

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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NORMAN R. LUSIGNAN, JR.
ROBERT N. TOBIAS
JESUS R. RODRIGUEZ
Appellants

CASE NO: G2-05-291; G2-07-374
G2-05-292; G2-07-375
G2-05-294; G2-07-373

v.

CITY OF HOLYOKE
GAS & ELECTRIC DEPARTMENT,
Respondent

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Commissioner:

Paul M. Stein

DECISION

The Appellants, acting pursuant to G.L.c.31, §2(b), brought these appeals against the City of Holyoke Gas & Electric Department (Holyoke G&E), arising from their non-selection for appointment to the labor service position of Working Foreman Electrical/Gas Service Repairman. In a prior decision of the Civil Service Commission (the Commission) on July 7, 2007 (20 MCSR 401), the Commission granted the Appellants certain equitable relief that directed Holyoke G&E to follow appropriate procedures required to fill the position permanently, as opposed to provisionally. On July 6, 2008, after hearing Appellants' motions concerning compliance with the

Commission's prior decision, a majority of the Commission ordered an evidentiary hearing of the matter, limited to the issue of whether the appellant Norman R. Lusignan, Jr. was "qualified for the promotional position in question" (21 MCSR 287), which hearing was held before the Commission sitting at the Springfield State Office Building on July 23, 2008 and August 27, 2008, and recorded on three (3) audiocassettes. Mr. Lusignan testified on his own behalf; Holyoke G&E called three witnesses. A Joint Stipulation of Facts and eleven (11) Exhibits were received in evidence (Joint Exhibits 1 through 9, Respondent's Exhibit 1, Appellant's Exhibit L-2) and one additional Exhibit was marked for Identification (Appellant's Exhibit L-1). Mr. Lusignan's post-hearing submission was received on October 10, 2008 and Holyoke G&E's post-hearing submissions were received on October 10 and 17, 2008.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits and the testimony of the Appellant; Holyoke G&E Acting Gas Superintendent Daniel J. Smith; Holyoke G&E Human Resources Coordinator Roger Fortin; and Holyoke G&E Manager James M. Lavelle, and inferences reasonably drawn from the evidence, I make the findings of fact below.

Undisputed Procedural Background

1. On or about February 7, 2005, Holyoke G&E conspicuously posted a labor service opening for provisional appointment in the title of Heating and Appliance Service Working Foreman. All interested persons were encouraged to apply in writing before February 25, 2005. (*Undisputed Facts; Joint Exhibit 1*)

2. Four Holyoke G&E employees within the departmental unit applied for the position and all were interviewed. The applicants, in order of their seniority were the

Appellants, Jesus R. Rodriguez, Norman R. Lusignan, Jr., and Robert N. Tobiasz, followed by the applicant Thomas A. Sears. (*Undisputed Facts*)

3. For labor service positions, the Massachusetts Human Resources Division (HRD) has delegated responsibility to the City of Holyoke (Holyoke) Labor Service Director, who is responsible for maintaining lists of the various labor service titles of its municipal employees including employees of Holyoke G&E. (*Undisputed Fact; Administrative Notice, 20 MCSR 401*)

4. On April 29, 2005, Holyoke G&E filed a Civil Service Requisition Form 13 with the Holyoke Labor Service Director and was notified that there was no eligible list for the position. Mr. Sears, the least senior employee was selected for provisional appointment to the position. The Appellants' appeals ensued. (*Undisputed Facts*)

5. On July 3, 2007, the Commission granted the appellants equitable relief pursuant to its powers inherent in Chapter 310 of the Acts of 1993, and ordered: (1) Holyoke G&E request that the Holyoke Labor Service Director establish and maintain a list for the position; and (2) upon certification of the names of three persons eligible for and willing to accept the position, the prior provisional appointment be discontinued and the position filled on a permanent basis by October 1, 2007 in accordance with applicable sections of G.L.c.31 and Personnel Administration Rules (PAR). (*Undisputed Facts*)

6. On or about August 30, 2007, Holyoke G&E requested the Holyoke Labor Service Director establish and maintain a list for the position in question. On or about September 27, 2007, the Holyoke Labor Service Director certified a list of eligible applicants, which list contained the same four names, in the same order of seniority, as those who applied for the position in February 2005. (*Undisputed Facts; Joint Exhibit 6*)

7. On October 1, 2007, Holyoke G&E made a permanent appointment of Mr. Thomas Sears to the position. (*Undisputed Facts; Administrative Notice, 21 MCSR 288*)

8. In October 2007, the parties filed motions presenting questions as to whether the permanent appointment of Mr. Sears complied with the Commission's July 3, 2007 decision. The Appellants also filed a second series of appeals with the Commission challenging the October 1, 2007 appointment as an unlawful "bypass". (*Undisputed Facts; Administrative Notice, 21 MCSR 288 & Claims of Appeal*)

Initial 2005 Position Description

9. The position in question falls within the MuniClass Manual Labor Service Class III (Mechanics and Craftsmen) and Occupational Codes 2854B (Working Foreman Electrical Appliance Repairman title in the Electrical Equipment Repairing Series) and 4208E (Working Foreman Gas Service Repairman title in the Gas Fitting Series. (*Joint Exhibits 1, 2, 3 & 5*).

10. According to the general description provided in the MuniClass Manual, a "working foreman":

Supervises and works with a small group (normally ranging from 3-10) of journeyman craftsmen, workers at a lower skill level and/or laborers. Makes work assignments, enforces safety regulations, maintains discipline, orders supplies and equipment, and reviews work of the crew assigned to him during progress and upon completion for compliance with instructions and conformance with accepted trade practices. The working foremen of journeymen must be skilled in the trade being supervised. In all cases performs the same type of work as individual supervised."

(*Joint Exhibit 3*)

11. The original notice of vacancy posted by Holyoke G&E on or about February 7, 2005 contained the following description of the position:

Duties:

Supervise, direct and perform the installation and repair of gas & electric appliances of all types such as ranges, furnace, water heater, boilers, roof top units, ovens and other

appliances. Ensure that customer service meets or exceeds customer expectations at all times; communicate with customers regarding service; schedule all work requests in a timely manner. Work with Supervisor to maintain, update and develop training programs for service and related personnel and to ensure personnel are properly trained; maintain, update and develop standard operating procedures for service and related work; maintain current, complete and accurate record of all work activities and related information. Work with supervisor to manage employee performance management system and manage capital and expense budgets. Position requires emergency response, shift work and rotating on-call.

Requirements:

- Demonstrated ability to manage personnel
- Ability to develop employee skills to meet customer demands and maintain efficiency
- Excellent verbal and written communication skills
- 5-10 years experience in a service related industry
- Associates degree, or equivalent, in HVAC, appliance service, or related program
- Proficiency with operating and maintaining gas & electric residential and commercial appliances and HVAC equipment; including hot air furnaces, steam boilers, hot water boilers, hot water heaters, unit heaters, stoves, dryers, etc.
- Working knowledge of plumbing, piping & electrical code
- Ability to read and interpret wiring diagrams and prints

Preferred Requirements:

- Gas fitter, pipe fitter, plumber
- 3-5 years of demonstrated supervisory experience in the service field
- 3-5 years similar management experience

(Joint Exhibit 1)

12. The original Position Description (HRD Form 30) for the position, prepared under the signature of James M. Lavelle, Holyoke G&E Manager, incorporated most of the “Duties” and “Requirements” information quoted above from the posting and in the section of the Form 30 entitled “QUALIFICATIONS AND ENTRANCE REQUIREMENTS” provided the following specific description of “required knowledge, abilities and skills [and] entrance requirements such as experience and/or education”:

Working Knowledge of:

- Gas & electric residential and commercial equipment; including proper installation and maintenance procedures.
- Operating & maintaining gas & electric residential & commercial appliance and HVAC equipment, including hot air furnaces, steam boilers, hot water boilers, hot water heaters, unit heaters, stoves, dryers, etc.
- Physical properties of natural gas and propane
- Methods and materials used in service maintenance work.
- Federal and State safety pertaining to gas-fired equipment installation.

- Combustible and electronic gas detectors.
- Pressure switches and industrial oven control systems.
- Electronic relays, combustion programmers, electrical controls and circuits.
- PC's and common office software applications (MS Word & Excel)

Ability to:

- Develop employee skills to meet customer demands and maintain efficient operation.
- Read and interpret wiring diagrams and prints
- Manage Departmental personnel.
- Communicate well with public & management.

Entrance Requirements:

- 5-10 years experience in service related industry.
- Associates degree, or equivalent, in HVAC, appliance service, or related program.

Preferred Requirements

- Gas fitter, pipe fitter, plumber
- 3-5 years of demonstrated supervisory experience in the service field
- 3-5 years of similar management experience

(Joint Exhibit 2)

2007 Selection Process

13. Shortly prior to the initiation of the 2005 appointment process for the working foreman position, Holyoke G&E had hired Mr. Roger Fortin in the management position of HR Coordinator. Mr. Fortin was minimally involved in the initial hiring process for the position on a provisional basis, but he participated fully in the 2007 hiring process for the permanent position. *(Testimony of Fortin, Lavelle, Smith)*

14. In his letter dated August 30, 2007 to the Holyoke Labor Service Director requesting the certified list for reposting the position, Mr. Lavelle enclosed a revised Form 30 which he described as containing “the minimum requirements for anyone wishing to be added to the list.” The Form 30 he attached neither dated nor signed. The evidence reasonably infers that the revised Form 30 was prepared by Mr. Fortin in July or August 2007, and forwarded to Mr. Lavelle who attached it to his August 30, 2007 letter, having intended to approve it. *(Testimony of Lavelle; Joint Exhibit 5)*

15. The undated revised Form 30 is identical to the initial Form 30, except that description of “Entrance Requirements” in the section of the Form 30 entitled “QUALIFICATIONS AND ENTRANCE REQUIRMENTS” , was revised to read as follows:

- Demonstrated ability to manage personnel
- Ability to develop employee skills to meet customer demands and maintain efficiency
- Excellent verbal and written communication skills
- 5-10 years experience in service related industry.
- Associates degree, or equivalent, in HVAC, appliance service, or related program.
- Proficiency with Microsoft Office, or equivalent, office software applications, incl Word and XL

(Joint Exhibit 5)

16. On or about September 11, 2007, Jeanette Barrios, Holyoke Labor Service Director, prepared Certification 2007-2145, which she forwarded to Holyoke G&E by letter on September 24, 2007, certifying Messrs. Tobiaz, Lusignan, Rodriguez and Sears, in that order, as “eligible applicants” for the position. *(Joint Exhibit 6)*

17. On or about September 13, 2007, Holyoke G&E posted a revised notice of vacancy for the position. The revised notice was prepared by Mr. Fortin. Except for changing the heading “Requirements” to read “Minimum Requirements”, and other minor edits not relevant to the dispute, Mr. Fortin’s form of revised posting was copied, essentially verbatim, from the initial February 7, 2005 notice. The notice requested interested applicants respond to Mr. Fortin on or before September 28, 2007. *(Joint Exhibits 1 & 4; Testimony of Fortin)*

18. On September 26, Mr. Fortin and Mr. Smith conducted a panel interview with each of the four applicants. (Mr. Smith had replaced Mr. Wieland, who had been one of the members of the 2005 interview panel, due to Mr. Wieland’s assignment to other urgent department matters.) A written memorandum describing the interview process and

the conclusions of the interview panel members was forwarded to Mr. Lavelle on or about September 28, 2007. The interview memorandum reported that Mr. Lusignan was disqualified because he did not meet the entrance requirements and that, of the three other applicants who did meet the entrance requirements, Mr. Sears was the most qualified choice. (*Joint Exhibit 7; Testimony of Fortin, Smith*)

19. The interviews of the four candidates used the same specified series of questions to determine their qualifications. There is no written record of the questions or the responses, other than what is reported in the interview memorandum. (*Joint Exhibit 7; Testimony of Fortin, Smith*)

20. As to Mr. Lusignan, the interview memorandum states:

It was determined that Mr. Lusignan did not meet several of the entrance requirements including: demonstrated ability to manage personnel; ability to develop employee skills to meet customer demands and maintain efficiency; proficiency with Microsoft Office; and excellent verbal and written communication skills. During the interview process Mr. Lusignan acknowledged that he had no supervisory experience. In answering the supervisory situational questions his responses indicated that he would tend to delegate responsibility for disciplinary matters to upper management and the Human Resources Department, and he did not demonstrate an understanding of the requirement of a foreman to be familiar with, and to enforce certain elements of applicable policies and procedures, or for the need to document pertinent information. Also he was unable to adequately describe how to develop and implement an effective training program for service technicians, other than to offer general suggestions such as purchasing more training videos and getting more manufacturer's training. He felt strongly that the Foreman should conduct all training and was inflexible about considering peer training. Mr. Lusignan was also unable to suggest any specific plans on improving operational efficiencies. Mr. Lusignan's application noted that he has Internet and computer skills, however he was not able to assemble a simple spreadsheet during the interview, and stated that he would need training to do so. Finally, Mr. Lusignan's communications skills are a concern as his commentary during the interview was often blunt, negative, and gave a clear indication that his approach would not foster positive team development. Mr. Lusignan is a capable technician but does not meet the qualifications for this position.

(*Joint Exhibit 7*)

21. The interview memorandum indicated that all of the other three applicants had some degree of supervisory experience (ranging from Mr. Tobiasz “limited” experience running HVAC installation jobs on the side, Mr. Rodriguez experience “working as a group leader of up to 15 people in a factory environment and overseeing his own alarm service side business” and Mr. Sears “more than 20-years related supervisory experience with includes thirteen years running his own mechanical contracting business.” All three other candidates were described to have “good” communications and inter-personnel skills; they performed satisfactorily in submitting the sample foreman’s report which included a spreadsheet and summary write-up. Only Mr. Sears did a “good job” in answering the questions on supervisory situations, policy and procedure and training; Mr. Tobiasz did a “fair job” in this area; Mr. Rodriguez’s performance appears to have been virtually indistinguishable, and just about as poor, as the description given for Mr. Lusignan in these areas. (*Joint Exhibit 7*)

22. All four candidates possess the 5-10 years “service related” experience and minimum educational experience – Mr. Sears holds a Bachelor’s Degree in Management from Lesley College (2001) and 28 years related service experience; the other candidates are high school graduates with the required “equivalent” HVAC, appliance service or related program training. (*Joint Exhibit 7; Joint Stipulation of Facts*)

23. By letter dated October 1, 2007, Mr. Lavelle reported to Ms. Barrios hat he found Mr. Lusignan “failed to meet the minimum entrance requirements for the position” for the reasons outlined in the interview memorandum and Mr. Lusignan’s application, copies of which he included in his letter. Mr. Lavelle also reported that he had selected Mr. Sears for appointment to the position. (*Testimony of Lavelle; Joint Exhibit 7*)

24. Mr. Lavalley elaborated on his opinion at the hearing. As the General Manager, a position that he described as the equivalent of the “CEO” of a private company, he perceived that the service department needed to step up the quality of supervision provided for a number of specific reasons, including job turnover, retirements, low morale and productivity. He also commented that the service operation was located remotely from the main headquarters and that additional on-site management was essential to provide the necessary quality of customer service. (*Testimony of Lavalley*).

25. Mr. Lavalley arrived at his conclusion that Mr. Lusignan was unqualified for the position of working foreman based on his review of the report of the interview conducted by Mr. Smith and Mr. Fortin, as well as his own personal interactions with Mr. Lusignan and other information about him contained in his personnel records. I found Mr. Lavalley to be a well-spoken and truthful witness who showed a consistent command of the relevant facts and the reasoning behind his conclusions. He demonstrated by his demeanor and professional bearing, both during direct and cross-examination, an honest belief that his actions were taken solely in the best interests of the Holyoke G&E and its customers in mind and with honest intent to comply with the requirements of the civil service laws. (*Testimony of Lavalley*)

26. The two main areas of concern for Mr. Lavalley were Mr. Lusignan’s failure to establish any demonstrated ability to manage personnel and his lack of judgment when it came to his verbal communications skills. (*Testimony of Lavalley*)

27. Mr. Lavalley provided credible examples of how Mr. Lusignan’s responses to management and training situational questions at the interview were unacceptable. For example, Mr. Lusignan’s suggestion that he would defer to upper management and HR

on employee relations issues was exactly not what Mr. Lavalle was looking for in picking someone to step up the level of the management capacity of the service department by putting a qualified supervisor on-site to hold employees more directly accountable. (*Joint Exhibits 8 & 9, Respondent's Exhibit 1; Testimony of Lavalle, Smith, Fortin*)

28. Similarly, Mr. Lavalle gave credible testimony that a supervisor must handle volatile situations, sometimes dealing with angry employees and customers, and must know how to diplomatically get a point across. Mr. Lavalle pointed to Mr. Lusignan's sometimes blunt, disrespectful and negative verbal communications skills as an "unacceptable risk" in dealing with peers, superiors and ratepayers. Mr. Lavalle pointed to several personal interactions and entries in Mr. Lusignan's personnel records to illustrate how he believed Mr. Lusignan's "mouth can sometimes get him into trouble." (*Testimony of Lavalle; Joint Exhibits 1, 8 & 9*)

29. Mr. Lavalle was also concerned that Mr. Lusignan was unable to complete the Excel Spreadsheet exercise as part of his interview, which was not disputed. The preponderance of evidence reasonably infers that the exercise was not complicated, that computer technology was becoming an ever-increasingly important component of the work of the service department, and that all supervisory personnel at Holyoke G&E, including the working foreman needed to be proficient in the use of this software. (*Testimony of Lavalle, Smith, Fortin, Lusignan; Joint Exhibit 7*)

Evidence of Mr. Lusignan's Qualifications

30. Mr. Lusignan has more than 20 years service as a Holyoke G&E service technician. There is no dispute that he is a qualified technician and that he is a dedicated and loyal employee of Holyoke G & E whose seniority in the service department makes

him the second-most senior technician in length of service, junior only to Mr. Tobiasz by about a year. (*Joint Exhibit 7; Stipulation of Facts; Testimony of Lusignan*)

31. Mr. Lusignan's duties as a service technician have included providing on-the-job training of new hires, which entails instructing them on the proper use of the two-way radio used to communicate with dispatch, how to prepare the departmental log sheets and required reports, and pairing up with trainees on the road as needed to provide assistance on the "technical end of the job." (*Testimony of Lusignan*)

32. Mr. Lusignan did not entirely dispute that he was "unprepared" and performed poorly at the 2007 interview, which he attributed to short notice as well as the fact that he had the impression that the interview was a formality and the decision to pick Mr. Sears was pre-determined. He claimed that he provided a lot of information, especially as to his ideas for employee training, in the original 2005 interview, which was not made available to the second interview panel. He admitted that he did not complete the Excel spreadsheet exercise, but was sure he could be trained to do it. He also agreed that he had no supervisory experience or training, and did not ask for such training, although it was pointed out that Holyoke G&E provided 100% tuition reimbursement to employees to further their education. (*Testimony of Lusignan, Smith, Fortin*)

CONCLUSION

Applicable Civil Service Law and Rules

As a delegated community for labor service functions, the Labor Service Director in Holyoke stands in the position of the Personnel Administrator, and is authorized to approve appointments such as the position of working foreman with Holyoke G&E, as the appointing authority, in accordance with the provisions set forth in G.L.c.31, §28 &

§29 and the applicable Personal Administration Rules (PAR). PAR.19 provides, with respect to such delegation of labor service appointments:

(2) Original Appointment

- ...
- (e) Selection and original appointment shall be made as provided in PAR.09 [i.e. [2n+1]
 - (f) The administrator may establish minimum requirement, including experience requirement, in addition to those imposed by statute for Class II and Class III positions; the administrator or local labor service director may also require a practical test to determine the qualifications of applicants for such positions.

(3) Promotional Appointments

- (a) 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 administrator. If there are less than the requisite number of persons, selection may be made from the lesser number.¹

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, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil

¹ The record is somewhat unclear as to whether Holyoke G&E filled the position of working foreman based on a posting for a permanent promotional appointment or original appointment. The paperwork returned after certification stated that Mr. Lusignan "failed to meet minimum entrance requirements" and the reasons supporting that determination clearly intend to apply the above-cited reference to the lack of the necessary "qualifications" as prescribed in PAR.19(2)(f) or PAR.19(3)(a) While any distinction in this case may simply be a matter of form over substance, the Commission decides the appeal under the rules of original appointment under PAR.19(2)(f). The Commission would not reach any different result if the appointment were treated as promotional.

Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983). An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928).

“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’” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

“The appointing authority, in circumstances such as those before us, may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment.” Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 666, 277 N.E.2d 273, 277 (1971) All candidates must be adequately and fairly considered. The Commission has been clear that it will not uphold the bypass of an appellant where it finds that “the reasons offered by the appointing authority were untrue,

apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991) The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear 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, 133 N.E.2d 489 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001) It falls within the ambit of the Commission's fact-finding responsibility, through the person who heard the testimony, to determine the credibility of witnesses, the probative weight to be given to the evidence and, when required, to provide a “thorough and reasoned explanation”, supported by the record, when choosing between fairly conflicting views. See Town of Brookfield v. Labor Relations Comm'n, 443 Mass. 315, 322, 821 N.E.2d 51, 57 (2005); Covell v. Department of Social Services, 439 Mass. 766, 787n.19, 791 N.E.2d 877, 893 (2003); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141-42,

680 N.E.2d 45, 52-53 (1997); Herridge v. Board of Registration in Medicine, 420 Mass. 154, 164-65, 648 N.E.2d 745, 750-51 (1995); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530-31, 517 N.E.2d 830, 832-33 (1988); School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120, 379 N.E.2d 1077, 1081 (1978).

Summary of Conclusion

Applying these principles to the evidence, the Commission concludes that Holyoke G&E has met its burden to establish that: (1) Mr. Lusignan did not possess one or more of the necessary qualification for appointment as working foreman and (2) the appointment of Mr. Sears from the three qualified candidates meets all applicable requirements of civil service law and rules. The Commission is troubled, however, by the fact that the critical deficiencies that disqualified Mr. Lusignan are due, in part, to his long tenure in a non-supervisory position with Holyoke G&E which did not present the opportunity for him to acquire or improve the skills that could have qualified him for advancement. A dedicated public employee should not be necessarily disadvantaged by having chosen a career in the public sector and, thereby, having missed the opportunity to acquire private-sector experience deemed necessary for promotion. Among the key elements of basic merit principles are “training and development for employees, as needed, to assure the advancement and high quality performance of such employees” as well as “retaining of employees” and “correcting inadequate performance”. G.L.c.31,§1. Accordingly, the Commission will exhort both the Holyoke G&E and Mr. Lusignan to collaborate and to take appropriate pro-active measures to provide Mr. Lusignan, and

others, with training and experience in the supervisory, communications and data processing skills needed to qualify for advancement in the future.

Mr. Lusignan's Disqualification

While the evidence supports the conclusion that Mr. Lusignan is a capable technician, the preponderance of the evidence also supports the conclusion that Holyoke G&E is justified in its conclusion that Mr. Lusignan did not possess the necessary supervisory ability and certain communications skills it reasonably could require of a working foreman.

Mr. Lusignan appears to argue that, because his name was certified as an "eligible" candidate on the certification, necessarily, he must be qualified for the position. As the Commission's prior decisions in this matter have stated, however, under PAR.19, the determination of the personnel administrator as to the facial qualifications necessary to be placed on an eligible labor service list is distinct from the determination as to whether any particular candidate actually **possesses** the necessary qualifications for appointment. See Lusignan v. Holyoke Gas & Electric, 21 MCSR 287, 289 (2008) The Holyoke G&E was fully entitled to employ an interview process that included situational exercises and other practical testing to assess the qualifications of candidates. See, e.g., PAR.19(2)(f) & (3)(a). Although it would have been preferable if Holyoke G&E had presented better records of the interview process at the hearing, the evidence introduced does sufficiently establish that the interview process met the appropriate standards of fairness, impartiality and equal treatment. The Commission notes that, although Mr. Lusignan criticizes the procedure as unfair, it appears that all three other candidates (including the other two

candidates senior to Mr. Sears) took the interviews seriously, and gave satisfactory responses to the situational exercises and passed both practical tests.

The Commission also finds nothing inherently unfair or improper in any of the specific minimum requirements used to measure the qualifications of Mr. Lusignan and the other candidates. As to supervisory ability, Holyoke G&E was clear that it wanted to see that any applicant could demonstrate management “ability” and, while prior actual experience was helpful, it was not essential. Mr. Lusignan had the same opportunity to demonstrate his ability by satisfactory responses to the management situational questions as did the other candidates. The Commission is persuaded that the reasons given for Holyoke’s conclusion that he did not offer acceptable answers to these questions are sound and sufficient. The evidence does not support a conclusion that Mr. Lusignan was asked any different questions, or evaluated any differently than the other candidates.

As to the evaluation of Mr. Lusignan’s communications skills, the Commission is persuaded that, although his written skills were minimally acceptable, his verbal communications were not. The managers who testified about him from personal knowledge, as well as the documented incidents in the personnel reviews, and the observations of Mr. Lusignan’s demeanor and testimony before the Civil Service Commission, are all consistent with the conclusion that his communications skills do not measure up to the level that Holyoke G&E may reasonably require in a supervisor. In particular, the Commission notes that Mr. Lusignan was “unprepared” with unsatisfactory answers at the interview; he undiplomatically confronted Mr. Lavalley when he was rejected for the appointment in 2005; and he could not fully discredit the repeated notations in his personnel evaluations from 2004 through 2007 – by different managers –

that flag his communications problems (the 2007 evaluation says, for example, that he can be “argumentative and overbearing” and “initially does not respond well to change”). Although Mr. Lusignan sees himself in a different light, and there is no question that his communications skills may be better today than they were three years ago, his own self-evaluation does not overcome the credible, substantial evidence that supports the Holyoke G&E conclusion that his skills did not match their requirements.²

By the same token, Holyoke G&E presented sound and sufficient evidence that a working foreman needed to be able to work proficiently with computer software and with Microsoft Excel in particular. Although this requirement was not contained in the job posting, it does appear in both the 2005 and August 2007 versions of the official job description (Form 30). It is not unreasonable to expect that an applicant for the supervisory position of working foreman would have made an effort to review the job description prior to being interviewed in September 2007. In addition, the evidence established that the Excel test was not complicated and Mr. Lusignan’s failure to complete it infers either a total lack of familiarity –surprising for someone who was described as computer savvy (*See Joint Exhibit 5*) – or is the result of an equally unacceptable inability to problem-solve under pressure.

In arriving at our conclusion, the Commission is mindful that an appointing authority is not permitted to establish arbitrary requirements or set the bar for qualification higher than reasonably necessary, and that, in the labor service, length of service carries considerable weight. In particular, an appointing authority cannot unreasonably tailor a

² In considering this issue, the Commission has not credited the evidence of a 2002 incident in which Mr. Lusignan alleged used inappropriate language with a co-worker, leading to a complaint of harassment that resulted in minor discipline that was expunged six months later. The evidence of this incident of impropriety is too inconclusive and remote to be given any weight.

job description so that only a pre-determined junior candidate would qualify or so as to disqualify a more senior candidate against whom the appointing authority was unjustifiably biased. None of these circumstances, however, have been proved and they are not found to be present in this case.

As noted above, the Commission does believe that a better job might be done to ensure that a long-time tenured employee such as Mr. Lusignan receives appropriate opportunities to obtain training in management and other self-improvement so that he would stand a better chance for advancement. In the event of future openings of a similar nature, the Commission would expect that the extent to which such opportunities have been afforded to employees (and/or pursued by them) would be a legitimate question to be addressed in subsequent appeals.

Accordingly, for the reasons stated above, the appeals of the Appellants, Norman R. Lusignan, Jr., Jesus R. Rodriguez, and Robert N. Tobiaz, are hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on February 5, 2009.

A True Record. Attest:

Commissioner

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

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

Notice to:

Jeffrey S. Morneau, Esq (for Appellant)

John J. Ferriter, Esq. (for Appointing Authority)

John Marra, Esq. (for HRD)