

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

**MATTHEW COLLINS,
STEPHEN McLAUGHLIN, and
WAYNE O'LOUGHLIN,**
Appellants

**CASE NOS: G2-13-205 (Collins)
G2-13-206 (McLaughlin)
G2-13-207 (O'Loughlin)**

v.
TOWN OF BILLERICA,
Respondent

Current Appearance for Appellant:

Gary G. Nolan, Esq.¹
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133 Merrimack Street
Lowell, MA 01852

Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellants, Michael Collins, Stephen McLaughlin and Wayne O'Loughlin brought these appeals to the Civil Service Commission (Commission) contesting the decision of the Town of Billerica (Billerica) to deny them a promotion to a labor service position of Working Foreman/Motor Equipment Repairman (WF/MER) within the Highway Division of the Billerica Department of Public Works (DPW). After a pre-hearing conference on October 22, 2013, the cases were consolidated and the issue of Mr. O'Loughlin's qualifications was bifurcated for full hearing on that issue, which was held on January 16, 2014. Witnesses were sequestered. The hearing was digitally recorded and a copy of the CD was provided to the parties. Twenty-nine (29) exhibits were received in evidence, and one additional exhibit was marked for identification.

The parties submitted Proposed Decisions on March 7, 2014.

¹ Appearance for Appellant at Full Hearing: James T. Dangora, Jr., Esq. , Shea, Dangora & Nelson, 566 Boston Road, Billerica MA 01821.

FINDING OF FACT

Based upon the documents entered into evidence and the testimony of the witnesses:

Called by the Appointing Authority:

- Abdul Alkhatib, Director of Public Works
- Ed Tierney, Superintendent of Highway Division;

Called by the Appellants:

- Wayne O'Loughlin, Appellant;

and taking administrative notice of all pertinent statutes, case law, regulations and policies; and drawing reasonable inferences from the evidence I find credible, I make the following findings of fact:

The Billerica DPW

1. Pursuant to the Town's bylaws, the Billerica DPW is managed by a Director, appointed by and responsible to the Town Manager for the supervision of all DPW operations and activities, which include six divisions (Administration, Cemetery/Parks, Water, Sewer, Engineering and Highway. (*Exhs.18 & 19; Testimony of Alkhatib*)

2. The Billerica Town Manager is designated as Personnel Director and is the Appointing Authority for all civil service positions, which includes the DPW. At all times relevant to this appeal, John Curran held the position of Billerica Town Manager. (*Exhs.4, 5, 18 & 19²; Testimony of Alkhatib*)

3. Abdul Alkhatib is the Director of the Billerica DPW, having served in that position for approximately eight years. He holds a degree in Civil Engineering. (*Testimony of Alkhatib*)

² In addition to Exhibit 19, Billerica attached to its Proposed Decision additional excerpts from the Town's Charter which are posted on the Town's official website as to which I also take administrative notice.

4. Ed Tierney, a thirteen-year employee of the Billerica DPW, rose through the ranks and is the Superintendent of the Highway Division. (*Exhs.1 & 9; Testimony of O’Loughlin, Alkhatib & Tierney*)

5. The Highway Division has a staff of approximately eighteen (18) and is divided into two Sections: (A) a Highway Section with two (2) Working Foremen (WF/Highway), one (1) Special Motor Equipment Operator (SMEO) and eleven (11) Heavy Motor Equipment Operators (SMEO); and (B) a Motor Equipment Repair Section aka Mechanics Section, with a Working Foreman (WF/MER) and two (2) Motor Equipment Repairmen (MER), who staff the Mechanics Garage. (*Exhs.1, 9 & 16; Testimony of O’Loughlin, Alkhatib & Tierney*)

6. The SMEO and the HMEOs in the Highway Section operate a variety of motor equipment ranging from passenger cars and light pick-up trucks to truck-trailer combinations with gross vehicle weight (GVW) up to 18,000 pounds and specialized motor equipment. The main difference between the SMEO, which is a higher rated title, and the HMEO title, is that the SMEO is authorized to operate vehicles over 9,000 pounds GVW while an HMEO is limited to vehicles below that threshold, and the SMEO requires a higher level CDL license (Class A) than an HMEO (Class B). In Billerica, both the SMEO position and the HMEO position also require a separate Hoisting License. (*Exhs.2[p.16], 5, 16 & 21; Testimony of Appellant & Tierney*)

7. The Mechanics Section handles maintenance of a fleet of more than ninety (90) vehicles used by the DPW. The duty of an MER includes “skilled repair and maintenance of motor equipment”, “inspects and troubleshoots gasoline and diesel powered vehicles”, “removes and disassembles diesel and gasoline engines”; “performs engine overhauls”; “performs auto body work and related welding and metal working duties” and other routine maintenance and repair assignments. Depending on the work load, some repair work, such as bodywork and repairs to

exhaust and air conditioning systems, is contracted to private companies. The fleet ranges from one 1988 vintage passenger car to several trucks and other vehicles that are brand new. Most are less than ten (10) years old. (*Exhs.16, 30; Testimony of Appellant & Tierney*)

8. Billerica's municipal charter and by-laws establish a five-member Personnel Board responsible, among other things, to "[c]ertify all personnel actions prior to their effective date to ensure regulatory compliance". At all relevant times, the Personnel Board had four vacancies, had insufficient members to conduct business, and had not conducted business for several years. (*Exhs.17 & 19; Testimony of Alkhatib; Administrative Notice [Billerica Town Charter]*)

9. Billerica has entered into a Collective Bargaining Agreement (CBA) with the Billerica Municipal Employees Association (BMEA), as the bargaining unit for certain Billerica employees, including the employees of the Billerica DPW. (*Exh.2*)

10. Article V "Seniority" of the CBA states, in part:

The seniority date for Civil Service related actions, i.e., promotion . . . will be based on Civil Service date for the first permanent appointment. All other items, ie vacations, longevity will be based on original full time date of hire.

The principle of senior most qualified shall govern and control in all cases of promotion within the bargaining unit

(*Exh.2,p.5*)

11. Article VI "Job Posting and Bidding" of the CBA states, in part:

When a position covered by this Agreement becomes vacant, and the employer decides to fill such vacancy, notice of the vacancy shall be posted. . . . Supervisory personnel shall be responsible for the posting of all job postings. Such notice of vacancy shall list the pay, duties and qualifications Employees interested shall apply in writing Within thirty (30) working days after the expiration of the posting period the Employer shall award the position to the senior most qualified applicant.

(*Exh.2, p.5; See also Exh.26*)

The 2013 Vacancy for WF/MER

12. In or about May 2013, Steve Morris, the WF/MER resigned his position. The Appellant, Stephen McLaughlin, then the senior MER in the Mechanics Section, was appointed temporary

WF/MER. Since 2005, Mr. McLaughlin had served previously as temporary WF/MER during Mr. Morris's brief absences on numerous other occasions. (*Exh.13; Testimony of Alkhatib & Tierney*)

13. On May 8, 2013, Town Manager Curran and DPW Director Alkhatib posted a "Notice of Vacancy" for the Working Foreman in the Highway Division/Motor Equipment Repair Section.

The "Duties" of the position were described as follows:

Under the direction of the Superintendent of the Highway Division, must keep records of employees and equipment and be responsible for inspection of work by subordinates and contractors for the conformance to plans and specifications; responsible for preparation of records and schedule work as assigned; to supervise and train subordinates, must be responsible for the safety methods and practices of such work; and to maintain and repair motor vehicles such as trucks and cars used by the DPW as well as all heavy equipment in the DPW; both gasoline and diesel engine driven; to maintain and repair all other tools and equipment including plows, trailers, pull-brooms etc.; the ability to use both gas and electric welders in the performance of the duties required; to keep time schedules in connection with all rolling stock for preventive maintenance purposes, and to be responsible for the maintenance of buildings and grounds and to perform all other duties as directed.

The "Requirements" for the position were described as follows:

1. High School Diploma or equivalency certificate.
2. Must possess a valid Class B CDL Driver's License and a valid Public Safety Class 1C,2A, 4E Hoisting license with air brake endorsement.
3. Must have a thorough knowledge and experience of methods, practices, tools and equipment used in repairing diesel and gasoline driven automotive equipment. Considerable knowledge of motor equipment construction and functions; ability to oversee as well as conduct any operations concerning the operation of diesel and motor equipment; ability to detect and locate causes of equipment breakdown; ability to keep accurate records including operation of fleet management computer program – Vehicle Manager 2012 Fleet Network edition, schedule inspection dates for motor equipment, ability to estimate costs of repairs to motor equipment and to order parts and supplies; ability to supervise employees engaged in repairing and servicing motor vehicles and equipment; ability to work with the tools and materials of the trade.
4. Applicant must document a minimum of three (3) years' experience in the mechanical repair of motor vehicles or equivalent technical education and one (1) year related supervisory experience.
5. Must have knowledge of and ability to operate gas and electric welders.
6. Must possess small tools needed to make repairs on vehicles.
7. All requirements and licenses must be held at the time of application.

8. Substitution for requirements will be at the discretion of the Director of Public Works.

(Exh.3)

14. According to the MuniClass Manual, the WF/MER must supervise workers at a lower skill level, i.e., here, the two MERs in the Mechanics Garage, and, thus, “must be skilled in the trade being supervised” and “also performs the same type of work as individuals supervised.” This position carries a high-level of responsibility to remain current in technical knowledge. The WF/MER inspects and documents all repairs. The job is critical to ensure vehicle operational safety as well as to keep equipment service as needed to fulfil the DPW mission, e.g. municipal road and public works maintenance and repair. *(Exh.16; Testimony of Alkhatib & Tierney)*

15. The job posting did not limit applications to any specific job titles. Four DPW employees submitted applications for the posted position of WF/MER. In order of seniority:

Wayne O’Loughlin	SMEO	Hire Date: 11/10/1986
Stephen McLaughlin	MER	Hire Date: 01/25/2001
Matthew Collins	MER	Hire Date: 11/03/2001
Craig Chestnut	HMEO	Hire Date: 07/19/2012

(Exhs.1, 8, 12, 15, 22)

Wayne O’Loughlin

16. Wayne O’Loughlin is a tenured labor service employee in the title of SMEO in the DPW’s Highway Section. He is a 1974 graduate of Billerica High School and holds a CDL Class A license. Mr. O’Loughlin’s work as an SMEO involves operating motor vehicle equipment. He is capable of operating all but one of the DPW’s vehicles, including heavy equipment, such as graders, front-end loaders, trucks of all sizes, and other similar equipment. Mr. O’Loughlin is the only SMEO in the Highway Division. *(Exhs.1, 8,16, 21 & 29; Testimony of Appellant)*

17. Mr. O’Loughlin has performed routine tire and oil changes and other preventative maintenance incidental to the position of SMEO. His duties as a SMEO include responsibility to describe the problem to a mechanic when a vehicle needs repair and to assist in preparing the

repair order, but they do not involve performing skilled or technical repairs, such as engine or brake work. In 2007, Mr. O'Loughlin was assigned to work in the Mechanics Garage for several weeks. He did once work on a clutch and transmission in a five-ton truck in 1994 and a driveshaft in 2007. (*Exhs.1,8 9,16, 21 & 29; Testimony of Appellant & Tierney*)

18. Mr. O'Loughlin learned to work on motor vehicles in high school where he studied industrial arts. He has continued to work "as a hobbyist" on his personal motor vehicles on his own time in his garage, including engines, exhausts and brakes systems, but this has not included heavy trucks or diesel-powered vehicles. He has a hand-held diagnostic scanner and owns his own tools including an air compressor, ratchets and impact sockets. He is not licensed to operate an automotive repair business. (*Exhs.8 & 29; Testimony of O'Loughlin*)

19. Mr. O'Loughlin served on active military duty with the U. S. Army from 1981 to 1984, where he served as a Motor Transport Operator (64C MOS), working as a truck driver. He achieved the rank of E-4 and was responsible for managing large motor transport activities and supervising lower ranked enlisted personnel. (*Exhs.10 & 29; Testimony of O'Loughlin*)

20. After honorable discharge from active duty, Mr. O'Loughlin continued service for another three years in the Army Reserve. He trained and served as a Wheeled Vehicle Mechanic (91B MOS). He worked about one weekend a month on tactical vehicles from "half-ton" and "five ton" trucks to M1 tanks, including diesel-powered and fuel-injected engines. He supervised lower ranked Reservists. (*Exhs.8, 10 & 29; Testimony of O'Loughlin*)

21. Also, before his employment with the DPW, Mr. O'Loughlin worked for a bus company as a bus driver and mechanic, performing routine maintenance and some transmission work, and worked part-time for an excavating company, where he operated a backhoe and a bulldozer and performed unspecified mechanical work. (*Exhs.10 & 29; Testimony of O'Loughlin*)

22. Mr. O'Loughlin made five (5) prior unsuccessful applications for promotion to Working Foreman in the Highway and Water Divisions. (*Exh.26; Testimony of O'Loughlin*)

23. Mr. O'Loughlin is active in the BMEA, serving as Shop Steward, Vice-President and, currently, union President. (*Testimony of O'Loughlin & Alkhatib*)

Steven McLaughlin

24. Mr. McLaughlin is the senior MER in the Mechanics Section of the DPW Highway Division. He holds a CDL Class B license, a Hoisting License and other motor vehicle operating licenses. He holds no certifications as a mechanic, having learned the trade through on-the-job experience. As noted, he has served as acting WF/MER. He is familiar with and has used the DPW fleet management computer program (2012 Fleet Manager system). (*Exhs.1, 12 & 29*)

Matthew Collins

25. Mr. Collins has worked as an MER in the Mechanics Section since 2011. Prior to that, he was employed as a mechanic with three private automotive garage businesses for approximately 16 years. He holds a Class B CDL and Hoisting license. He also is ASE certified in gasoline-driven engine repair, air brakes, steering and suspension. (*Exhs.1, 15 & 29*)

Craig Chestnut, Jr.

26. Mr. Chestnut was hired in July 2012 as an HMEO in the Highway Division. He achieved tenure on January 19, 2013. He is a 2006 honors graduate of Shawsheen Valley Technical H.S. and a 2008 graduate of Universal Technical Institute. He received formal training and holds certifications in automotive repair, including diesel technology, air conditioning, air brakes and OSHA safety. He holds a Class B CDL and a Hoisting license. (*Exhs.1, 22 & 29*)

27. Since 2008, Mr. Chestnut has worked as a "master" mechanic for C & G Truck and Heavy Repair (C&G) in Tyngsboro, a business owned by his father, Craig Chestnut, Sr. C & G is

one of the outside vendors that the DPW contracts with to perform repairs. Mr. Chestnut continued to work weekends at C&G after he was hired by the DPW. He has used the 2012 Fleet Manager system and has supervised the other mechanics at C&G in his father's absence. *(Exhs.22 & 29; Testimony of Alkhatib & Tierney)*

28. On June 13, 2013, Mr. Chestnut was reassigned to the Mechanics Section. This assignment was supposed to expire in 20 days but actually lasted through July 25, 2013. Mr. Morris, the previous WF/MER is Mr. Chestnut's former step-father, a fact that Superintendent Tierney, but not Director Alkhatib, knew. *(Exh.4; Testimony of Alkhatib & Tierney)*

Candidate Interviews

29. All four candidates were interviewed individually by a panel comprised of Town Manager Curran, Assistant Town Manager Cathy O'Dea, DPW Director Alkhatib and Superintendent Tierney. Director Alkhatib made notes. No other record of the interviews or the questions asked were produced, although Director Alkhatib's notes infer that candidates were asked similar, if not identical, questions that focused on experience, qualifications and any changes they would implement in the garage. *(Exh.29; Testimony of Alkhatib & Tierney)*

30. During the interview, Mr. O'Loughlin described his work as a mechanic in the Army and with the Shaughnessy Bus Company as well as his work on his personal vehicles. He said he didn't have any auto repair certifications or licenses and that his supervisory experience was in the Highway Division, the Army Reserves, and as a union official in the BMEA. He stated that he was unfamiliar with the 2012 Fleet Manager system but thought he could do it. He thought the shop was running fine and would not make any changes. He had no questions for the panel. *(Exh.29; Testimony of O'Loughlin, Alkhatib & Tierney)*

31. Mr. Chestnut explained his work as a mechanic and supervisory experience at C&G. He provided and discussed his certifications in the area of auto repair, especially diesel engines, air brakes and A/C, and his knowledge of the 2012 Fleet Manager system. He stated that his experience would allow the DPW to do more work in-house. He asked the panel to describe the expectations of him if he were offered the job. (*Exh.29; Testimony of Alkhatib & Tierney*).

32. Mr. Collins explained his previous mechanic's experience in the private sector and the DPW and his certification for gasoline-driven engines repair. Mr. Collins had not used the Fleet Manager computer system but said he could learn it. (*Exh.29; Testimony of Alkhatib & Tierney*)

33. Mr. McLaughlin described his work experience as a mechanic with the Town and through the certificates he has obtained. Mr. McLaughlin expressed knowledge of the 2012 Fleet Manager system and his experience in a supervisory role he gained when he filled in as acting WF/MER in the past. (*Exh.12-1 & 29, Testimony of Tierney; See Exh.13*)

34. The individual candidates' interview performance was not scored. The interview panel determined a consensus rank from best to worst for each candidate, as follows:

1. Mr. Chestnut
2. Mr. McLaughlin
3. Mr. Collins
4. Mr. O'Loughlin

The panel found Mr. Chestnut was the "senior most qualified" applicant. Pursuant to a Billerica "Employee Action Form" dated July 24, 2013 executed and approved by Town Manager Curran he was awarded the promotion, effective July 25, 2013. The promotion was never submitted to or "certified" by the Personnel Board. (*Exhs.27 & 29; Testimony of Alkhatib & Tierney*)

35. Neither DPW Director Alkhatib nor Superintendent Tierney knew the civil service "2n+1" rule which limited the promotion to WF/MER to one of the three most senior candidates qualified and willing to accept the job. (*Exhs.23 & 24; Testimony of Alkhatib & Tierney*)

36. In accordance with DPW Alkhatib's customary practice, none of the unsuccessful candidates were personally informed of their non-selection. They learned of Mr. Chestnut's promotion when they saw a job posting on July 25, 2013 for Mr. Chestnut's former position of HMEO. (*Exh.5; Testimony of Alkhatib, Tierney & O'Loughlin*)

37. On July 25, 2013, each unsuccessful candidate filed a grievance through the BMEA. Director Alkhatib found no violation of the CBA and denied the grievances. On appeal to Town Manager Curran, he also denied the grievances, finding no violation of the CBA and, also, that the grievance was not arbitrable. These appeals to the Commission duly ensued. (*Exhs.7, 11 & 14: Claims of Appeal*)

38. At the pre-hearing conference held by the Commission on October 22, 2013, Commission Chairman Bowman issued a procedural order that bifurcated the issue of Mr. O'Loughlin's qualifications for a separate hearing and required Billerica to provide a written statement of the reasons that it had not selected him. (*Procedural Order*)

39. Pursuant to the Procedural Order, by joint letter dated November 4, 2013 from Town Manager Curran and DPW Director Alkhatib, Mr. O'Loughlin was informed that, after considering "all of the written material you submitted for the position as well as your interview", he was not qualified for the position as "you do not meet the job requirements in multiple ways", which included the following specific reasons:

- Lack of required skills and technical experience to perform and supervise repair work on DPW vehicles
- Lack of supporting documentation for mechanical work performed in the Army
- Unfamiliarity with the 2012 Fleet Manager computer system
- Lack of one year related supervisory experience

(*Exh.20*)

Summary

Billerica has shown by a preponderance of the evidence that, despite procedural flaws in the process, it had reasonable justification to disqualify Mr. O'Loughlin from consideration for appointment to the position of WF/MER, and to select the "senior most qualified" candidate from among the other three qualified applicants. As none of the Appellants have any right to relief from the Commission, all three of these appeals will be dismissed.

Applicable Civil Service Law and Rules

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. "The commission's primary concern is to ensure that the appointing authority's action comports with 'basic merit principles,' as defined in G.L.c.31,§1." Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001). "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

In the matter of labor service functions, municipalities are delegated with the authority of the Personnel Administrator [HRD] to make and approve appointments and promotions, such as labor service positions of Working Foreman, at the local level, in accordance with the provisions set forth in G.L.c.31, §28 & §29 and the applicable Personnel Administration Rules (PAR). PAR.19 provides, with respect to such delegated labor service promotional appointments:

Promotional appointments and changes of position under the provisions of M.G.L. c.31, §29 shall be made from among the same number of persons with the greatest length of service as the number specified in making appointments under PAR.09 [2n+1], provided that such persons possess the required qualifications and serve in eligible titles, as determined by the [appointing authority's local labor service director, acting as delegated representative of HRD]. If there are less than the requisite number of persons, selection may be made from the lesser number.

Civil service law operates in tandem with the public employment collective bargaining law, G.L.c.150E. It is well-settled that, pursuant to G.L.c.150E, §7(d), when a material conflict arises between civil service law and a collective bargaining agreement, the civil service law will take precedence. See, e.g., Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477n.15 (2004); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bhd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992)

Applicable Standard of Review

The role of the Commission in this matter is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by [it]." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

Reasonable justification means an appointing authority's actions were based on "sound and sufficient" reasons, supported by the preponderance of 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); Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315 (1991). Proof by a preponderance of the evidence means "more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding

any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)

In conducting this inquiry, the Commission acts “de novo” and is not limited to the evidence that was before the appointing authority but “finds the facts afresh”. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997)

The commission’s task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.”

E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See also Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

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. In the event of a failure of proof, the commission has the power to overturn the appointing authority’s decision. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) Id. It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs., 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd, 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988).

Procedural Deficiencies

The Appellants have identified numerous examples of Billerica's alleged procedural missteps made in the course of its posting of the position of WF/MER and the appointment of Mr. Chestnut to fill the position. I find none of these objections grounds to invalidate the appointment.

The most serious objection concerns the fact that neither DPW Director Alkhatib nor Superintendent Tierney were aware of the well-established so-called "2n+1" rule that limits the choice of candidates who may be promoted to a labor service title to the three most senior candidates qualified and willing to accept the job. PAR.19(f). Whether Town Manager Curran was familiar with the rule is unknown, as he did not testify. I infer, however, that, given this ignorance, although Billerica later claimed it has found Mr. O'Loughlin "unqualified", in fact, no such actual finding was made until after this appeal was filed and it became apparent that it was necessary to make that finding in order to justify the appointment of Mr. Chestnut who, as the fourth candidate in seniority, otherwise would not fall within the "2n+1" formula. I conclude, however, that, this misstep does not preclude Billerica from proving to the Commission that Mr. O'Loughlin, in fact, did not possess the necessary qualifications for the critical job, even though it did not document that conclusion until after this appeal was filed.³

It is an express statutory condition for appointment of a lower ranked candidate to an official service position that the appointment requires a prior, written statement of reasons, positive or negative, for not selecting the higher ranked candidate(s). See G.L.c.31, §27; PAR.08(4). However, no comparable statutory requirement or rule mandates that an appointing authority provide reasons for selecting a less senior candidate in making a labor service appointment. See, e.g., Harrop v. Fall River School Committee, 22 MCSR 1 (2009) and cases cited. It would

³ The Appellants filed a Motion In Limine at the outset of the hearing to preclude Billerica from contending that Mr. O'Loughlin was not a qualified candidate. I denied that motion, without prejudice. After hearing all of the evidence, for the reasons expressed here, I now confirm that ruling.

certainly have made for a more orderly and transparent process had explanatory disclosures been made sooner, and it would behoove Billerica to consider that fact in future appointments. I do not find, however, that, in the circumstances of this case, the absence of a written statement of disqualification was a material mistake. The evidence clearly demonstrates that the shortcomings that disqualified Mr. O’Loughlin were clearly understood and it would exalt form over substance to preclude Billerica from elaborating on that conclusion at this, a “de novo” hearing.

The Appellants’ other procedural objections are also unfounded. Failure to designate specific job titles that entitled candidates to apply for the position, whether intentional or inadvertent, is not a fatal flaw. At best, it allowed any DPW employee to apply. The highly technical description of the job duties and requirements plainly sufficed to enable employees to self-identify if they were a fit or not and, by opening up the application process broadly, it actually provides more opportunity for individualized decisions about whether a particular candidate in fact, possesses the necessary qualification for the job. See generally Lusignan v. City of Holyoke G & E Dep’t, 21 MCSR 287(2008), subsequent decision, 22 MCSR 137 (2009)

Similarly, the Appellants are mistaken to contend that Mr. O’Loughlin was the only candidate qualified to apply because he was the only employee who was in the “next lower title” (SMEO) to a Working Forman, presumably in reliance on G.L.c.31, §15 regarding provisional promotions. That provision does not apply here to a permanent promotion in the labor service.

Finally, the posting and hiring was made with dual input and approval of the Town Manager and DPW Director, which the evidence established to be the appropriate authority to take those actions within the requirements of civil service law.⁴ The failure to include the Billerica Personnel Board in the process is not a material or substantive violation of any civil service law

⁴ From the evidence presented, Billerica did not have a separate “Labor Service Director” as contemplated by the applicable civil service rules and it appears the Town Manager was acting in that capacity. It would behoove Billerica to verify this status, however, and document its compliance with this requirement.

or rule and, given its dormant status, any requirement that it must “certify” an appointment would, as a practical matter, have the undesirable effect of bringing the hiring and promotion of civil service employees in Billerica to a grinding halt. The redress for that deficiency, if any, does not lie with the Commission.

Flaws in the Interview Process

The Commission has long-recognized that appointing authorities may consider a candidate’s interview performance in making hiring and promotional decisions, so long as the process is fair and reasonably objective. Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers”, which is the lynch-pin to the basic merit principle of civil service law. E.g., Flynn v. Civil Service Comm’n, 15 Mass.App.Ct. 206, 208, rev.den., 388 Mass. 1105 (1983). The Commission’s decisions have commented on a wide range of interview plans, some of which are commendable and some more problematic. Example of the former: Anthony v. Springfield, 23 MCSR 201 (2010), Gagnon v. Springfield, 23 MCSR 128 (2010); Lusignan v. City of Holyoke G & E Dep’t, 22 MCSR 137 (2009); Boardman v. Beverly Fire Dep’t, 11 MCSR 179 (1998). Examples of the latter: Morris v. Braintree Police Dep’t, 27 MCSR 656 (2104); Monagle v. City of Medford, 23 MCSR 267 (2010); Mainini v. Town of Whitman, 20 MCSR 647, 651 (2007); Belanger v. Town of Ludlow, 20 MCSR 285 (2007); Horvath v. Town of Pembroke, 18 MSCR 212 (2005); Fairbanks v. Town of Oxford, 18 MCSR 167 (2005); Saborin v. Town of Natick, 18 MCSR 79 (2005); Sihpol v. Beverly Fire Dep’t, 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep’t, 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep’t, 10 MCSR 133 (1997).

Although Billerica's interview process could stand some improvement, in the present case, I find it falls on the acceptable side of the line. Some better record of the questions and answers would have been preferable, but I can discern from the interview notes that were made by DPW Director Alkhatib that the interview focused on the candidates' experience and ability to perform the duties of the job of a WF/MER and that all candidates were afforded a fair opportunity to present themselves. While a "consensus" evaluation is generally not preferable, here, the focus of the assessment clearly was almost exclusively based on job skills and experience for a highly technical labor service position, which are independently verifiable, and little emphasis placed on more subjective elements that sometimes do require a more structured interview process (e.g., initiative, appearance, etc.). Accordingly, I do not find that concern to be material here.

Nor do I find compelling Mr. O'Loughlin's claim that, had he only known that his limited skills and experience would be found wanting, he would have elaborated more than he did at the interview about his qualifications. The job posting could not have been clearer that Billerica expected all applicants to "document" their experience in automotive repair and supervision of mechanics. Moreover, as more fully explained below, while the documentation that Mr. O'Loughlin subsequently produced concerning his experience might have plugged some gaps that Billerica identified in the application and interview process, they do not plug all of them.

Mr. O'Loughlin's Qualifications

Mr. O'Loughlin clearly does possess some of the qualifications for a promotion to position of WF/MER. He is the "senior man" in the Highway Division and the employee with the highest equipment operator rating of SMEO, which entitles him to operate all but one of the vehicles in the DPW's fleet. An equipment operator must have a certain degree of knowledge about the vehicles he operates to be able to recognize that a vehicle is malfunctioning and needs to be

brought to the shop. Also, during his military service in the 1980s, Mr. O'Loughlin did perform the duties of a mechanic and supervised other personnel. As BMEA President he has some limited management duties. Mr. O'Loughlin does repair his own vehicles as a "hobbyist" and possesses substantially all the tools required to do the job of an MER. He is clearly not a novice when it comes to automotive mechanics.

Nevertheless, Billerica did meet its burden to establish that Mr. O'Loughlin had failed to document that he brings to the table the state-of-the-art qualifications that Billerica is entitled to require of a WF/MER, who is entrusted with oversight over the Mechanics Garage and bears ultimate responsibility for the proper maintenance of all DPW vehicles. Unlike all of the other three candidates who demonstrated their current training and work experience in the field, Mr. O'Loughlin has not been gainfully employed in the field of automotive repair for more than twenty years. He is not familiar with the data tracking computer system. There is a clear difference between recognizing a malfunction and being able to identify and repair or replace the defective part(s) in a good and workmanlike manner. In these two important categories, Billerica was reasonably justified to conclude that Mr. O'Loughlin lacked the state-of-the-art qualifications for this highly technical and important position, and that judgment must be respected. See Poske v. City of Worcester, 25 MCSR 501 (2012); Garfunkel v. Department of Revenue, 24 MCSR 128 (2011) (affirming need for specialized qualifications for information technology position)

Some deficiencies that disqualified Mr. O'Loughlin are due, in part, to his long tenure as an SMEO, which did not present the opportunity to acquire or keep up-to-date skills that could have qualified him for a mechanic's job. He notes that an SMEO earns substantially more than MER, so it would be unreasonable to take a pay cut to become an MER, and, unlike other candidates,

he had no recent experience in the private sector. Mr. O’Loughlin correctly argues that one of the key elements of basic merit principles in civil service law is the provision for “training and development for employees, as needed to assure the advancement and high quality performance of such employees”. G.L.c.31,§1. The Commission is mindful of this issue, but it is an unreasonable stretch to expect Billerica to provide public funding for “continuing” education and training that enables an employee, in effect, to make a “career change” from a truck driver (MEO) to a mechanic (MER), two completely different job series. cf. Lusignan v. City of Holyoke G & E Dep’t, 22 MCSR 137 (2009)

Bias or Prejudice

Mr. O’Loughlin asserts that he was disqualified for two impermissible reasons: (1) animus against him for his union activities; and (2) Billerica’s pre-disposition to give Mr. Chestnut the job. Neither claim is supported by the evidence.

As to the claim that Mr. O’Loughlin was rejected because he had a long history of union activism, I find no credible evidence to warrant the conclusion that any of the decision-makers in Billerica harbored such animus. Neither Mr. O’Loughlin nor the other two unsuccessful applicants made that contention in their official BMEA grievances.

A more substantial question does exist as to whether Mr. Chestnut was pre-determined to be promoted and the entire selection process was a subterfuge designed to achieve that result. Certainly some signs point to that intention. Mr. Chestnut, then a “master mechanic” working in his father’s garage, was hired by Billerica as a truck driver (HMEO) and then was transferred to the Mechanics Garage to work as a “temporary” MER under Mr. McLaughlin (the acting WF/MER), while the application process to replace Mr. Morris was ongoing. One of Mr. Chestnut’s selling points was his ability to bring “in-house” certain work, due to his personal

expertise, that was then being contracted out to C&G, the garage owned by his father, and where he continued to work on weekends.⁵

While these facts do raise an eyebrow, they do not prove a violation of Mr. O'Loughlin's civil service rights. As Mr. O'Loughlin lacked the qualifications for the position of a WF/MER, he has no standing to complain that another candidate was improperly selected. Civil service law does not contemplate, and the Commission is not required to permit, appeals by such a disqualified candidate to challenge the selection of a duly qualified candidate.

Further Proceedings

Billerica argues that, upon a finding that Mr. O'Loughlin was properly disqualified, the appeals of the other two Appellants, Messrs. McLaughlin and Collins, must also fail as a matter of law. In particular, assuming Messrs. McLaughlin and Collins, themselves, along with Mr. Chestnut, all were qualified for the position⁶, the applicable civil service law entitled an appointing authority to appoint any of them, all being within the "2n+1" formula, without stating the reasons and qualified non-selected labor service candidates are not entitled to appeal their non-selection to the Commission. See PAR.19; Pelligrini v. City of Malden, 25 MCSR 146 (2012); Poske v. City of Worcester, 25 MCSR 501 (2012) Moreover, the CBA provides that the "senior most qualified" candidate shall be appointed and, so long as that candidate is one of the three senior applicants within the "2n+1" formula, compliance with the CBA is not inconsistent with civil service law. Thus, Billerica contends that, its choice of Mr. Chestnut as the "senior most qualified" candidate both complies with civil service law and the CBA. I agree.

I acknowledge that it could fairly be argued that Mr. Chestnut was pre-determined to be the "senior most qualified" candidate. Unfortunately, I cannot find any grounds under civil service

⁵ Presumably, upon promotion to WF/MER, Mr. Chestnut resigned his position with C&G and/or filed proper disclosures of the relationship to the extent C & G continues to work as a DPW Highway Division vendor.

⁶ I note that Mr. Collins agreed that he, too, was not familiar with the 2012 Fleet Manager computer program.

law to permit even Mr. McLaughlin or Mr. Collins to raise this objection. As noted above, civil service law in the sphere of labor service promotions affords only a very limited opportunity to challenge an appointing authority's selection and, so long as the selection is made from among one of the three most senior qualified candidates, the Commission is not obliged to intervene. Thus, unless Mr. McLaughlin or Mr. Collins are prepared to claim that Mr. Chestnut is unqualified – when the evidence presented weighs heavily to suggest quite the contrary – or some other compelling reason can be shown for the Commission to exercise discretion to intervene here, further hearings in the other two appeals appear futile. Accordingly, I am obliged to agree with Billerica that further proceedings in these appeals is not warranted as none of the Appellants have shown any realistic basis to believe that their civil service rights have been prejudiced by Mr. Chestnut's appointment, or that they are entitled to any form of meaningful relief from the Commission.

In sum, for the reasons stated, the appeals of the Appellants, Michael Collins, Stephen McLaughlin and Wayne O'Loughlin, are dismissed.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on April 2, 2015.

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:

Gary G. Nolan, Esq. (for Appellant)

Laurie W. Engdahl, Esq. (for Respondent)