall not use the same reasons for bypassing him that were used in this bypass, except that the prior disciplinary matter may be used if appropriate.

WHEREFOR, the appeal filed under Docket No. G2-05-362 is hereby ***allowed.***

Civil Service Commission,

_____

Daniel M. Henderson
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – No; Henderson, Commissioner – Yes; Marquis, Commissioner – No; McDowell, Commissioner – Yes; and Stein, Commissioner - Yes) on August 12, 2010.

A true record. Attest:

_____

Commissioner

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

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

Notice to:
Kevin Madden, Atty.
Mark A. Hickernell, Atty.
John Marra, Atty.-HRD

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAUL TUROWSKI,
Appellant

v. G2-05-362

CITYOF QUINCY,
Respondent

CONCURRING OPINION OF COMMISSIONER MCDOWELL

I concur with the conclusion of the hearing officer, but I respectfully dispute statements of the hearing officer as incorrect as a matter of law. I disagree with the hearing officer's incorrect assertion that appointing authorities do not have wide and broad discretion when making hiring decisions.

Notwithstanding my disagreement with the above-referenced statement included in the hearing officer's decision, I concur with his conclusion to allow the Appellant's appeal. Even when the correct standard of law is applied (i.e. – giving the Appointing Authorities wide and broad discretion in hiring decisions), I believe the hearing officer's findings support his conclusion to allow the Appellant's appeal.

Specifically, I do not believe there is sufficient evidence to show that the interview process was fair and/or that all applicants were treated equally. The record amply shows that factors unrelated to basic merit principles resulted in other applicants having an unfair advantage over the Appellant. As such, the relief ordered here is appropriate.

Ellaina McDowell, Commissioner

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **CIVIL SERVICE COMMISSION**

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PAUL TUROWSKI,
Appellant

v. G2-05-362

CITYOF QUINCY,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves a promotional appointment to the position of lieutenant in the City of Quincy (hereinafter "City"). The City bypassed the Appellant for three reasons: 1) a poor interview; 2) excessive absenteeism; and 3) a 5-day suspension that occurred within two (2) years of this promotional appointment.

The interview panel consisted of Wellesley Police Chief Terrence Cunningham and Braintree Police Chief Paul Frazier. Chief Cunningham and Chief Frazier both submitted a written statement regarding these interviews and testified before the Commission. The authority to interview candidates is inherent in G.L. c. 31, § 25. Flynn, 15 Mass. App. Ct. 206, 208 (1983). Subjectivity is inherent in the evaluation of interviews. Flynn, supra. It is an error to introduce into the decision a requirement of adequate indicia of objectivity for the statutorily authorized interviews. Neither the statute authorizing interviews, nor the Flynn case, nor any other authority…imposes such (a) requirement on appointing authorities." City of Westfield v. Civil Service Commission & another., No. 98-601, Hampden Superior Court (1999).

The written statement submitted by Chiefs Frazier and Cunningham stated in part: "When questioned about his relationship with his peers and subordinates, Sergeant Turowski displayed anger, stating that they did not understand him. Additionally, he failed to accept any responsibility regarding a recent suspension which occurred as a result of his inability to control his anger and emotions. It was difficult to conduct the interview due to the candidate constantly controlling the conversation from a highly defensive posture." There is nothing in the record to show that the two Police Chiefs who served on the panel were biased or influenced by improper motives. Respectfully, the hearing officer's finding that the interview was a "set-up" against the Appellant is not supported by the record and unfairly impugns the integrity of these individuals.

The five (5)-day suspension involved the Appellant's loss of self-control, shouting at a superior officer and knocking objects off a desk on December 4, 2003, less than two (2) years prior to the interview referenced above. According to a report submitted by a Quincy police captain, the Appellant entered the captain's office on December 4th and questioned why he was being asked for medical documentation regarding an absence. When provided with an explanation, the Appellant accused the captain of "fucking sleeping with [two sergeants names redacted]" and became loud and hostile. The Appellant then referred to another sergeant as a "fucking asshole" and then told the captain that he "should swear under oath under God as an Irish Catholic that [the Captain] should tell the truth about the sick bank." According to the captain, the Appellant then inexplicably stated to him, "I met you in the urinal". The Appellant then called the captain a "fucking liar" and the Appellant stated that his father was a Boston police officer and that the captain should not be a police officer. The tirade wasn't over. The Appellant then used his left hand and swept his hand across the captain's desk, causing items to be thrown off his desk and against a wall.

Either of these reasons, standing alone, provided the City with reasonable justification to bypass the Appellant for promotional appointment to lieutenant. Even the hearing officer acknowledges in his findings that the Appellant "has to learn to better control his attitude and edge."

While the record establishes that relatives of then-Mayor Phelan were promoted to the position of lieutenant, this alone does not show that the decision to bypass the Appellant was not justified. In fact, as stated in the findings, at least one of the selected candidates who is related to then-Mayor Phelan (Lieutenant Greenwood) did not bypass the Appellant. Rather, he was ranked first among all candidates who took and passed the promotional examination. Any implication that Greenwood was selected based on his relationship by marriage to then-Mayor Phelan is not supported by the record. Ironically, it was the *Appellant,* who telephoned his *brother*, Lt. Peter Turowski, to see if he could intervene and "rectify" the situation regarding his non-selection. (Finding 14).

The record shows that there were sound and sufficient reasons for the decision to bypass the Appellant and the Commission has erred by "substituting its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Cambridge v. Civil Service Commission, 43 Mass. App. Ct., (1997) at 305.

For all of the above reasons, I respectfully dissent.

_____

Christopher C. Bowman
Chairman
August 12, 2010