

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

CIVIL SERVICE COMMISSION

Stephen J. Wilcinski,
Appellant

v.

Docket NO. G2-07-384

Belmont Fire Department,
Respondent

Appellant's Attorney:

Brian E. Simoneau
161 Worcester Road, Suite 200
Framingham, MA 01701
Phone: (508) 881-1119
Fax: (508) 302-0212
E-Mail: Brian@Policelaborlaw.com

Respondent's Attorney:

Darren R. Klein
Kopelman & Paige, P.C.
101 Arch Street
Boston, MA 02110
Phone: (617) 556-0007
Fax (617) 654-1735
E-Mail: dklein@k-plaw.com

Commissioner:

Daniel M. Henderson¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Stephen J. Wilcinski, (hereinafter "Wilcinski" or "Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the Town of Belmont Fire Department (hereinafter "Appointing Authority" or "Town,"), as stated for bypassing him for

¹ The Commission acknowledges the assistance of Legal Intern Heather Coons in the preparation of this Decision.

promotional appointment to the position of Fire Captain. The Appellant filed a timely appeal.

A full hearing was held on March 11, 2008 at the offices of the Civil Service Commission. The hearing was stenographically recorded and the transcript was designated as the official record of the proceeding.

FINDINGS OF FACT

12 exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- David L. Frizzell, Fire Chief, Belmont Fire Department
- Angus Edward Davison, Assistant Fire Chief, Belmont Fire Department

For the Appellant:

- Stephen J. Wilcinski, Appellant
- John Pizzi, Captain, Belmont Fire Department
- Wayne Haley, Captain, Belmont Fire Department

I make the following findings of facts:

1. As it appears from the HRD Form 14, the Town promoted the above-named Appointee, (Gardiner) to the position of Fire Captain on or about September 25, 2007, thereby bypassing the Appellant. (Exhibit 4, Stipulated Fact).
2. The Appellant has been employed by the Town of Belmont as a firefighter since February 3, 1986. On March 27, 1997 he was promoted to the rank of Lieutenant. (Stipulated Fact).

3. The Appellant has taken and passed numerous promotional civil service examinations including four examinations for the positions of Lieutenant and Captain as well as five open competitive examinations for the position of Fire Chief. (Testimony of Appellant Tr. 198). He has been certified in the title of Captain by the Human Resources Division (HRD) since May of 2001. (Testimony of Appellant, Tr. 129).
4. At the time of the hearing, the Appellant was 44 years old and had a projected retirement date of July 2, 2018. (Testimony of Appellant, Tr. 196). There are only five (5) Captain's positions in the Belmont Fire Department, none of which are expected to become vacant during the remainder of his career. (Testimony of Appellant, Tr. 196-197).
5. The Appellant graduated from the Boston Fire Academy and is certified as an Emergency Medical Technician, Fire Inspector I & II, and Fire Officer I. (Exhibit 12). He has also taken other specialized fire fighting-related courses. (Testimony of Appellant, Tr. 197).
6. Chief David L. Frizzell described the Appellant as a good firefighter, a good Company Officer, and a good Lieutenant. (Testimony of Frizzell, Tr. 71-72).
7. Appointee Kenneth G. Gardiner, Jr. (hereinafter 'Gardiner') has been employed by the Town of Belmont as a firefighter since June 2, 1997. On July 9, 2003 he was promoted to the rank of Lieutenant. (Stipulated Fact).
8. At the time of the bypass, the Appellant had more than double the experience in the fire service than the Appointee. (Testimony of Frizzell, Tr. 56). Chief Frizzell

did not consider this wide gap in experience when he bypassed the Appellant.

(Testimony of Frizzell, Tr. 57).

9. Chief Frizzell did not consider the substantial disparity in seniority or experience between the Appellant and the Appointee, as a factor in his appointment decision:-“I look more at job performance and things like that than actual time on the job.” (Testimony of Frizzell, Tr. 57)
10. Chief Frizzell testified that the Appointee has slightly more specialized training, as compared to the Appellant. (Testimony of Frizzell, Tr. 88). However, on cross examination, he acknowledged that the Appellant was certified as a Fire Inspector I & II, while the Appointee was only certified as a Fire Inspector I. (Testimony of Frizzell, Tr. 89, Testimony of Davison, Tr. 170, 178, 180-182. Fire inspection is a duty generally assigned to those promoted to the position at issue. (Testimony of Frizzell, Tr. 89, Testimony of Davison, Tr. 180-182).
11. Gardiner took and passed the promotional examination for the position of Permanent Full Time Fire Captain, achieving a score of 76. (Stipulated Fact).
12. The Appellant took and passed the promotional examination for the position of Permanent Full Time Fire Captain, achieving a score of 84. (Stipulated Fact).
13. Chief Frizzell did not consider this eight point difference in examination scores significant and testified that it merely “tells who is a better test taker.” (Testimony of Frizzell, Tr. 53).
14. On or about September 24, 2007, the Human Resources Division notified the Appellant that it had approved the above-described bypass. (Stipulated Fact).

15. No witness could recall anyone other than the Appellant, and the other higher scoring individual for the position at issue, ever having been bypassed for promotion in the history of the Belmont Fire Department. (Testimony of Frizzell, Tr. 48, Testimony of Frizzell, Tr. 128).
16. Chief Frizzell admitted that the only other time a person had been bypassed for promotion in the history of the Belmont Fire Department; the Appellant had also been bypassed then. In August, 2004 the Appellant had been bypassed for promotion to the position of Fire Captain by Chief Frizzell. Chief Frizzell had only been Chief a matter of a few months at the time he made the decision to bypass the Appellant in August, 2004. (Testimony of Frizzell, Tr. 20, Testimony of Frizzell, Tr. 48-52).
17. Chief David L. Frizzell is and was, at all times relevant, the Appointing Authority for the Belmont Fire Department. (Testimony of Frizzell, Tr. 22).
18. The Belmont Fire Department consists of one Chief, one Assistant Chief, five Captains, twelve Lieutenants, and thirty-seven firefighters. (Testimony of Frizzell, Tr. 26).
19. Generally once every four days, the Captains in the Belmont Fire Department work as Shift Commanders. They are responsible for tasks such as scheduling personnel, assigning work, enforcing the rules, regulations, and departmental policies. (Testimony of Frizzell, Tr. 25-26).
20. The selection process was allegedly designed to select the candidate best qualified for the position of Shift Commander, a position in which Chief Frizzell served for one day. (Testimony of Frizzell, Tr. 57-58).

21. The Appellant testified that he worked as Shift Commander / Acting Captain for over 700 hours. (Testimony of Appellant, Tr. 193-194). However, in reliance upon on payroll records, and his having worked out of grade since the records were produced, he initially claimed that he had approximately 1,000 hours of experience in the position. (Testimony of Appellant, Tr. 193, Exhibit 12). However, in preparation for the hearing, he reviewed attendance records and determined the total to be approximately 700 hours. (Testimony of Appellant, Tr. 193-194). Chief Frizzell testified that the Appellant has “somewhere in between” 700 and 1,000 hours of experience as Shift Commander/Acting Captain, a function which he performed satisfactorily and without incident. (Testimony of Frizzell, Tr. 104, Testimony of Haley, Tr. 144).
22. In contrast to the Appellant’s approaching one thousand hours of as experience as Shift Commander/Acting Captain, the Appointee had 78 hours of experience in the position. (Testimony of Frizzell, Tr. 62, Testimony of Davison, Tr. 172).
23. From September, 2004 to January, 2006, at the Appellant’s request, his name was taken off the list of those interested in serving as Acting Captain. (Testimony of Frizzell, Tr. 104). Chief Frizzell interpreted this as evidence of an unwillingness to accept the permanent Captain’s position. However, Chief Frizzell did not ask the Appellant directly for an explanation. (Testimony of Frizzell, Tr. 104).
24. The Appellant asked for his name to be removed from the Acting Captain list because he had been bypassed for the permanent position and he wanted to afford

- others the opportunity to gain experience in the Captain's role. (Testimony of Appellant, Tr. 195).
25. In the role of Acting Captain/Shift Commander, the Appellant sometimes served as the highest ranking fire official on duty. (Testimony of Frizzell, Tr. 66-67).
26. The written component of the selection process consisted of the submission of a letter of intent, a cover letter, a resume, the completion of a narrative regarding the most difficult leadership challenge which the candidates had confronted as well as a narrative regarding what the candidate saw as "up and coming" in the Belmont Fire Department. (Testimony of Frizzell, Tr. 22-23).
27. The other components of the selection process included an oral interview and a presentation regarding the use of seatbelts. (Testimony of Frizzell, Tr. 23).
28. Chief Frizzell and Assistant Chief Angus Davison ranked the candidates based on their performance on the interview and written exercise. (Testimony of Frizzell, Tr. 32). Noticeably missing from the selection process was any substantive review of the candidates' past work performance, evaluations, or input from the candidates' supervisors or subordinates. (Testimony of Frizzell, Tr. 22-23, 32). In fact, neither the candidates' supervisors nor subordinates were consulted as part of what Chief Frizzell describes as a comprehensive selection process. (Testimony of Frizzell, Tr. 72-73, Testimony of Davison, Tr. 169).
29. Assistant Chief Davison testified that he served as the Appellant's Shift Commander for a period of time which he could not recall, "somewhere between 2001 and 2004." (Testimony of Davison, Tr. 187). He had little direct contact with either the Appellant or the Appointee, as they were assigned to stations one

- and two while the Assistant Chief was assigned to headquarters. (Testimony of Davison, Tr. 189). With the exception of an occasional overtime shift, he did not act as the Appointee's Shift Commander. (Testimony of Davison, Tr. 188).
30. Rather than consider the candidates' actual work performance over time, Chief Frizzell designed a scenario to simulate what the Chief thought that a Captain would be expected to do. (Testimony of Frizzell, Tr. 73-74).
31. Chief Frizzell decided to evaluate the candidates in the following five areas: ability to follow written and verbal direction, the ability to properly interpret written documents, attention to detail, leadership, and the ability to communicate. (Testimony of Frizzell, Tr. 28, Exhibit 5). He explained why he believed that each of these abilities was important to the position of Captain. (Testimony of Frizzell, Tr. 29-31).
32. Having personally supervised both the Appellant and the Appointee, both Captains Pizzi and Haley testified that they would rate both candidates as equal in the aforementioned five areas. (Testimony of Pizzi, Tr. 134-135, Testimony of Haley, Tr. 148-149).
33. Of the three candidates on the eligible list, the Appointee had the lowest score. (Testimony of Frizzell Tr. 24). However, in each of the aforementioned five areas, Chief Frizzell and his assistant ranked him above both higher scoring candidates. (Testimony of Frizzell, Tr. 37, Testimony of Davison, Tr. 151). For example, with respect to the ability to follow directions, the Appointee was ranked ahead of both candidates, because he allegedly followed all directions in the selection process. Chief Frizzell testified that "with Lieutenant Wilcinski, we feel that he didn't

follow the direction as far as his writing assignment.” (Testimony of Frizzell, Tr. 33).

34. In his letter to HRD, Chief Frizzell claimed that “[t]he ability to follow directions, both written and oral, is paramount to a safe and successful work environment.

The ability to follow directions on the fire ground is imperative for firefighter and citizen safety.” (Exhibit 5). He further testified that firefighters may be placed in jeopardy if directions are not followed at an emergency. (Testimony of Frizzell, Tr. 29). He admitted that the Appellant “has done a good job at incidents” and he could not recall an incident, during the Appellant’s 22 year tenure, where the Appellant did not follow directions on the fire ground. (Testimony of Frizzell, Tr. 75, 224).

35. Captain Pizzi testified that has supervised the Appellant for over ten years and he never had any issues with the Appellant following his directions or orders. (Testimony of Pizzi, Tr. 122, 124-125). Likewise, Captain Haley has never had a problem with the Appellant not following directions. (Testimony of Haley, Tr. 142).

36. With respect to the ability to interpret written documents, Chief Frizzell rated the Appointee as highest and criticized the Appellant, because he allegedly made a “leap of faith” in his interpretation of the seatbelt law. (Testimony of Frizzell, Tr. 33-35, 44). However, Captain Haley testified that the Appellant has no problem interpreting written documents. (Testimony of Haley, Tr. 142).

37. Chief Frizzell testified that some of the Appellant’s paperwork did not contain a signature and had the wrong cell phone number. (Testimony of Frizzell, Tr. 35-

- 36). Consequently, Chief Frizzell again rated the Appointee ahead of the Appellant in the area of attention to detail. (Testimony of Frizzell, Tr. 36-37). However, the Appointee's written submission contained grammatical errors such as imprecise language and the misuse of the phrases "without haste" and "I am of the adage". It is also noteworthy that the Appointee admitted in the submission that "fault" would not be a factor in a determination of future discipline of the subordinate. The Appointee also admitted that he made an error in judgment, in not filing a report with his Chief regarding the incident, leading to the Chief being "blindsided". (Exhibit 11, Testimony of Frizzell, Tr. 76-78).
38. Chief Frizzell was asked on cross-examination regarding the Appointee's misuse of the phrase "...without haste." In his written presentation. Frizzell answered: A. "It is the word he used and I understood what he meant. Q. What did you understand him to mean? A. Without delay. Q. So it is your testimony that without haste means without delay? A. Sure." This is an example of Chief Frizzell giving the Appointee the benefit of doubt. (Exhibit 11, Testimony of Frizzell, Tr. 77-78).
39. Captain Pizzi testified that the Appellant never manifested a problem with respect to attention to detail his reports are clear and concise. (Testimony of Pizzi, Tr. 125-127). Likewise, Captain Haley testified that the Appellant demonstrated an adequate level of attention to detail. (Testimony of Haley, Tr. 142-143).
40. In the area of leadership, because the Appointee had been the union president, Chief Frizzell also rated the Appointee ahead of the Appellant. He testified that as union president, the Appointee had experience leading a large group. (Testimony

of Frizzell, Tr. 36). However, Chief Frizzell admitted that the position of union president did not involve the same duties as the position at issue, which called for commanding personnel and equipment at a fire scene and imposing discipline. (Testimony of Frizzell, Tr. 82-83).

41. Captain Pizzi testified that he personally observed the Appellant in a leadership role and he ran his company very well. (Testimony of Pizzi, Tr. 126). Captain Haley described the Appellant as a “confident, competent, and knowledgeable” leader, who displays a “very steady, calm demeanor” at fire scenes and emergencies. (Testimony of Haley, Tr. 142). He further described the Appellant as a very good leader. (Testimony of Haley, Tr. 143).
42. Chief Frizzell testified that the Appointee did a “tremendous job” on the seatbelt presentation. (Testimony of Frizzell, Tr. 38). He used Power Point slides and his presentation of the General Order regarding seatbelts was engaging and interesting. (Testimony of Frizzell, Tr. 38). Also, he applied progressive discipline. (Testimony of Frizzell, Tr. 42).
43. Power Point has never been used by the Belmont Fire Department to disseminate a General Order. (Testimony of Frizzell, Tr. 87, Testimony of Pizzi, Tr. 124, Testimony of Appellant, Tr. 198). Such General Orders are disseminated via e-mail and bulletin boards. (Testimony of Frizzell, Tr. 88).
44. In contrast, Chief Frizzell testified that the Appellant “submitted a bunch of documents that he had gotten off the web” and his presentation was not engaging or as beneficial to the audience as it could have been (Testimony of Frizzell, Tr.

- 38-39). According to Chief Frizzell, the Appellant mentioned progressive discipline but was reluctant to apply it. (Testimony of Frizzell, Tr. 43).
45. The Appellant's materials related to the Department's General Order on seatbelt usage and he disseminated them in written format, which is consistent with how such General Orders are distributed. (Testimony of Frizzell, Tr. 88). He did not use Power Point because he was instructed to design the presentation as if he was presenting it to his group as a Shift Commander. (Testimony of Appellant, Tr. 200). Power Point has never been used for such presentations. (Testimony of Appellant, Tr. 200).
46. Captain Pizzi described the Appellant as an effective communicator who has successfully trained others on new procedures and equipment and never had a problem disseminating information to those under his command. (Testimony of Pizzi, Tr. 126-128). Similarly, Captain Haley stated that the Appellant is a "very good instructor" who demonstrated an ability to effectively communicate with his students. (Testimony of Haley, Tr. 143).
47. Chief Frizzell testified that the Appointee was honest and open in his interview, while the Appellant was guarded and his answers were not free. (Testimony of Frizzell, Tr. 38). However, he agreed that the rating of the candidates' interview performance was subjective and that he and his assistant were the sole raters. (Testimony of Frizzell, Tr. 85, Testimony of Davison, Tr. 180.) Also, the interviews were not recorded and no scoring sheets or model answers were utilized. (Testimony of Frizzell, Tr. 86, Testimony of Davison, Tr. 174-175). The interviews were conducted in the aforementioned manner even though Chief

- Frizzell stated that at least one outside Fire Chief would participate and that the oral presentations may be recorded. (Exhibit 7).
48. The individual promoted to the position of Captain would be in charge at fire scenes. (Testimony of Frizzell, Tr. 92). However, not one question regarding firefighting tactics or procedures was asked during the interview. (Testimony of Frizzell, Tr.92).
49. Captain John Pizzi testified that it is important for Captains to be knowledgeable about of firefighting tactics and procedures. (Testimony of Pizzi, Tr. 121). He rated the Appellant's firefighting tactics and procedures as good to excellent. (Testimony of Pizzi, Tr. 122).
50. Captain Wayne Haley, who has worked with the Appellant for approximately ten years, described the Appellant's performance at fire scenes as outstanding. (Testimony of Haley, Tr. 141-142). Assistant Chief Davison described the Appellant as "an excellent officer on the fire ground and at an incident and is extremely well skilled." (Testimony of Davison, Tr. 168).
51. According to the Appellant, during his interview, Chief Frizzell stated something to the effect of either he was thrilled with or could not be happier with the Appellant's performance. (Testimony of Appellant, Tr. 201).
52. In addition to the five areas mentioned previously, Chief Frizzell also considered what the candidates had done to better themselves as well as their outside interests which might benefit the Fire Department. (Testimony of Frizzell, Tr. 45).
53. In this area, Chief Frizzell rated the Appointee ahead of the higher scoring candidates. (Testimony of Frizzell, Tr. 45). He did so because the Appointee

served as the Department's safety officer is on the Incident Stress Management Team, served as union president, and took courses at the Fire Academy. (Testimony of Frizzell, Tr. 45-46).

54. Both Ms. Nuwanda Evans of the Human Resources Division (HRD) and Assistant Chief Davison reviewed draft versions of the bypass letter and Chief Frizzell had an opportunity to revise the document based on their feedback. (Testimony of Frizzell, Tr. 68).

55. Chief Frizzell admitted that Ms. Evans assisted him with the drafting of the bypass reasons and she specifically advised him that he should address, in the bypass letter, each candidate's current work or job performance as it relates to the next level. (Testimony of Frizzell, Tr. 67-68).

56. Nevertheless, Chief Frizzell did not include information in the bypass letter regarding the candidate's day to day work performance. (Testimony of Frizzell, Tr. 68-68). In fact, the letter contains little substantive information regarding the candidates' performance. (Exhibit 5). This is ironic since when dismissing the 11 year disparity in experience between the Appointee and Appellant, Chief Frizzell testified that "I look more at job performance and things like that than actual time on the job." (Testimony of Frizzell, Tr. 57). Assistant Chief Davison, who participated in the selection process, testified that although job performance was discussed, no candidate was ranked ahead of the others in that area. (Testimony of Davison, Tr. 163).

57. In his bypass letter to HRD, Chief Frizzell makes no mention of sick leave usage. (Exhibit 5). However, he testified that he considered the Appellant's sick leave

usage. (Testimony of Frizzell, Tr. 100-101). The consideration of sick leave usage is contrary to the Town's stipulation that it was not considered in making the selection decision. (Stipulation of the Respondent, Tr. 117).

58. Also, Chief Frizzell did not include any references to the Appellant's past discipline in his bypass letter and, in January of 2006, he informed the Appellant that he had a "clean slate" and that he would not use any prior discipline against him. (Testimony of Frizzell, Tr. 111-113, Testimony of Appellant, Tr. 200, Exhibit 5). However, Chief Davison testified that the Appellant's past discipline was a consideration. (Testimony of Davison, Tr. 165).
59. The Personnel Administrator rule that applies to the appointing authority's statement of reasons for bypass: "Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all reasons for selection or bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. The certification process will not

proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. PAR.08(3) (Administrative notice)

60. The Appellant is a large man in the 6'3" 250 Lbs. range. He testified unhesitantly in a strong clear voice. He appears bright, well educated and well trained. He possesses command presence. He has a professional demeanor. He is career oriented and devoted to the Belmont Fire Department. He admitted to some disappointment and bitterness when he was first bypassed for promotion to Captain in 2004. However he also stated that he turned down the offer to be Acting Captain after that bypass, partly to give the opportunity for that experience to candidates behind him in experience. His body language, eye contact and presentation were appropriate and believable. The tone and content of his answers rang true. I find the Appellant's testimony to be credible and reliable. (Testimony and demeanor of Appellant)

61. Chief Frizzell rose up through the ranks in the Belmont Fire Department, from fire alarm operator in 1986 to Fire Chief in June, 2004 and holds the rank of Captain as a civil service employee. Both the Appellant and Chief Frizzell started in the Belmont Fire Department in the same year, 1986. (Testimony of Frizzell Tr. 20-21, Stipulation)

62. Chief David L. Frizzell emphasized his subjective appraisals of the competing candidates' performance in this selection process, while nearly ignoring their substantiated actual past job performance. He was in charge of the entire selection process, in this matter, including its design, administration and evaluation. He

personally determined the “set of [5] skills” and personally measured those skills for promotion to this position of Fire Captain. He determined which of the 3 competing candidates performed best in each of the skill areas and then he ranked them by his own personal assessment. He employed such terms as: “best”, “fair”, “good” and “poor” to describe his appraisal of the candidates’ performance in the process. He testified in a dismissive manner regarding civil service exam scores and experience or seniority. He did not consider the clear disparity in both exam score and experience, in favor of the Appellant as important factors in this selection process. I find that Chief Frizzell believes that he, as the appointing authority held wide personal and subjective discretion to choose among the three competing candidates, without giving consideration to these or other more objective criteria. (Testimony and demeanor of Frizzell)

CONCLUSION

In a bypass appeal, the Commission must decide whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy," then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission 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). Also, Basic merit principles, as defined by Chapter 31 of the General Laws, require that employees be selected and advanced "on the basis of their relative ability, knowledge and skills, assured of fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious actions." Sammataro v. Chicopee Police Department, 6 MCSR 145 (1993).

It has been found here that Chief Frizzell honestly believed that he, as the appointing authority held wide subjective discretion to choose among the three

competing candidates. However, Appointing Authorities are charged with the responsibility of exercising sound discretion 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.”

In the instant case, the Respondent violated basic merit principles in several ways. First, Chief Frizzell completely ignored the eight (8) point difference between the Appellant’s and the Appointee’s promotional examination scores. In summarily dismissing the disparity in scores, Chief Frizzell testified that the examination merely “tells who is a better test taker.” (Testimony of Frizzell, Tr. 53). However, “[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.” Sabourin v. Town of

Natick, Docket No. G-01-1517 (2005); Bardascino et al v. City of Woburn, Docket No.: G1-04-134, G1-04-120, G1-04-111 (2006). Moreover, “[b]eyond the basic fact that test scores, while not granting an individual an entitlement, should not be lightly disregarded and that the criteria for selection should not be unfairly weighed, the appointment process in this case was completely subjective and it flies in the face of the purpose of G.L. c. 31, which requires employees to be selected and advanced on the basis of their relative ability, knowledge and skills and be assured fair and equal treatment.” Duguay v. City of Holyoke, Docket No.: G-3652 (1998), quoting Tallman v. City of Holyoke, Docket No.: G-2134.

Secondly, Chief Frizzell also failed to adequately consider and describe the candidate’s day to day work performance, even after the Human Resources Division specifically advised him to do so. (Testimony of Frizzell, Tr. 67-68, Exhibit 5). There was no review or discussion of the candidates’ day to day work performance, evaluations, or recommendations from their supervisors. (Testimony of Frizzell, Tr. 22-23, 32). In fact, neither the candidates’ supervisors nor subordinates were consulted as part of what Chief Frizzell described as a comprehensive selection process. (Testimony of Frizzell, Tr. 72-73) Indeed, this actual job performance over time would be very telling as to a candidate’s knowledge, skills, and ability. See Duguay & Tallman, supra. See e.g. Palm v. City of Beverly, Docket No: G1-04-442 (2007) (Lower scoring candidate’s positive performance evaluations were a valid reason, *inter alia*, to bypass higher scoring candidate); Mulhern v. MBTA, Docket No.: 01-P-375 (2003) (Commission finds that Appointing Authority failed to afford sufficient weight to Appellant’s past performance evaluations); Sullivan v. City of Boston, Docket No.: G2-06-48 (“As the Commission has

noted before, the solution, **particularly regarding promotions**, need not require the establishment of cost prohibitive and often outdated paper-and-pencil tests. Rather, the solution can include a selection process for permanent promotions which **emphasizes past performance, managerial evaluations** and candidate interviews.”) (Emphasis supplied); Palmer v. Town of Marblehead, Docket No.: G-02-404 (2005) (Appellant’s “past performance in a civil service position” was a legitimate bypass reason). The Town’s failure to adequately consider the candidates’ performance over time, in combination with the Town having ignored the eight point disparity in examination scores, strongly suggests that the Town violated basic merit principles. Specifically, Chief Frizzell discounted legitimate, valid, and objective elements of the process in favor of the highly subjective elements of the process, where he and his assistant were the sole evaluators of the candidates’ performance.

Moreover, two supervisors who were both acquainted with both the Appellant’s and the Appointee’s actual work performance, testified that they would rate both candidates as equal the five areas which the Chief selected as useful for identifying the most qualified candidate. (Testimony of Pizzi, Tr. 134-135, Testimony of Haley, Tr. 148-149). Consequently, as evidenced by the testimony of two members of the Chief’s command staff, there was nothing with respect to the Appellant’s work performance which would support the bypass. Recognizing that past performance over time is a very good indicator of future performance, the fact that both candidates were rated equally, in those areas which Chief Frizzell selected, suggests that they would both perform equally as well in the position of Captain. “When all factors for selection are equal between a selected candidate and an Appellant bypassed ranked higher on a civil service list,

deference should be given to the candidate with the higher score.” Porter v. Reading Police Department, Docket No.: G1-06-228 (2008).

In addition to discounting work performance, Chief Frizzell further failed to consider that, at the time of the bypass; the Appellant had more than double the experience in the fire service than the Appointee. (Testimony of Frizzell, Tr. 56-57). Also, at the time of the bypass, the Appellant had approximately 700 hours of experience in the role of Shift Commander / Acting Captain, a function which he performed satisfactorily and without incident. (Testimony of Frizzell, Tr. 61, 70, 105, 171, 173, Testimony of Haley, Tr. 144). While serving in this position, the Appellant was sometimes the highest ranking fire official on duty. (Testimony of Frizzell, Tr. 66-67). In comparison to the Appellant’s experience as Acting Captain, the Appointee had only 78 hours of experience in the role of Shift Commander/Acting Captain. (Testimony of Frizzell, Tr. 62, Testimony of Davison, Tr. 172). Although Chief Frizzell testified that he considered this disparity, he never addressed it in his written submission to HRD. (Testimony of Frizzell, Tr. 173, Exhibit 5). The failure to address or even mention this substantial disparity in his statement of bypass reason further suggests that the selection process was not actually designed to select the best candidate for the position, but it was designed instead to unfairly advantage the Appointee over the Appellant.

Furthermore, instead of considering objective measures such as work performance, examination scores, and relevant experience, the Appointing Authority relied heavily on the “seatbelt exercise,” a written assignment, and an unrecorded oral interview which “is an indisputably subjective component of the selection process.”

Bardascino et al v. City of Woburn, Docket No.: G1-04-134, G1-04-120, G1-04-111

(2006). “The interview may be helpful in selecting one candidate from a group of candidates **scoring equally on an examination.**” Bardascino, supra, quoting McGunagle v. North Attleborough Police Department, 13 MCSR 1, 2 (1999). (Emphasis in original.) Here, however, there was an eight point disparity in examination scores. (Stipulated of Fact). Furthermore, “[s]ubjectivity is an inherent part of the interview.” Tuohey v. MBTA, Case No.: G2-04-394 (2006). Therefore, in order for the results of the interview process to be afforded weight, it must fairly measure the candidates’ relative knowledge, skills, and abilities. See Sellon v. Mansfield Police Dept., Docket No.: G2-05-172 (Interviews are a valid selection tool. However, “is appropriate for the Commission to assess whether an interview process is conducted on a level playing field free of political or personal bias.”)

In this case, no scoring sheets or model answers were utilized and the interviews and seatbelt presentations were not recorded, even though Chief Frizzell stated in an August 13, 2007 memorandum to the candidates that “[y]our presentation may be videoed” and his assistant testified that the statement meant that the Town may videotape the presentations. (Exhibit 7, Testimony of Frizzell, Tr. 86, Testimony of Davison, Tr. 174-175). Also, Chief Frizzell and his assistant were the sole evaluators of the candidates. (Testimony of Frizzell, Tr. 32, 86). This is contrary to the aforementioned memorandum wherein Chief Frizzell writes “[y]ou will also participate in a review board that will be comprised of the Assistant Chief, **one to three Chiefs from area departments** and myself.” (Exhibit 11) (Emphasis added). Although not problematic per se, the lack of objective criteria, the failure to include other Chiefs as promised in Frizzell’s memorandum, and the failure to record the interviews and presentations, in combination

with the other infirmities described herein, supports a finding that the process was biased and unfair to the Appellant. Contrast Brown v. Town of Duxbury, Docket No.: G2-04-264 (Chief, who did not participate in interview, assembled a highly qualified, experienced, competent, and objective panel of professionals from outside the Department.) See Bariamis v. Town of Tewksbury, Docket No.: G1-04-394 (2006) (“Interviews are indisputably a subjective component of a selection process.”)

Also, it should be noted that the Belmont Fire Department has a long history of making promotions in accordance with civil service examination scores. In fact, in the known history of the Belmont Fire Department, nobody other than the Appellant and the individual whose name appears second on the eligible list for the position at issue has ever been bypassed for promotion. (Testimony of Frizzell, Tr. 48, 128). The only other time in the known history of the Belmont Fire Department that a candidate had been bypassed for promotion was in August, 2004; Chief Frizzell then also decided to bypass the Appellant for promotion to Captain. The fact that Frizzell had only been Chief, a brief two months at that time raises additional concerns. Consequently, given the Town could have taken simple measures such recording the oral components of the selection process and including outside evaluators, as Chief Frizzell had announced in his memorandum to the candidates.

Another flaw in the selection process is the lack of even a single question regarding firefighting techniques or procedures. (Testimony of Frizzell, Tr. 92). This is particularly troubling since, according to Chief Frizzell, a Fire Captain must “possess a vast knowledge of firefighting tactics.” (Exhibit 5). Furthermore, because Captains are in charge at fire scenes, they must be knowledgeable about firefighting tactics and

procedures. (Testimony of Frizzell, Tr. 92, Testimony of Pizzi, Tr. 121). As justification for not asking any questions regarding firefighting knowledge, skills, or abilities, Chief Frizzell testified that “[t]he firefighting tactics and procedures questions were answered as part of the promotional exam.” However, this is the same examination which he summarily dismissed as only useful for telling “who is a better test taker.” (Testimony of Frizzell, Tr. 53). It appears as if this failure to evaluate the candidates’ firefighting knowledge was designed to unfairly disadvantage the Appellant, as Captain John Pizzi rated his knowledge of firefighting tactics and procedures as good to excellent. (Testimony of Pizzi, Tr. 122). Furthermore, Captain Wayne Haley, who has worked with the Appellant for approximately ten years, described the Appellant’s performance at fire scenes as outstanding. (Testimony of Haley, Tr. 141-142).

Without even considering the more objective criteria, such as examination score, work performance, and firefighting knowledge, Chief Frizzell and Assistant Chief Angus Davison ranked the candidates based on their written submissions, their performance in the admittedly subjective oral interview, and a “five to ten minute presentation on seatbelts.” (Testimony of Frizzell, Tr. 22-23). The seatbelt exercise, which appeared to be heavily weighted, required the candidates to address the non-usage of seatbelts and present the Department’s directive regarding seatbelt usage. (Testimony of Frizzell, Tr. 41). Chief Frizzell credited the Appointee for using Power Point in his seatbelt presentation and criticized the Appellant for not doing so. (Testimony of Frizzell, Tr. 38, Exhibit 5). However, Power Point has never been used in the Belmont Fire Department to disseminate General Orders, which are customarily disseminated via e-mail and bulletin boards. (Testimony of Frizzell, Tr. 87-88, 200, Testimony of Pizzi, Tr. 124, Testimony of

Appellant, Tr. 198). Although Chief Frizzell appeared to take issue with the manner in which the Appellant made his presentation, he disseminated his materials in written format, which is consistent with how General Orders are distributed. (Testimony of Frizzell, Tr. 88). He did not use Power Point because he was instructed to design the presentation as if he was presenting it to his group as a Shift Commander. (Testimony of Appellant, Tr. 200). Power Point has never been used for such presentations and the directive on seatbelts consists of a straightforward one page document. (Testimony of Appellant, Tr. 199-200). If Chief Frizzell had expected the competing candidates to make interesting, innovative and engaging presentations, unrestrained by past practice; he should have given them fair (advance) notice of that expectation. It is fundamentally unfair to reward one candidate for an unrequested and therefore unauthorized innovation and conversely penalize another competing candidate for following established past practice. Unauthorized innovation in a routine established area such as a training presentation could be determined to be a matter of insubordination or rules violation, especially if the results are untoward. See Glenn Pearson v Town of Whitman 16 MCSR 46, 48-49, D-01-1564, decision October 9, 2003.

The Town claimed that the Appellant “simply presented the interview panel with a series of handouts and did not explain the seatbelt policy or engage his audience. It was not an effective presentation.” (Exhibit 5). This alleged inability to effectively communicate is wholly inconsistent with the Appellant’s work performance. For example, Captain Pizzi described him as an effective communicator who has successfully trained others on new procedures and equipment and never had a problem disseminating information to those under his command. (Testimony of Pizzi, Tr. 126-128). Similarly,

Captain Haley stated that the Appellant is a “very good instructor” who demonstrated an ability to effectively communicate with his students. (Testimony of Haley, Tr. 143).

Given these positive appraisals of the Appellant’s communication abilities, as demonstrated through actual work performance, the alleged deficiencies exhibited in “a five to ten minute presentation on seatbelts,” even if true, cannot serve a sound sufficient reason to overcome the eight point difference in examination scores. See Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991) (Bypass reasons must be sound and sufficient); See Kevin Maynard v. Plymouth Fire Department, 17 MCSR 26, 27 (2004). (“An Appointing Authority must proffer objectively legitimate reasons for the bypass, rather than rationalizations for the selection of one candidate over the other.”) See Tuohey v. MBTA, Case No.: G2-04-394 (2006) (subjective determinations that lower ranked candidates demonstrated better attributes were not considered objectively legitimate reasons but impermissible rationalizations). Chief Frizzell could not establish anything substantive in the Appellant’s long career to show that he had demonstrated any lack of ability, knowledge and skills regarding the position of Captain. It would require a heavy objectively measured consideration to offset the Appellant’s 8 point exam score advantage and 11 year advantage in relevant experience. Indeed, if Chief Frizzell had found that the Appellant had been incapable in any way of properly performing the duties and functions of the Shift Commander/Acting Captain position, he should have taken some action. That action would have been either removing him from the position upon documenting the shortcomings or taking remedial/corrective action regarding the shortcomings. Chief Frizzell did neither over the many years the Appellant performed the duties and functions of the position of Shift Commander/Acting Captain. Chief Frizzell’s

failure to take any such action further substantiates the Appellant's claim of being improperly bypassed.

Finally, the Town criticized the Appellant for being reluctant to apply progressive discipline in the seatbelt scenario. However, Chief Frizzell admitted that the term "progressive discipline" appears nowhere in any written document related to the imposition of discipline in the Belmont Fire Department. (Testimony of Frizzell, Tr. 78-79). As outlined above, the seatbelt exercise was not a fair and accurate test of the Candidates' true knowledge, skills, and abilities and cannot serve as reasonable justification for the Appellant's bypass. The competing candidates' past performance and skill level should have been well known to Chief Frizzell. The use of the subjective, unrecorded interview process and the contrived seatbelt scenario in this selection is of questionable value; especially, when other objective, recognized, long-term measures were readily available. In a medium size Department such as Belmont, the opportunities for career advancement are more limited than in a large one and therefore each promotional appointment is that much more significant. Chief Frizzell was or should have been aware of the potential negative impact on Department morale arising from a bypass decision which overlooked a wide disparity in both exam score and seniority or experience. He sent a clear message, either consciously or unconsciously, that civil service exam score and seniority is secondary to his own subjective evaluation of the competing candidates.

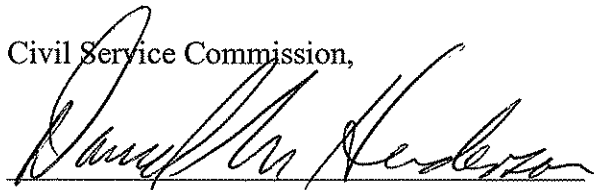
"The Appellant had the right to be considered for appointment based on a fair consideration of his relative ability, knowledge and skills or 'basic merit principles' pursuant to G.L. c. 31§ 1." Aponte v. Boston Police Department, Docket No.: G-01-1072

(August 4, 2004). Furthermore, it was the Respondent's duty to insure that all candidates receive fair and equal treatment in all aspects of the selection process and that they are protected from arbitrary and capricious actions. Boston Police Department v. Collins, 48 Mass. App. Ct., 408, 412 (2001). Here, as outlined above, in violation the basic merit principles aforesaid, the Respondent has failed in its duty. As a result thereof, the Appellant's rights have been prejudiced through no fault of his own. In such cases, Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, vests the Commission with broad powers of equitable relief. Pursuant to said powers, and because it is not likely that a Captain's position will become available in due course in advance of the Appellant's retirement, the Commission orders the following:

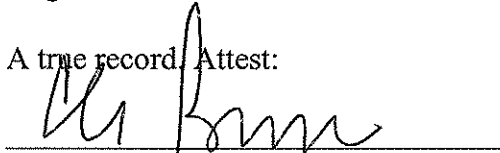
The Civil Service Commission directs the Town of Belmont Fire Department and HRD to vacate forthwith its most recent appointment, (Gardiner) to the position of Captain for the Belmont Fire Department. The Civil Service Commission further directs the Human Resources Division to place Stephen J. Wilcinski's name at the top of the current eligibility list and/or the next eligibility list for promotional appointment for said position, so that his name appears at the top of the next certification which is requested by the Town of Belmont Fire Department and from which the next appointment to the position of Captain for the Belmont Fire Department shall be made, so that the Appellant receive at least one opportunity for consideration. It is expected that the Town then will employ a selection process that comports with the tenor and tone of this decision and the purposes of Chapter 31. The Town may choose to employ as part of the next candidate evaluation process, segments which are recognized as subjective determinations, such as interviews and training presentations. However, if the Town chooses to employ such

subjective segments, it must audio and video record such segments of all the competing candidates. If selected, upon appointment to the position of Captain, the Appellant shall receive the additional relief consisting of a retroactive seniority date, for civil service purposes only, back to the date of the improper bypass.

For all of the above reasons, the appeal under Docket No. G2-07-384 is hereby **ALLOWED**, as stated above.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman voted No, Stein voted Yes, Henderson voted Yes, Taylor voted Yes and Marquis voted No, Commissioners) on August 20, 2009

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Brian E. Simoneau, Atty.
Darren P. Klein, Atty.
John Marra, Atty. HRD

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STEPHEN J. WILCINSKI,
Appellant

v.

G2-07-384

BELMONT FIRE DEPARTMENT,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves a promotional appointment to the position of Fire Captain in the Town of Belmont. The Appellant and the selected candidate were among three eligible candidates willing to accept appointment, with the Appellant ranked second (with a score of 84) and the candidate ultimately selected for appointment ranked third (with a score of 76). The Town chose to consider other factors besides the civil service examination scores and established a thorough review process, which included an interview of the candidates. The Town then submitted a list of reasons for its selection to the state's Human Resources Division (HRD). The reasons were detailed and covered all components of the Town's interview process, as well as the extensive criteria used by the Fire Chief and the Assistant Fire Chief to evaluate all three candidates.

The majority faults the Town for not giving more weight to the civil service examination scores and instead relying more heavily on what they deem as the subjective interview process. These are not sufficient reasons for overturning the Town's selection decision or the extraordinary relief ordered by the majority. (See Francis E. Murphy, III v. Cambridge and

Mass. Civ. Serv. Comm'n, No. 03-0815, Middlesex Super. Court (2004). (City was not required to given any particular weight to the 8-point score differential on the civil service exam for two candidates competing for the position of Fire Chief.) Further, the authority to interview candidates is inherent in G.L. c. 31 § 25. Flynn, 15 Mass. App. Ct. 206, 208 (1983).

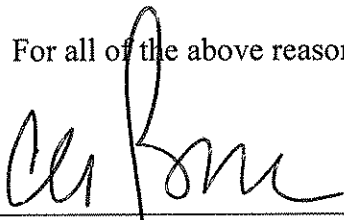
Taking a step further into the shoes of the Appointing Authority and the interview process itself, the majority then challenges why certain interview questions were given more weight than others in making its recommendation. These are decisions for the Town, not the Commission, to make, particularly in the instant case where there is simply no evidence of any political or personal bias on behalf of the Appointing Authority. Moreover, it is undisputed that both the Appellant and Gardiner went through the same review process under the same circumstances.

The record shows that the Town presented sound and sufficient reasons for their decision which were based on sound policy considerations. It is not within the authority of the Commission "to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct., (1997) at 305.

Finally, even if one were to accept the conclusions of the majority, I do not believe the extraordinary relief granted here is warranted. The traditional relief granted in such bypass appeals is for: 1) the Appellant's name to be placed at the top of the current or next Certification for the position in question, until such time as he or she has received at least one additional consideration for promotion; and 2) the Appellant is to be granted a retroactive seniority date back to the date of bypass if selected. In this case, the majority has ordered the town to vacate the appointment of Captain Gardiner and then place the name of the Appellant at the top of the current or next certification for the position of Fire Captain in Belmont.

Mr. Gardiner has now served in the position of Fire Captain as a permanent civil service employee in Belmont since approximately September 2007. The Appellant appealed the bypass decision to the Commission in December 2007. In addition to all of the reasons cited above, I believe it is unwarranted and an inappropriate use of the Commission's discretion to vacate Mr. Gardiner's appointment at this time.

For all of the above reasons, I respectfully dissent.

A handwritten signature in black ink, appearing to read "Chris Bowman", written over a horizontal line.

Christopher C. Bowman
Chairman
August 20, 2009