

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

LAWRENCE P. VALLIERE,
Appellant

v.

G2-10-223

CITY OF WESTFIELD,
Respondent

Appellant's Attorney:

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West Springfield, MA 01089

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Lawrence P. Valliere, (hereinafter "Valliere" or "Appellant"), pursuant to G.L. c. 31, § 2(b), contests the decision of the City of Westfield (hereinafter "City" or "Appointing Authority") to bypass him for promotional appointment to the position of Captain in the Westfield Police Department (hereinafter "Department"). A pre-hearing conference was held on September 22, 2010 at the Springfield State Building in Springfield. A full hearing was held on two (2) days on November 10, 2010 at the Springfield State Building and on December 1, 2010 at Westfield City Hall. With the

exception of the Appellant and Westfield Police Chief John Camerota, all witnesses were sequestered.

The full hearing was digitally recorded and copies of the recordings were provided to the parties. Both parties submitted post-hearing briefs.

FINDINGS OF FACT

Thirty-seven (37) exhibits were entered into evidence by the Appointing Authority on November 10, 2010. Two (2) exhibits were entered into evidence by the Appellant on November 10, 2010. The Appointing Authority entered one additional exhibit into evidence which was marked as Exhibit 9A. Based upon the documents and the testimony of:

For the Appointing Authority:

- John Camerota, Police Chief, City of Westfield;
- José Torez, Police Officer, City of Westfield;
- Michael McCabe, Police Captain, City of Westfield;
- Karl Hupfer, Police Commissioner (Chairman), City of Westfield;
- Leonard Osowski, Police Commissioner, City of Westfield;
- Felix Otero, Police Commissioner, City of Westfield;

For the Appellant:

- Dennis P. Kousch, Police Lieutenant, City of Westfield;
- Charles Medeiros, former Acting Mayor and City Council Pres., City of Westfield;
- Lawrence P. Valliere, Appellant;

I make the following findings of facts:

1. The Appellant is a tenured civil service employee who was first employed as a police officer by the City in 1980. (Exhibit 11) He was promoted to the position of Police Sergeant in January of 1999 (Exhibit 25) He was appointed to Police Lieutenant in December of 2004. (Exhibit 31)

2. The Appellant was one of three (3) candidates who took and passed the Westfield Police Captain examination competing for one (1) vacant position. (Exhibit 1)
3. Said vacancy was the product of an internal reorganization of the Westfield Police Department. (Camerota and Hupfer Testimony)
4. The creation of a second Captain position was contemplated initially by former Chief Benjamin Surprise and the Police Commission in approximately 1999. (Hupfer Testimony).
5. The creation of a second Captain position was necessary for the following reasons:
 - a) Budget constraints were going to be dealt with by removing one Sergeant's position and replacing the Administrative Lieutenant position with that of second captain; (Camerota Testimony) More specifically, the Police Department could save money by removing a Sergeant (and his salary) and merging the duties of the Administrative Lieutenant with that of a second Captain (Camerota Testimony); and
 - b) The Police Department was too large to be managed by the Chief and one Captain. (Hupfer Testimony) The responsibilities needed to be broken down such that there would be a Line Captain (a/k/a Patrol Captain or Uniform Captain) and an Administrative Captain who would handle administration responsibilities such as preparing reports to the state and the managing record system. (Hupfer Testimony, Camerota Testimony, Exhibit 5 for reorganization chart, Exhibit 6 for responsibilities of Uniform [Patrol] Captain and Administrative Captain)

6. The second Captain position was created by the passage of Westfield City Ordinance No. 1516 on March 22, 2010. (Exhibit 5)
7. Before the second Captain's position was created, the Appointing Authority needed to fill the position of Captain Michael Avonti; which became vacant when he retired in 2008. (McCabe Testimony)
8. In 2008, as part of a previous promotional process, now-Captain McCabe, the Appellant, Hipolito Nunez and Dennis Kousch took the Captain's exam. The Appellant was interviewed in 2008. (Hupfer Testimony). McCabe was ultimately accepted in May of 2008 and holds the position to this date. (McCabe Testimony)
9. Prior to the 2008 interviews, the Appellant had approached Westfield Police Officer Jose Torez about putting in a good word to then Mayor Michael Belanger on the Appellant's behalf regarding the Captain's position left vacated by Captain Avonti. (Torez Testimony and Appellant Testimony).
10. Torez was and is currently a junior officer to the Appellant who has been supervised by the Appellant since 2008. (Torez Testimony).
11. Torez told the Appellant that he did not feel comfortable complying with the Appellant's request, and ultimately Torez did not put in a good word with Mayor Belanger on the Appellant's behalf. (Torez Testimony). Upon receiving Torez' response, the Appellant appeared upset. (Torez Testimony). Torez feels that his decision not to comply with the Appellant's request has placed a wedge between them. (Torez Testimony). The Appellant was not happy with Torez' decision. (Appellant Testimony).

12. On or about March 31, 2008, former Acting Mayor and City Council President Charles Medeiros (hereinafter “Medeiros”) had a face to face discussion with Torez regarding the Appellant’s appointment to the position of second Captain. (Medeiros Testimony, Exhibit 36).¹
13. On or about April 1, 2008, Medeiros called the Appellant on a telephone line, knowing that he [Medeiros] was being recorded, and talked about his [Medeiros’] meeting with Torez. (Medeiros Testimony and Exhibit 36).
14. The telephone call involved statements as to why Torez would not put in a good word for the Appellant in connection with the promotion to second Captain. (Exhibit 36).
15. During the initial stage of the call, the Appellant admits that he asked Torez to put in a good word for him regarding the promotion to second Captain and that Torez would not do so. (Exhibit 36).
16. Medeiros explained it was he and not Torez that wanted the Appellant to be appointed Captain rather than Nunez. (Medeiros Testimony).
17. During the telephone call and while Medeiros was telling the Appellant that Torez was fearful of talking to Mayor Belanger on the Appellant’s behalf, the Appellant stated that “Nobody’s got the balls to stand up and do the right thing.” (Exhibit 36).
18. Later during the same telephone call, Medeiros stated to the Appellant that he [Medeiros] was getting a strange feeling from other Westfield Police Officers. (Medeiros Testimony, Exhibit 36). The Appellant inquired as to whether he was talking about Torez, and before Medeiros could answer, the Appellant stated that “We need stronger dudes than that”, i.e. meaning Torez. (Exhibit 36).

¹ Before making my determination that Exhibit #36 was admissible, Medeiros was asked whether he knew whether he was being recorded. Medeiros testified in the affirmative. (Medeiros Testimony).

19. In the City of Westfield, it is the Police Commission that has the power of hiring, firing, promoting, etc. police officers. (Medeiros Testimony).
20. In the City of Westfield, the Mayor has the authority to appoint members of the Police Commission with confirmation required by the Westfield City Council. (Medeiros Testimony).
21. During the year of 2008, Medeiros was a Westfield City Councilor. (Medeiros Testimony). Medeiros served on the Westfield City Council until December 31, 2009. (Medeiros Testimony).
22. Medeiros testified that approaching the Mayor with good words regarding a candidate could have some influence over the Police Commission given that the Mayor has the power to appoint them. (Medeiros Testimony).
23. When the funding and the ordinance change were in place for the second Captain's position in 2010, there were three remaining candidates contained on the list and were ranked in the following order:
- 1) Lawrence P. Valliere (the Appellant)
 - 2) Hipolito Nunez
 - 3) Dennis P. Kousch (Exhibit 1, Camerota and Hupfer Testimony).
24. As previously stated, the Westfield Police Commission is a governmental body comprised of three members and charged with the responsibility of appointing police officers; and issuing promotions, demotions, suspensions, and terminations, i.e. Appointing Authority. (Hupfer Testimony, Medeiros Testimony).
25. In making appointments, the Appointing Authority conducts interviews in open public session and then votes to move into Executive Session for their deliberations.

(Hupfer Testimony, Camerota Testimony). While in Executive Session, the Appointing Authority allows both Camerota and Captain McCabe (hereinafter “McCabe”) to make their recommendations on appointments, and then Camerota and McCabe leave the room so that the Appointing Authority can deliberate on the appointments. (Hupfer Testimony and Camerota Testimony).

26. On June 22, 2010, Camerota sent a general e-mail stating that a special meeting was scheduled for July 8, 2010 regarding the interviews for promotions to Police Captain, Police Lieutenant, and Police Sergeant. (Exhibit 9)
27. Both the Appellant and Lieutenant Kousch read the e-mail as to the date of the promotional interviews. (Exhibit 9A which is being attached hereto).
28. On June 25, 2010, Camerota caused a notice to be posted and e-mailed indicating that the regularly scheduled Police Commission meeting was being rescheduled to July 8, 2010 and that on the Agenda were the interviews for the promotions in the positions of Captain, Lieutenant, and Sergeant. (Exhibit 8 and Camerota Testimony).
29. In preparation for the interviews, each Commissioner reviewed the personnel records of each candidate. (Testimonies of Hupfer, Osowski and Otero). They also reviewed the resumes of each candidate. (Testimonies of Hupfer, Osowski and Otero).
30. The resume of the Appellant indicates that he received an Associates Degree in Criminal Justice from Holyoke Community College in 1979 and a Bachelors Degree in Criminal Justice from Westfield State College in 1997. (Exhibit 11).
31. The resume of Hipolito Nunez, the candidate selected for the promotional appointment, indicates that he received an Associates Degree in the Science of Law Enforcement from Holyoke Community College in 1987; a Bachelor’s Degree in the

Science of Criminal Justice in 1993, and a Master's Degree in the Science of Criminal Justice Administration in 2001. (Exhibit 10).

32. In 1993, Nunez was suspended for five (5) days for sexual harassment. (Camerota Testimony)

33. Nunez and the City reached a settlement agreement in 2005 that resulted in the removal of this suspension from his personnel file. (Exhibit 34)

34. Nunez was appointed to the position of Temporary Lieutenant in 1998. (Exhibit 26).
Nunez was appointed to the position of Permanent Lieutenant in 1999. (Exhibit 27).

35. Nunez had six (6) years more experience than the Appellant in the position of Lieutenant. (Exhibits 26 and 27 and Appellant's Testimony).

36. In 2004, Nunez was designated as the Administrative Lieutenant by Chief Camerota. (Camerota Testimony, Exhibits 3 and 16).

37. At some point while Nunez was serving as a lieutenant, Camerota received a letter of complaint from the local patrolmen's union that Nunez lacked supervisory skills and was abusive to employees. (Camerota Testimony)

38. The above-referenced complaint was referred to the Westfield Police Commission which reviewed the matter in an executive session attended by Nunez, the Police Chief and others. As a result of their review, the Police Commission ordered that Nunez be monitored for three (3) months with monthly reports to the Police Commission. (Exhibit 35)

Events occurring prior to the July 2010 Interviews

39. Just prior to the interviews of the three Captain candidates, the Appellant took the unusual step of hand delivering a seven-page letter to the homes of all three Police

Commissioners. In the letter, the Appellant alleged that “several documented incidents ... contribute to the perception that this will not be a fair and impartial process.” (Exhibit 15)

40. The Appellant’s letter contained several alleged examples purporting to show that Chief Camerota could not be fair and impartial and requested that the Police Commission prohibit Camerota from participating in the interview and selection process. (Exhibit 15)
41. A summary of the Appellant’s allegations included: 1) A 2008 incident where Chief Camerota allegedly blamed the Appellant for filing what the Chief believed was a baseless grievance even though the Appellant did not file the grievance; 2) An April 2008 retirement party where Chief Camerota spoke and individually recognized every lieutenant present as individuals that “would lead this department into the future” but did not mention the Appellant; 3) a training opportunity that only Lt. Nunez was made aware of; 4) Chief Camerota and Lt. Nunez both serving on the Board of Directors of the local Boys and Girls Club; 5) Lt. Nunez and members of his family helping Chief Camerota remodel his house in January 2010; 6) Lt. Nunez being given permission to use the Police Chief’s vehicle while the Chief was out on medical leave; and 7) Lt. Nunez’ personnel file had been “sanitized”. (Exhibit 16)
42. Because the Appellant had made a request to the Appointing Authority that Camerota not be allowed to make a recommendation on the Captain’s position, the Police Commission moved into Executive Session to deliberate on the Appellant’s request. (Hupfer Testimony and Exhibit 37).

43. Present at the Executive Session were the three members of the Police Commission, the Appellant, and Camerota. (Camerota and Hupfer Testimony).
44. At the Executive Session, the Appellant reiterated some of the issues that he stated in the Recusal Letter and Camerota responded to each issue. (Hupfer, Osowski and Otero Testimony, Exhibit 15, Exhibit 16 and Exhibit 37).
45. After Camerota and the Appellant made their respective statements, they left the room, and the Police Commission decided that Camerota may make a recommendation on the promotion to the second Captain's position. (Exhibit 17 and Hupfer Testimony). The Police Commission moved back into open session and the three candidates were interviewed. (Hupfer Testimony).
46. Each of the three candidates were interviewed for the position of Captain in open session.
47. Although each of the candidates were asked the same questions, there was no uniform scoring or ranking system. Chairman Hupfer was the only person to take notes. (Hupfer testimony)
48. The Police Commission then went back into executive session to discuss who should receive the promotional appointment. The three police commissioners, Chief Camerota and Captain McCabe were present. Chief Camerota and Captain McCabe recommended the appointment of Nunez. (Hupfer Testimony)
49. Police Commission Chairman Hupfer has served on the City's police commission for seventeen (17) years. He retired from the State Police in 1985 and worked at Hanover Insurance until 1998 and then served as a Captain in the Franklin County Sheriff's office until 2009. (Hupfer testimony)

50. Hupfer testified that he was looking for a qualified, educated, very capable person who would be primarily involved in the administration of the department as opposed to line oversight. (Hupfer testimony)
51. Leonard Osowski has served on the City's police commission for twelve (12) years. He was self-employed for forty (40) years as a property manager. (Osowski testimony)
52. Asked what pre-established criteria he had for selecting someone for the promotional appointment, Osowski testified that he looked at how long someone was doing the job, that Nunez was doing a great job as lieutenant, that Nunez had more years of seniority, was bilingual and had less sick time than the Appellant. (Osowski testimony)
53. Felix Otero was appointed to the City's police commission in June 2010 and the July 8, 2010 meeting was the first time he served in that capacity. He was a Westfield police officer from 1988 to 1993 and left to become a correction officer. He currently works as a trial court officer. (Otero Testimony)
54. During Executive Session, the Police Commission selected Nunez for the promotional appointment. Since Nunez was ranked below the Appellant on the Certification, this constituted a bypass.
55. Upon determining that any candidate on a Certification is to be bypassed...an Appointing Authority shall, immediately upon making such determination, send to [HRD] in writing, [1] a full and complete statement of the reasons or reasons for bypassing a person or persons more highly ranked [negative reasons], or [2] of the

reasons for selecting another person or persons, lower in score or preference category [positive reasons]. (PAR.08 (3))²

The Police Commission provided three negative reasons for bypassing the Appellant including: 1) The Appellant submitted a letter ... “attacking the credibility and integrity of Police Chief John A. Camerota ... [and] he made false statements concerning the candidate chosen; 2) [the Appellant] “is not involved with the community at present”; and 3 “[the Appellant’s personnel records show[] that he has been out sick 56 days from 1-1-2008 to the present.” “Hipolito [Nunez] has proven to be a dedicated employee with no sick days over the past five years.” There was no mention of the interview performance of each candidate. (Exhibit 2)

56. The Police Commission also provided positive reasons for selecting Mr. Nunez including: 1) he is the most senior lieutenant with almost seven years more experience in rank than the other two candidates; 2) he is the only candidate who possesses a masters degree; 3) he is the only candidate who is bilingual; 4) over the last four years he has held the position of administrative lieutenant. (Exhibit 3)

Negative Bypass Reason 1: The Appellant submitted a letter ... “attacking the credibility and integrity of Police Chief John A. Camerota ... [and] he made false statements concerning the candidate chosen.”

57. Asked what “false statements” were contained in Valliere’s letter, Police Commission Chairman Hupfer testified that “I just think generally that, in Lt. Valliere’s mind, I don’t think he misquoted or made false accusations in his own mind. I believe that

² As of September 1, 2009, due to budgetary constraints, HRD has delegated the responsibility of ensuring sound and sufficient reasons to the individual cities and towns. Bypassed candidates, however, maintain their right of appeal to the Civil Service Commission. See Letter from Paul D. Dietl, Chief Human Res. Officer, HRD, to Mun. Appointing Auths., Human Res. Divs., Fire Chiefs, and Police Chiefs (Aug. 7, 2009), available at http://www.mass.gov/Eoaf/docs/hrd/cs/information/cs_aug_7_2009.doc. Since these selections occurred prior to September 1, 2009, however, the pre-existing process of first forwarding bypass reasons to HRD was followed here.

those accusations he made, he put the thought into it and thought it was true.” (Hupfer testimony)

58. Hupfer was asked if, during their deliberations in Executive Session, he described the Appellant’s letter as “character assassination”. Hupfer did not deny using those words and acknowledged stating during Executive Session that the Appellant had also “assassinated himself” by writing the letter. (Hupfer testimony)

59. Hupfer testified that there was “no real evidence” to support the allegations in Valliere’s letter and that it was mostly “hearsay”. (Hupfer testimony)

60. Chief Camerota acknowledged in his testimony before the Commission that he did mistakenly blame the Appellant for filing a grievance that the Appellant had nothing to do with. (Camerota Testimony)

61. Chief Camerota acknowledged that, during a retirement party in April 2008, the Appellant was the one lieutenant present who he did not publicly recognize as a future leader of the City’s police department. He testified that it was an oversight. (Camerota Testimony)

62. Chief Camerota acknowledged that both he and Nunez serve on the Board of Directors of the local Boys and Girls Club. (Camerota Testimony)

63. Chief Camerota acknowledged that he gave Nunez permission to use the Police Chief’s cruiser while he was out on medical leave but insisted this was not unusual. (Camerota Testimony)

64. Captain McCabe, an Appointing Authority witness, testified that he met with Nunez personally, told him it was inappropriate to be using the Chief’s vehicle around the

time that promotions were under consideration and ordered him to stop doing so.

(Testimony of McCabe)

65. Chief Camerota testified that he was aware of the 5-day suspension of Nunez in 1993 but only became aware of the settlement agreement that removed this information from his personnel file the day before the Commission hearing. (McCabe Testimony)

66. In regard to work Nunez performed on his house, Chief Camerota testified that, during the late Spring or early Summer of 2010, shortly prior to the promotional interviews, he and Nunez discussed replacing a porch on a two-family residence owned by the Chief. (Camerota Testimony)

67. Over a period of seven days in September 2010, shortly after the promotional appointments, Nunez, Nunez's two brothers, Nunez's son and members of Camerota's family replaced the porch on the two-family residence. (Testimony of Camerota)

68. I asked Chief Camerota if he believed then – or now – that having a conversation with one of the candidates up for promotional appointment about helping him construct a new porch on his property created even the appearance of a conflict of interest. He answered “no”. (Camerota Testimony)³

69. Chief Camerota did not disclose in writing that, at the time of the selection process, he had spoken with Nunez about assisting him with replacing a deck on his house, a

³ G.L. c. 268A, Section 23(b)(3) prohibits a municipal employee from knowingly or with reason to know acting in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that any person could improperly influence or unduly enjoy his favor in the performance of his official duties.

project that would ultimately be completed over a period of several days, requiring many hours of service from Nunez and members of his family.⁴

70. Hupfer did not dispute that Nunez was performing work on Chief Camerota's house, but said he had no problem with this given that the two men had been friends for many years. (Hupfer testimony)

71. When asked if Nunez performing services on Chief Camerota's house created even the perception of a conflict of interest, Hupfer said it would not because, having known the Chief for seventeen (17) years, he is confident that the Chief would not let this impact his recommendation. (Hupfer testimony)

72. Hupfer did not dispute that Nunez was driving Chief Camerota's cruiser around the time of the interviews, but he did not believe this created any perception problems because "anyone can drive the Chief's car." (Hupfer testimony)

73. Hupfer did not dispute that Chief Camerota may have failed to recognize Valliere as a future leader of the Department at a retirement party, but attributed any such omission to the Chief's dislike of public speaking. (Hupfer testimony)

74. Police Commissioner Osowski testified that he was surprised by the Appellant's letter and viewed it as "an attack on the Chief." (Osowski testimony)

75. Osowski testified that he took exception to being described as a "yes man" in the Appellant's letter. (Osowski testimony)

⁴ Section 23(b)(3) provides that "[i]t shall be unreasonable to so conclude if such . . . employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

76. Osowski testified that he didn't see the letter as a complaint about a potential conflict of interest, but rather, as "going after the Chief on his credibility. I've known the Chief for many years and I couldn't see it." (Osowski testimony)
77. Osowski testified he was not concerned that Nunez may have been working on Chief Camerota's house. He stated, "I've got a truck. I let guys borrow my truck. Everybody helps everybody else at the Department ... including myself." (Osowski Testimony)
78. Asked more generally if he considered it a problem if a candidate for promotion was providing services to a Police Chief at or around a promotion, Osowski replied, "no." (Osowski Testimony)
79. Police Commissioner Otero testified that he didn't think that the Appellant's letter was appropriate and he questioned the timing of the letter. (Otero testimony)
80. Otero testified that the Appellant's letter was lacking any evidence and based on hearsay and that he found the Chief's responses to the allegations to be "credible". (Otero testimony)
81. Asked if the work Nunez did for Chief Camerota was problematic, Otero stated, "because its Hipolito Nunes and he's done it in my house and he's done it over everybody's house ... and he's helped everyone out in the Department ... to be honest with you, I didn't even think that way." (Otero Testimony)
82. Otero testified that over the years, prior to him joining the Commission, Nunez has assisted him with work on his house on many occasions. The most recent assistance was approximately a year and a half ago when Nunez helped him with some plumbing work in his basement. (Otero Testimony)

Bypass Reason 2: “ [the Appellant] is not involved with the community at present”

83. The Appellant is a resident of Agawam and has two daughters. He testified that most of his “community involvement” centers around them, including volunteering for their sports teams, either on the field or through fundraising. His girlfriend also has two daughters who are actively involved in sports and he assists their teams as well. (Appellant Testimony)

84. The Appellant testified that he is an active member of the American Legion and has assisted them with fundraising. (Appellant testimony)

85. Commissioner Osowski testified that Nunez has “been involved in city politics for quite awhile” and has significant community involvement in Westfield including service for the local Boys and Girls Club, Kiwanis and the local Spanish American Association. (Osowski Testimony)

86. Osowski mistakenly testified that he thought the Appellant lived in Westfield. (Osowski Testimony) The Appellant lives in Agawam.

87. Chairman Hupfer was unaware that the Appellant lived in Agawam. (Hupfer testimony)

88. There were no questions during the interview regarding community involvement. Hupfer testified that his knowledge about Nunez’s community involvement came from his own personal knowledge. (Hupfer testimony)

Bypass Reason 3: “[the Appellant’s personnel records show/] that he has been out sick 56 days from 1-1-2008 to the present.” “Hipolito [Nunez] has proven to be a dedicated employee with no sick days over the past five years.”

89. Chairman Hupfer prepared the bypass reasons, including the issue of sick time usage, after meeting with Chief Camerota a short time after the night of the interviews.

(Hupfer Testimony)

90. The Appellant was not out sick for 56 days from 1-1-2008 to the present. Exhibit 12A is a copy of the actual sick time usage for the Westfield Police Department.

According to these records, the Appellant was out sick for 31 days during this time period. (Exhibit 12A)

91. None of the candidates were asked to explain their sick time usage during the interviews. (Hupfer, Osowski, Otero Testimony) Chief Camerota did not believe there was any pattern of abuse regarding the Appellant’s sick time usage. (Camerota Testimony) Commissioner Otero testified that he did not believe sick time was an issue in the selection. (Otero Testimony)

92. Nunez did not use any sick time during the period of question. However, he did not need to use sick time as he had a considerable amount of “time coming” that he had earned by working extra hours. (Camerota Testimony)

Other Positive Reasons Associated with Selecting Nunez

93. As previously referenced, in addition to the negative reasons, the Police Commission cited the following positive reasons for selecting Mr. Nunez: 1) he is the most senior lieutenant with almost seven years more experience in rank than the other two candidates; 2) he is the only candidate who possesses a masters degree; 3) he is the

only candidate who is bilingual; 4) over the last four years, he has held the position of administrative lieutenant. (Exhibit 3)

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.

The Appellant, a 30-year veteran of the Westfield Police Department, who currently serves as a lieutenant, was bypassed for the position of Police Captain. The functional responsibilities of this Captain would include administrative oversight, as opposed to patrol oversight, of the City's police department. He was bypassed by Hipolito Nunez, another lieutenant.

The Appellant was ranked first on the civil service Certification used to make the promotional appointment and Nunez was ranked second. It appears that the Appellant's ranking was based on a score of 88 and Nunez's ranking was based on a score of 87.

As part of the decision-making process, the City's 3-member Police Commission, the Appointing Authority, interviewed the three candidates and consulted with the Police Chief, to whom the Captain would report.

A few days before the interviews, the Appellant drafted a seven-page letter to all three of the Police Commissioners and then hand-delivered it to their homes, with the intent of speaking to each of them individually. The letter stated several reasons why the Appellant believed that the Police Chief was predisposed to recommending Mr. Nunez for the promotion and not recommending the Appellant. Thus, he asked that the Police Chief be required to recuse himself from the promotional process.

Immediately prior to the interviews, the Police Commission convened an executive session to review the Appellant's letter. After listening to the Appellant and the Police Chief, the Police Commission determined that the allegations in the Appellant's letter were unfounded and constituted an attack on the Police Chief's integrity. The Police Commission then adjourned their executive session and conducted the promotional interviews in public.

After the interviews were completed, the Commission met with the Police Chief and the one other Police Captain and asked for their recommendations. Both of them recommended Nunez for promotion. All three Police Commissioners concurred with their recommendations and voted to promote Mr. Nunez. The Chairman subsequently drafted the reasons for bypass after further consultation with the Police Chief.

The three negative reasons for bypassing the Appellant were that the Appellant submitted a letter that purportedly attacked the credibility and integrity of the Police Chief; the Appellant's lack of community involvement; and the fact that the Appellant had 56 sick days since January 2008.

The Police Commission also provided positive reasons for selecting Mr. Nunez including his seniority in the next lower title; his masters degree; the fact that he is bilingual; and that he held the position of administrative lieutenant over the past four years.

The Police Commission has not established by a preponderance of the evidence that the negative reasons proffered for the bypass of the Appellant were sound and sufficient. There was no reasonable justification at the time of the bypass for the Police Commission to conclude that the letter submitted by the Appellant prior to the interview attacked the credibility and integrity of the Police Chief and contained false statements about the candidate selected. While the Appellant may have exercised poor judgment in hand-delivering the letter to the Police Commissioners and seeking to speak to them personally just prior to the interviews, the examples cited in the letter appear to be well supported and, in most cases, not disputed by the Police Chief. These facts did certainly present a

bona fide basis to seek the Chief's recusal from the imminently pending interview and selection process.

Chief Camerota candidly acknowledged that, shortly prior to the interviews, he spoke with Mr. Nunez about replacing a porch on the Chief's two-family home. Over a period of seven days in September 2010, shortly after the promotional appointments, Nunez, Nunez's two brothers, and Nunez's son helped members of Camerota's family replace the porch on the two-family residence.

While the Police Commissioners do not dispute the above-referenced facts, they each concluded that the Appellant's allegation that this arrangement created the appearance of a conflict of interest was an attack on the Police Chief's credibility and integrity. Police Commission Chairman Hupfer said he had no problem with the work performed by Nunez given that the two men (Camerota and Nunez) had been friends for many years.

Police Commissioner Osowski testified he was not concerned that Nunez may have been working on Chief Camerota's house. He stated, "I've got a truck. I let guys borrow my truck. Everybody helps everybody else at the Department ... including myself."

Police Commissioner Otero stated, "because its Hipolito Nunes and he's done it in my house and he's done it over everybody's house ... and he's helped everyone out in the Department ... to be honest with you, I didn't even think that way." Otero testified that over the years, prior to him joining the Commission, Nunez has assisted him with work on his house on many occasions. The most recent assistance was approximately a year and a half ago when Nunez helped him with some plumbing work in his basement.

G.L. c. 268A, Section 23(b)(3) prohibits a municipal employee from knowingly or with reason to know acting in a manner that would cause a reasonable person having

knowledge of the relevant circumstances to conclude that any person could improperly influence or unduly enjoy his favor in the performance of his official duties.

While the State Ethics Commission is the proper authority to ultimately determine if Chief Camerota, by participating in the review process at the same time that Nunez was preparing to perform services on his home, created an appearance of a conflict of interest, the Police Commission had no reasonable justification to conclude that the Appellant's concern was an attack on the integrity and credibility of the Police Chief. It was perfectly reasonable for the Appellant to be concerned that one of the three candidates eligible for promotion had committed to performing several days of services on the Police Chief's home at the time of the interviews. The inability of the Police Commission to recognize this appears to show a glaring misunderstanding of state ethics laws and their responsibility to guard against the appearance of bias and favoritism in a selection process.

Similarly, most of the other examples cited in the Appellant's letter were well substantiated and/or uncontested by the Police Chief. Nunez did use the cruiser assigned to the Police Chief around the time of the interviews and was admonished by a Police Captain for doing so. Chief Camerota acknowledged that he failed to recognize the Appellant as a future leader of the Department at a retirement party and that he did mistakenly blame the Appellant for filing a grievance that the Appellant had nothing to do with. Also, Chief Camerota acknowledged that he does serve on the Board of Directors of the local Boys and Girls Club with Nunez.

For all of the above reasons, the Police Commission was not justified in concluding that the Appellant's letter contained false statements and/or attacked the credibility and integrity of the Police Chief.

Further, the Police Commission has not shown that it had reasonable justification to bypass the Appellant based on his purported lack of involvement with the community. None of the candidates were asked questions about their community involvement during the interview process. Two of the three Commissioners weren't even aware what town the Appellant lived in. They were unaware that the Appellant is involved with his local American Legion and his daughter's school sports' teams. The Commissioners – and the Police Chief – gleaned information about Nunez's community involvement through their own personal knowledge, with Commissioner Osowski testifying that Nunez had “been involved in City politics for quite awhile.” This was not a fair, impartial procedure upon which to assess each applicant's community involvement.

The third negative reason stated for bypassing the Appellant is just plain wrong. The Police Commission stated that the Appellant had been out sick 56 days over the past three years. He was not. The Appellant was out sick for 31 days during this time period. Further, it appears that the reason that Nunez had no sick days was that he opted to use “time coming” that he had earned by working extra hours.

The positive reasons proffered by the Police Commission for selecting Nunez are a closer call. They include the undisputed fact that Nunez: 1) has greater seniority in rank than the Appellant, 2) has a masters degree; 3) is bilingual; and 4) previously held the position of administrative lieutenant (performing many of the same duties the new Captain would perform).

Although education, seniority, training and experience are already built into the test scores (G.L. c. 31, § 22), this should not preclude an Appointing Authority from considering these 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.

After carefully listening to all of the witness testimony, including the three Police Commissioners, I conclude that, in this particular case, the Police Commission was not reasonably justified in bypassing the Appellant based on Nunez's seniority, education or his bilingual skills. Some Police Commissioners did not cite these reasons as a pre-established criteria for promotion and there was scant evidence to show, in this particular case, that the Police Commission seriously considered these factors. Further, the Police Commission established an insurmountable obstacle for the other two candidates and effectively excluded them from consideration by establishing prior experience as an administrative lieutenant as a criterion for selection. Since Nunez was the only candidate who met that criterion, Nunez was effectively the only candidate under serious consideration for the position. This is exactly the type of predetermined selection process that the Commission is here to guard against and it represents an appropriate occasion for the Civil Service Commission to act.

In reaching this conclusion, I carefully considered the Police Commission's argument that the Appellant does not come before the Commission with clean hands. I agree. In regard to a prior promotional process, he asked a subordinate police officer to lobby the City's then-Mayor on his behalf and it is clear that he personally lobbied a city councilor who, regrettably, appeared eager to engage in backroom-type deal making in addition to

making inexcusable remarks during a recorded phone conversation which I opted not to repeat verbatim in the findings. Finally, the Appellant sought to have one-on-one conversations with each of the Police Commissioners days before the interview. None of these actions are acceptable, but they can not excuse and do not justify the Police Commission's impermissibly tainted selection process here. Nor do they relieve the Civil Service Commission from ensuring that this important selection is based on basic merit principles.

ORDERS

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. The promotional appointment of Hipolito Nunez to the position of permanent Police Captain in the Westfield Police Department is hereby ***vacated*** and, retroactive to August 8, 2010, his appointment is to be deemed as temporary.
2. Mr. Nunez may continue to serve as a temporary Police Captain in the Westfield Police Department until such time as the Police Commission completes a new review process for a permanent Police Captain that is fair, impartial and based on basic merit principles.
3. The state's Human Resources Division (HRD) shall reactivate the 2008 eligible list of candidates for Police Captain in the Westfield Police Department for the sole purpose of allowing the Westfield Police Commission to conduct a new review process.

4. Certification No. 280251, containing the names of three candidates willing to accept the promotional appointment to the position of Westfield Police Captain, is reactivated.
5. Within 180 days of receipt of this order, the Police Commission shall conduct a new review process for Police Captain that is fair, impartial and based on basic merit principles.
6. As part of the new review process, the Police Commission shall use the services of an independent, outside consultant that has experience with assisting municipalities with the appointment and promotion of public safety officers.
7. The consultant shall have the sole responsibility of interviewing the three candidates eligible for promotion. The candidates' interviews shall be rated on criteria established by the consultant that is consistent with the duties and responsibilities of the Police Captain and that provide all candidates with a fair opportunity for consideration.
8. At the conclusion of the interviews, the consultant shall provide the Police Commission with a summary of the interviews along with any ratings and/or rankings based on the interviews that would assist the Police Commission in making its decision.
9. The consultant shall not be informed of and/or use as a criteria for assessing the candidates the letter submitted by the Appellant to the Police Commission in which he requested that Chief Camerota recuse himself from the selection process.

10. The Police Commission shall convene a public meeting to review the summary and any ratings or rankings prepared by the consultant regarding the interviews. After giving appropriate consideration to the consultant's summary and ratings during a public meeting, the Police Commission shall appoint a Police Captain from the three eligible candidates. In making its appointment, the Police Commission shall not use the same reasons proffered for the 2010 bypass of the Appellant.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on August 11, 2011.

A True copy. Attest:

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:
Kathleen E. Degnan, Esq. (for Appointing Authority)
William J. Fennell, Esq. (for Appellant)
John Marra, Esq. (HRD)