

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

THOMAS M. CARLSON,  
Appellant

v.

G2-11-99

TOWN OF BURLINGTON,  
Respondent

Appellant's Attorney:

Richard Heavey, Esq.  
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50 North Street  
Medfield, MA 02052-0147

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman<sup>1</sup>

**DECISION**

The Appellant, Thomas Carlson (Appellant), acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) the Town of Burlington's (Respondent) decision to bypass him for promotional appointment to the sergeant position in the Burlington Police Department (Department). A full hearing was held on November 2, 2011. The hearing was digitally recorded and copies of the recording were provided to the parties. Both parties submitted post-hearing briefs.

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk ThyThy Le in the drafting of this decision.

## **FINDINGS OF FACT**

Seventeen (17) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Michael Kent, Burlington Chief of Police;

*Called by the Appellant:*

- Thomas M. Carlson, Appellant;
- Kevin Doherty, Sergeant, Burlington Police Department;
- David McLean, Sergeant, Burlington Police Department;
- Michael Debye, Sergeant, Burlington Police Department;

I make the following findings of fact:

1. The Appellant has been employed as a police officer with Burlington Police Department since July 2004. (Appellant Testimony)
2. Two (2) permanent sergeant positions became available at the Burlington Police Department.
3. Among the five eligible candidates willing to accept promotional appointment for the sergeant position on Certification No. 2011BURL3, the Appellant was ranked second. Officer Kirchner, who bypassed the Appellant, was ranked third.
4. Robert A. Mercer, the Town Administrator of Burlington (Mercer), instructed Chief Kent to recommend eligible officers for the two vacancies, which would subsequently be approved by Mercer. (Chief Kent Testimony)

5. The Burlington Police Department consists of a Police Chief, 2 Captains, 4 Lieutenants, 9 Sergeants and 48 patrol officers. (Chief Kent Testimony)

#### *The Selection Process*

6. Michael Kent has been the Burlington Police Chief since March 15, 2010. Prior to becoming the Burlington Police Chief, he was the second in command with the Amherst Police Department. (Chief Kent Testimony)
7. Upon his arrival in Burlington, he did not know any of the police officers personally. (Chief Kent Testimony)
8. Chief Kent was not familiar with the Burlington Police Department's provisions in the collective bargaining agreement regarding promotional procedures adopted on November 30, 2007. However, Chief Kent took into consideration the interview, observations made of the candidates during a previous "ride along" that he conducted when he first became Chief, personnel files, work history, feedback from police personnel and letters from citizens. (Chief Kent testimony and Exhibit 11)

#### *The Interview*

9. The interviews were held in the presence of Chief Kent, Mr. Mercer and a human resource representative. (Chief Kent Testimony)
10. Chief Kent testified that he was most impressed with Officer Kirchner's interview, testifying that Officer Kirchner "slam dunked" it compared to the other candidates. Chief Kent stated that he was most impressed with Officer Kirchner's statement along the lines of "he has eighteen years of credible service, not just seniority because seniority just means that you show up to work every day, but he [has] credible service to the town and department for

eighteen years and hopes that a couple of points on the civil service exam wouldn't decide who the next sergeant is when he has that much credible service as compared to the other candidates.” (Chief Kent Testimony)

11. In contrast, Chief Kent testified that the Appellant's interview was not memorable to him. (Chief Kent Testimony)

#### *The Ride Along*

12. Chief Kent testified that the Appellant made a felony arrest during his ride along with the Appellant. However, no note was made on the Appellant's arrest. (Chief Kent testimony)
13. Chief Kent testified that the Appellant's felony arrest is what he would expect of someone with the Appellant's experience. (Chief Kent Testimony)
14. During Mr. Kirchner's ride along, Chief Kent testified that he was impressed with his communication and community policing skills when he observed Mr. Kirchner approach a mother and her children to hand them a “cop card”. (Kent Testimony)

#### *The Cop Card Program*

15. A newspaper article (“article”) featuring the Burlington Cop Card program (“cop card program”) and Mr. Kirchner, stated that the program is a community policing initiative that involves the distribution of cards with pictures and names of Burlington officers. These cards are given to children as a way to introduce children and parents to members of the department. Children may collect all 50 cards to be entered in a raffle (Exhibit 15).
16. Chief Kent testified that he did not conclude that Mr. Kirchner was the initial architect of the cop card program but believes that his involvement reinvigorated the program creating a positive reflection on the Burlington Police Department. (Chief Kent Testimony)

17. Chief Kent further testified that in reading the article, he believed that the article accurately represents the program and its significance in the community, despite the program's lack of funding. (Chief Kent testimony)

#### *Work History*

18. The Appellant and Mr. Kirchner were similar in the following respects:

a. Both the Appellant and Mr. Kirchner have:

- i. No attendance or disciplinary problems (Exhibits 8 & 7)
- ii. Received recognition from citizens praising them for their work (Exhibits 5 & 6)
- iii. Received consistent ratings of 4 out of 5 for their work and good standing (Kent testimony)
- iv. Similar educational backgrounds (Chief Kent Testimony)

19. Chief Kent testified that he considered Mr. Kirchner's eighteen (18) years of experience as a factor in the selection process and found it more appealing than the Appellant's six (6) years of experience. Chief Kent testified that he considered experience to determine who is most qualified to meet the demands of the position and command the department in his absence. (Chief Kent Testimony)

20. Prior to Chief Kent making a recommendation to Mercer, Chief Kent asked the lieutenants and sergeants of the department to submit their input on which candidate is most suitable for the two sergeant positions. Chief Kent testified that he did not consider how many supporters each candidate had. Rather, he was looking for substantive feedback to help guide his decision. Chief Kent testified that he gave more weight to the three lieutenants'

recommendation to promote Mr. Kirchner rather than the Appellant because of the lieutenants' greater seniority. (Chief Kent testimony).

21. On January 26, 2011, Richard White, Town Manager of Dennis ("White"), praised Mr. Kirchner for the way he handled a teenage drinking incident at the Burlington Mall involving his daughter and her cousin in an e-mail. White also stated that Mr. Kirchner demonstrated skills along the lines of patience, control, empathy and professionalism in controlling the situation and explaining to the teens involved the "seriousness of the event...while being supportive and understanding at the same time." (Chief Kent Testimony & Exhibit 5)

#### *Personal Initiatives*

22. Chief Kent testified that he recognized that the Appellant paid for and participated in training courses on his own personal time. Although Chief Kent acknowledged that it is a commendable personal initiative, he believes that Mr. Kirchner's voluntary efforts to restart the cop card program has more value than the Appellant's personal initiative because the cop card program benefits the department as a whole. (Chief Kent Testimony)

#### *The Bypass*

23. On February 10, 2011, Chief Kent recommended Mr. Kirchner as one of the two officers to fill the sergeant vacancies. Chief Kent's recommendation relied heavily on: 1) Mr. Kirchner's interview, 2) eighteen (18) years of experience, the longest compared to any other candidate, 3) his "excellent communication skills" and 4) Mr. Kirchner's involvement in the Cop Card program. Furthermore, Chief Kent relied on White's letter, observations during the ride along, and three senior lieutenants' opinions as grounds for supporting his excellent communication and commanding skills. (Exhibit 2 & Chief Kent Testimony)

24. On February 14, 2011, in reliance on Chief Kent's recommendation, Mercer appointed Mr. Kirchner to fill one of the two Sergeant positions, bypassing the Appellant.

## CONCLUSION

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by 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).

G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the

evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a 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 Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but 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.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

Here, the Town faced the enviable problem of selecting individuals for promotion from a pool of highly qualified and dedicated police officers. The Town presented valid reasons for bypassing the Appellant and selecting Mr. Kirchner, including: Mr. Kirchner’s interview performance, his far greater years of experience, his overall commitment to community policing



initiatives as displayed by his efforts to reinvigorate the “cops card” program; and feedback received from lieutenants in the Department. Further, there was no evidence that the Town’s decision was based on political considerations, favoritism or bias.

Although experience is already built into the test scores (G.L. c. 31, § 22), this should not preclude an Appointing Authority from considering such factors as part of its additional review as long as it can be shown that such consideration was reasonably justified and was not used as a subterfuge for stacking the deck in favor or against any particular candidate. See Valliere v. Westfield Police Comm’n, 24 MCSR 424 (2011).

The Town’s promotional decisions were based largely on the recommendations of Chief Kent, who took charge of the Department in 2010, after many years serving as the second in command of the Amherst Police Department. Chief Kent was a credible witness. He appeared intent on making promotional decisions that were in the best interest of the Department and, more specifically, choosing the most qualified candidate for an important command position.

The review process was not perfect. Chief Kent was not aware of provisions in the collecting bargaining agreement that require a point system regarding promotional appointments and he inappropriately relied on a letter of commendation from a Town Manager who was, among other things, appreciative that Mr. Kirchner did not arrest his niece. A seasoned professional such as Chief Kent should have known to put that letter in the proper context and not consider it as part of this promotional process. These shortcomings in the selection process, however, do not undercut the overwhelming conclusion that Chief Kent’s decision was based on largely valid reasons free of any political mischief.

For all of the above reasons, the appeal under docket number G2-11-99 is hereby *dismissed*.

Civil Service Commission

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Christopher C. Bowman  
Chairman

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

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Richard Heavey, Esq. (for the Appellant)  
Leo J. Peloquin, Esq. (for the Respondent)