

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

**WALTER DALEY,**

*Appellant*

*v.*

**G2-14-161**

**TOWN OF WILMINGTON,**

*Respondent*

Appearance for Appellant:

*Pro Se*

Walter Daley, Esq.

Appearance for Respondent:

Nicholas J. Dominello, Esq.

Deutsch Williams

One Design Center Plaza, Suite 600

Boston, MA 02210

Commissioner:

Paul M. Stein<sup>1</sup>

**DECISION**

The Appellant, Walter R. Daley (Mr. Daley or Appellant), acting pursuant to G.L. c. 31, § 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Wilmington (Wilmington) to bypass him for a promotion to the position of Fire Lieutenant. A pre-hearing was held on August 12, 2014 and a full hearing was held on September 29, 2014. Both were held at the offices of the Civil Service Commission.<sup>2</sup>

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

<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31 or any Commission rules taking precedence.

Witnesses were not sequestered. The hearing was digitally recorded, with copies provided to the parties.<sup>3</sup> Both parties submitted proposed decisions.

### **FINDINGS OF FACT:**

Based on Exhibits one (1) through eighteen (18) and the testimony of:

*Called by the Respondent:*

- Kendra Amaral, Assistant Town Manager and Human Resource Director, Town of Wilmington;
- Richard McClellan, Fire Chief, Town of Wilmington

*Called by the Appellant:*

- None<sup>4</sup>

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

1. In September 1995, Mr. Daley was appointed to a fire fighter position in the Wilmington Fire Department. (Exhibit 6)
2. Mr. Daley is a West Point graduate. (Exhibit 6)
3. The United States Military Academy at West Point was founded in 1802 and attending West Point is one of four (4) paths to becoming an officer in the US Army. According to the website [www.goarmy.com](http://www.goarmy.com), cadets gain leadership skills through a rigorous curriculum at the

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<sup>3</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

<sup>4</sup> The Appellant did not testify before the Commission. The Commission may draw a negative inference, however it is not required to do so. The Appellant was able to put forth his case with his opening statement, cross examination and proposed decision. I do not draw a negative inference from the Appellant's lack of testimony.

Academy and once they complete their undergraduate degree, they are commissioned and receive the gold bar of Second Lieutenant. (Administrative Notice)

4. After graduating from West Point, Mr. Daley held the rank of Infantry Lieutenant in the United States Army and led an infantry platoon. (Exhibit 6)
5. A squad is the smallest unit of soldiers consisting of 4 to 10 soldiers; a platoon is the next unit in the army organization and consists of 3 to 4 squads or 16 to 40 soldiers, [www.army.mil/infor/organization/unitsandcommands/oud](http://www.army.mil/infor/organization/unitsandcommands/oud). (Administrative Notice)
6. Since 2010, Mr. Daley has completed courses to become certified as a Fire Officer I, Incident Safety Officer, and Fire Instructor I. Mr. Daley has also completed forty-six (46) credit hours towards an Associate Degree in Fire Protection and Safety. (Exhibit 6)
7. The Appointing Authority for Fire Lieutenant positions in the Town of Wilmington is the Town Manager. (Testimony of Chief McClellan)
8. Prior to beginning the promotion process for Fire Lieutenant positions, Wilmington had a list of eligible candidates for promotion with only two names on it; Mr. Daley and Mr. Fred Ryan. Mr. Daley was ranked first on this list. There was already one vacant lieutenant position and town management anticipated promoting a total of four (4) firefighters to lieutenant positions in 2014. (Testimony of Ms. Amaral)
9. Wilmington chose to obtain a new eligible list instead of selecting from the eligible list it already had. (Testimony of Ms. Amaral)
10. Mr. Ryan has been a Wilmington fire fighter since 1998, completed Fire Fighter I & II Certification through the Massachusetts Firefighter Academy in 2000 and received fire prevention certification in November 2013. Prior to joining the Wilmington Fire Department, Mr. Ryan was a Project Manager for a construction company. (Exhibit 12)

11. Wilmington chose to schedule an Assessment Center as the examination format because an Assessment Center was used recently to hire the Fire Department Chief. Wilmington found that the Assessment Center was an effective way to “identify leadership and people for command positions”. (Testimony of Ms. Amaral)
12. An orientation was held sometime in November 2013 to inform possible candidates that an Assessment Center would be held for lieutenant positions. (Testimony of Ms. Amaral)
13. The Assessment Center was held on February 19, 2014 and consisted of three (3) exercises; a technical exercise relating to managing a fire, a personnel exercise in which the candidate would have to deal with a difficult employee and an In-Tray exercise which would measure how the candidates prioritize responsibilities. (Testimony of Ms. Amaral)
14. Mr. Daley was one of twelve (12) candidates who took part in the Assessment Center for Fire Lieutenant Promotion for the Town of Wilmington on February 19, 2014. Mr. Daley was ranked third, tied with another fire fighter. Mr. Ryan was ranked sixth, tied with another fire fighter. (Exhibit 3)
15. The Assessment Center scores were communicated to the candidates by consulting firm which conducted the Assessment Center and Wilmington subsequently was notified of the scores. (Stipulated Fact)
16. On April 9, 2014, Mr. Ryan met with the Town Manager and Ms. Amaral about making a lateral move to a nearby town which would have an open position in the summer. At this meeting, Ms. Amaral told Mr. Ryan that Wilmington had not completed the process to fill the lieutenant positions and they anticipate conducting interviews. Ms. Amaral told Mr. Ryan that it was his decision to take the lateral move or wait to see what would happen with the promotions in Wilmington. There were no guarantees made to Mr. Ryan nor was he

provided with any information about the interviews. (Stipulated Fact, Testimony of Ms. Amaral)

17. On May 27, 2014, Fire Chief McClellan sent an e-mail to the twelve (12) potential candidates who took the Assessment Center exam in February 2014 advising them that they would be interviewed on June 9, 2014 and to prepare for the interview and bring their resumes and supporting documents. (Exhibit 9)
18. Mr. Daley's name was on the e-mail recipients' list. (Exhibit 9)
19. Prior to conducting the interviews, Ms. Amaral and members of the Fire Department determined how the interviews should be structured. The discussion included who would conduct the interviews and what types of questions would be asked. It was determined that each candidate would be interviewed before a panel that consisted of six members. The members of the panel were; Ms. Amaral, Chief McClellan, a Deputy Fire Chief and two Lieutenants from the Wilmington Fire Department. In addition, the Fire Chief from the Town of Andover would be part of the panel. (Testimony of Ms. Amaral, Chief McClellan)
20. Each candidate would be allotted up to forty-five (45) minutes for his/her interview. (Exhibit 9)
21. The panel was looking for leadership, clear and assertive communication, how they [the candidates] went about their thought process and whether their answers were logical. The candidates were instructed to bring their resumes and supporting paperwork to the interview. (Exhibit 9) The instruction to bring resumes and certificates was a test to determine if they could follow directions. Panel members also noted if the candidates were dressed appropriately, made eye contact, sat up in their chairs, shook hands and introduced

themselves to the unknown Chief [Fire Chief from Andover] because Ms. Amaral stated, “It was an interview”. (Testimony of Ms. Amaral)

22. All interviews were held on June 9, 2014. (Exhibits 7,9)

23. One (1) of the candidates did not partake in the interview process. As a result, there were eleven (11) interviewees on June 9th. (Exhibits 3, 7, 9)

24. The interviews were not recorded. (Undisputed Fact)

25. On the morning of June 9, 2014, the interview panel agreed upon fourteen (14) questions from a pool of previously suggested questions they wanted each candidate to answer. The questions were a mix of technical questions, questions which allowed the candidates to discuss their education and experience and “opened-ended” questions that the panel would use to assess a candidate’s leadership potential. (Testimony of Ms. Amaral, Chief McClellan)

26. Question No. 11 was an example of a technical question, “How much water does E3 and the Squad carry in their tanks?” (Testimony of Ms. Amaral, Exhibit 10)

27. An example of an “open-ended” question was Question No. 9, “Can you name a past situation or experience where you acted in a supervisory role? Please describe it and what in the experience you thought you handled well and what you could have improved.” (Testimony of Ms. Amaral, Exhibit 10)

28. The candidates’ scores were consensus scores. Each panel member could score the candidates individually, however the candidates would receive one consensus score from the entire panel for each question. The consensus score was awarded after discussing each answer a candidate gave to each question immediately after the interview was completed with the candidate. (Testimony of Ms. Amaral)

29. The maximum score a candidate could receive was seventy (70). (Testimony of Ms. Amaral)

30. The candidates with the highest consensus scores after the interviews were completed would be promoted. (Testimony of Ms. Amaral)

31. Chief McClellan was unsure when the decision to give 100% weight to the interviews was made. Chief McClellan did not make the decision nor have any input into the decision to give the interview scores 100% weight since he was a Deputy Chief at the time. (Testimony of Chief McClellan) If there was a discrepancy between the order of the candidates' ranking at the Assessment Center and the ranking of the interviews, the interview ranking would control. (Testimony of Chief McClellan & Ms. Amaral) This decision was made before the Assessment Center was held and decided in a meeting by the Town Manager, Ms. Amaral and the former Fire Chief. (Testimony of Ms. Amaral)

32. After the interviews, the consensus scores placed the top four candidates: Mr. Ryan (who moved from sixth in the Assessment Center to first), Mr. Nansel, Ms. Green and Mr. Cavanaugh. Mr. Daley moved from third to fifth. (Exhibit 7)

33. Mr. Daley received a score of forty-five (45) and Mr. Ryan received a score of sixty (60). (Exhibit 7)

34. The only candidate who moved into the top four based on interview performance was Mr.

Ryan. The only candidate who dropped out of the top four was Mr. Daley. (Exhibits 3, 7)

Assessment Center	Rank	Interview	Rank	Assessment Center & Interview	Rank
Green	1	<u>Ryan</u>	1	Green	1
Cavanaugh	2	Nansel	2	Nansel	2
<u>Daley</u> *	3	Green	3	<u>Ryan</u>	3
Nansel*	3	Cavanaugh	4	Cavanaugh	4
Robbins	4	<u>Daley</u>	5	<u>Daley</u>	5
Leverone	5	Robbins	6		
Woods**	6				
<u>Ryan</u> **	6				

\*tied for third; \*\*tied for sixth

35. After the consensus scores were completed, the interview panel did a “gut check” and combined each candidate’s assessment center score with his or her interview score and divided the number by two. The top four candidates after this calculation were the same top four candidates based on the interview scores alone. However the rankings did change.

(Exhibit 7, Testimony of Ms. Amaral)

36. Although the panel averaged the interview scores and the assessment center scores, the interview scores were given 100% weight and the ranking after the interviews was the controlling factor for promotions. (Testimony of Ms. Amaral)

37. Mr. Daley was not promoted and received a bypass letter dated June 27, 2014, signed by the Appointing Authority, the Town Manager. The rationalizations stated were based entirely on interview performance:

- You did not excel at the oral interview.
- [You] showed a lack of respect for command staff by responding to the Deputy Fire Chief by first name during the interview.
- Focusing on golf shirts as the one policy change you could make given the opportunity.
- Responding to a hypothetical of implementing an unpopular policy by deflecting responsibility by explaining “why command staff thinks it’s a value” rather than showing leadership in getting the group to understand the policy.
- When asked to describe a situation you acted in a supervisory role...your answer was non-descriptive. You vaguely referenced your military experience...

(Exhibit 2)

38. The letter also contained the reasons why Mr. Ryan was selected, also based entirely on interview performance:

- Mr. Ryan scored the highest on the oral interview and was detailed in his responses to all of the interview questions.



- He addressed each person in the interview in a respectful manner.
- Though Mr. Ryan also chose golf shirts as the policy he would like to change, he clearly described his reasoning which focused on improved response times in emergencies.
- When presented with the hypothetical of implementing an unpopular policy, Mr. Ryan focused on taking responsibility for the implementation of the policy...
- Mr. Ryan demonstrated good decision making skills when asked to describe a situation in which he acted in a supervisory role.

(Exhibit 2)

39. During the Commission hearing, Ms. Amaral further stated that the reasons for bypassing Mr. Daley and selecting Mr. Ryan were entirely based on how they performed at the interview. According to the panel, Mr. Daley performed poorly during the interview because his interview was very short, only 15 to 20 minutes long despite 45 minutes being allotted to him and Mr. Daley did not give a lot of detail in his answers, claiming that his brief answers did not allow the panel to gauge how he would perform as a leader. Ms. Amaral also noted that Mr. Daley came to the interview wearing a shirt and tie but no suit or sport coat.

(Testimony of Ms. Amaral)

40. According to Ms. Amaral, the panel also felt it was disrespectful for Mr. Daley to call the Deputy Fire Chief by his first name during the interview when command staff and a fire chief from another town are present. (Testimony of Ms. Amaral)

41. Ms. Amaral was displeased that both Mr. Daley and Mr. Ryan chose implementing uniform changes, i.e. switching from button down shirts to polo (golf) shirts as the one policy they would change. However, the panel distinguished Mr. Ryan's answer because he was able to link the change to improved response times whereas Mr. Daley stated it would be more conducive to firefighters performing physical labor as required. (Testimony of Ms. Amaral)

42. Ms. Amaral's questionnaire notes for Mr. Daley's response to the policy change question are "work uniform more conducive (sic) to physical labor. Recognize it's minor. Easy change." (Exhibit 10)
43. Question No. 4 was the question which contained the hypothetical about the unpopular policy. The hypothetical is as follows: "the Chief has just presented you with a new departmental policy. You know it will not be popular with your group. How will you deliver the information to your group and ensure they are following the policy? If you fill in for another Lieutenant and notice his/her group is not adhering to the policy, what would you do?" (Exhibit 14)
44. In his response to Question No. 4, the panel felt Mr. Daley did not exhibit the potential for leadership the panel was looking for. They felt he did not support the policy as enthusiastically as Mr. Ryan did. Both candidates said they would implement the policy and talk to anyone who was not onboard. Mr. Ryan would discuss any resistance with the Lieutenant he was filling in for first whereas Mr. Daley would skip the Lieutenant and go to the Chief first. (Testimony of Ms. Amaral)
45. Ms. Amaral's notes for Mr. Daley's response to Question No. 4 are as follows: "try to explain why command staff thinks it's a value for the dept. Hope can talk it out. If other shift have one-on-one discussion, if doesn't work talk to Chief or have more formal discussion." (Exhibit 10) Ms. Amaral's notes for Mr. Ryan for the same question are as follows: "Good at feeling people. May talk to person one on one ahead of time. Take them aside on other group. Bring to his LT. if the conversation did not work." (Exhibit 11)
46. Question No. 9 asked, "Can you name a past situation or experience where you acted in a supervisory role?" Mr. Daley mentioned his military service and conceded he may have

been too cautious in the past. He felt he should have been more aggressive. Ms. Amaral felt his answer was very vague and he did not provide a specific example [of when he acted as a supervisor] or a “walk through” of his experience. Ms. Amaral expected that as a member of the fire department for a number of years, Mr. Daley would have some supervisory experiences and that he would “pick one and tell us about it”. (Testimony of Ms. Amaral)

47. According to Ms. Amaral, Mr. Ryan’s response to Question No. 9 was “phenomenal” and he was able to walk the panel through his thought process when describing an instance where he took the lead in responding to a house fire. (Testimony of Ms. Amaral)

48. Mr. Daley received scores of twos (2) for Questions 1a and 1b. Question 1a asks” The department is hiring shift lieutenants, a fire prevention officer and an operations and training officer. Please rank the positions in order of your preference, with 1 being the most preferred and 3 being the least.” Question 1b asks: “Please describe what you think the key position responsibilities are of your preferred position.” (Exhibit 11)

49. Mr. Daley received low scores on Questions 1a and 1b because the panel determined he was only interested in a shift position as his first choice, did not have a preference between the remaining positions and had to be prompted to decide on his second and third choice. (Testimony of Ms. Amaral)

50. Chief McClellan does not remember why he gave Mr. Daley a score of three (3) on Question 1a but the consensus score ended up being a two (2). The Chief does remember that a candidate’s definitive reasons about what positions he or she wanted and why would result in a higher score than a candidate stating “I will take anything.” (Exhibit 10, Testimony of Chief McClellan)

51. The panel determined that Mr. Ryan had definitive answers about which Lieutenant positions he preferred and why. Mr. Ryan received scores of fives (5) on Questions 1a and b.

(Testimony of Ms. Amaral, Exhibit 7)

52. Questions No. 10 through No. 13 were technical questions dealing with hazards in Wilmington, equipment knowledge and the location of a particular property. Mr. Daley received consensus scores of fours (4s) and fives (5s) while Mr. Ryan received mostly threes (3s) and fours (4s). (Exhibits 7, 10)

### *Legal Standard*

The authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotion appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file...a written statement of his reasons for appointing the person whose name was not highest.

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. The appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "thorough review" and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm'n 78 Mass.App.Ct. 182 (2010); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). See also Mayor

of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that [they] produce ‘sound and sufficient’ reasons” consistent with basic merit principles and protected from arbitrary and capricious actions).

In reviewing a bypass decision, “[t]he 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). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. 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) Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (appointing authority must proffer “objectively legitimate reasons” for the bypass); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “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”); MacHenry v. Civil Service Comm’n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (noting duty to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”). See also Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses . . . in accordance with basic merit principles. . . . [T]he commission acted well within its discretion.”); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission must

not substitute its judgment for a “valid” exercise of appointing authority discretion, but civil service law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”)

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 (2001) In the event of a failure of proof, the commission has the power to reverse the bypass decision. 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).

#### *Parties’ Positions*

Mr. Daley argues that he is as qualified as Mr. Ryan for a lieutenant position and that his interview scores and the reasons for the scores are not reasonably justified. Mr. Daley questions the validity of relying on the interviews to make promotion decisions when an assessment center would be more objective, more comprehensive and more predictive of how a fire fighter would perform in a leadership position. Mr. Daley also raises the issue that Mr. Ryan was given an unfair advantage when he was told by the Town Manager and Ms. Amaral that interviews for the lieutenant positions would be coming up. Finally, Mr. Daley argues that the bypass reasons were not based on basic merit principles.

Wilmington argues it has discretion in the promotion process and could disregard the assessment center and conduct a fair and impartial interview process. There was no bias against

Mr. Daley or for Mr. Ryan. Mr. Ryan performed best in the interview and was the better candidate.

### *Analysis*

I am perplexed by Wilmington's decision to go through the trouble and expense of hiring a consultant to conduct an Assessment Center for Lieutenant Positions only to give no weight to the results in the selection process. Assessment Centers are typically day long exercises in which the evaluators observe the candidates in various situations and are designed to determine the best candidates in an objective manner. Despite these characteristics of Assessment Centers, and Ms. Amaral testifying that Wilmington was pleased with the results of a prior Assessment Center used for promotions, Wilmington chose to rely only on the candidates' interviews.

The only value assigned to the Assessment Center results was as a "gut check" to make sure there were no significant discrepancies between the Assessment Center rankings and the interview rankings. There were significant discrepancies, Mr. Ryan shot up in the rankings and Mr. Daley tumbled downward. The interview panel chose to ignore these discrepancies and carry on with the decision to make the interview rankings the controlling factor.

That being said, Wilmington has the authority to determine the components of its hiring process. Public safety agencies are properly entitled, and often do, conduct interviews of potential candidates as part of the hiring process. Morris Jr. v. Braintree Police Department, 27 MCSR 656 (2014). The Commission recognized that subjectivity is inherent to the interview process. 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).

In this matter, the hiring panel's level of subjectivity crossed the line and violated basic merit principles in a number of ways. First, the interview panel chose to subjectively focus on trivial issues that have no basis in merit principles. Focusing on Mr. Daley addressing the Deputy Fire Chief by his first name during the interview and considering this a lack of respect is choosing form over substance and has no basis in merit principles. Mr. Daley has been on the force for nineteen years and has worked as a colleague with the Deputy Chief for a number of years. In addition, at the time of the interviews, the Chief and the Deputy Chief had been only recently promoted. A familiarity can develop between coworkers even in paramilitary organizations that adhere to a strict command structure. They all knew each other and Mr. Daley did not behave in an otherwise disrespectful manner towards members of the panel. A slip of the tongue should not be considered a reason for bypass nor should it invalidate Mr. Daley's years of service and the substance of his answers. To bypass a long term employee for a promotion because of a slip of the tongue is not reasonably justified. Additionally, Ms. Amaral stated that Mr. Daley's failure to wear a suit or sport jacket was also considered when evaluating his interview performance and this has no basis in merit principles.

Second, looking at the substantive matter of the interview process, on at least two questions (Question No. 4 and No. 7) Mr. Daley and Mr. Ryan gave essentially the same answers, yet Mr. Daley was scored lower with no reasonable justification. Both candidates mentioned a uniform change to golf/polo shirts as the policy they would change for the same reason i.e. that wearing polo shirts would improve the fire fighters efficiency through easing manual labor or increasing response times. Mr. Daley received one point for his answer and Mr.



Ryan received two points. Regarding the unpopular policy hypothetical Mr. Daley and Mr. Ryan discussed following the same course of action; first speaking to anyone who had a problem with the new policy one on one and then going up the chain of command, if necessary. Yet Mr. Daley was scored a point lower than Mr. Ryan.

Third, the panel seemed to arbitrarily give no consideration to Mr. Daley's military experience. Graduating from West Point is a well-known significant achievement. Mr. Daley then became a Lieutenant in the US Army. An army Lieutenant has the responsibility to command at least sixteen (16) soldiers which exceeds the eight (8) fire fighters a Fire Lieutenant might command. A fire department is a paramilitary organization with similar rank and file as the military. It is reasonable that Mr. Daley would assume that the interview panel would understand how graduating from West Point and being an officer in the military would relate to leadership or supervisory experience. Additionally, if members of the interview panel had questions about Mr. Daley's military experience or were unclear about how the military command works they could have asked him to elaborate.

Finally, what are perhaps the most curious scores are Mr. Daley's scores on Questions 1a and 1b for which he received twos. Question 1a is in part administrative since it asks what type of lieutenant position a candidate would like if promoted. How one candidate can provide such a lackluster answer that it would result in a two while almost all the other candidates provided answers that received top scores has not been adequately explained by Wilmington.

These entirely subjectively evaluations and concerns do not stand up to the overwhelming objective evidence of Mr. Daley's employment record and resume. Mr. Daley and Mr. Ryan are similarly situated with Mr. Daley having the edge in a number of ways. He has three additional years with the fire department. Both have fire fighter certifications with Mr. Daley having more

certifications than Mr. Ryan. Mr. Daley is also working towards an Associates' Degree in fire prevention. Both candidates had prior supervisory experience before joining the Wilmington Fire Department. Mr. Daley's military training and leadership is more of a natural fit to a paramilitary organization than Mr. Ryan's construction site supervisory experience. Mr. Daley also scored higher than Mr. Ryan on the technical questions in the interview.

The decision to bypass Mr. Daley depended entirely on an unduly subjective assessment of his interview performance compared to others despite Wilmington having an independent Assessment Center certification available to it. It is also problematic that Mr. Ryan, the one candidate whose ranking significantly improved, was given advanced notice that interviews would be held for the lieutenant positions approximately six weeks before the other candidates.

Even more problematic, the Town Manager and Ms. Amaral knew that Mr. Ryan was considering transferring to a nearby town shortly after promotional decisions would be made. I do not find Ms. Amaral's claims, that this information did not influence the promotion process, credible. Rather, the unusually large shift in Mr. Ryan's standing from the Assessment Center based, mostly, on alleged distinctions in the interview performance (mostly minor in nature), leaves me to believe, that, more likely than not, the knowledge of Mr. Ryan's transfer request (if he didn't get promoted) clearly influenced his singular jump in standing, ensuring his promotion, and Mr. Daley was the collateral damage from that action dropping him from third to fifth and out of contention.

In sum, the record shows that the Respondent nearly abandoned the Assessment Center results in favor of the interview results. The Assessment Center provided a relatively objective method of evaluating the candidates' qualifications for promotion. Having engaged the Assessment Center for this purpose, the Respondent's determination to rely on the interview results instead,

at least primarily, gives the appearance that the Respondent abandoned objective reasons for its ultimate decision. Although the Respondent compared the ranking of the candidates as result of the Assessment Center with the ranking of the candidates as a result of the interview as a “gut check”, the Respondent gave the Assessment Center results no further consideration. Further, the subjective effect of the interview results was magnified by the fact that instead of each interviewer ranking the candidates individually, the group of interviewers gave each candidate a consensus score. As a result, the Respondent’s decision was based primarily on the flawed subjective interviews. Basic merit principles include “assuring fair treatment of all applicants and employees ....” G.L. c. 31, s. 1. To administer an objective Assessment Center only to then decide whom to promote on the basis of subjective interviews in the manner performed here does not assure fair treatment of all employees. This decision should not be read to preclude interviews in the promotion process but to include them, allowing for individual scoring of the interviews, along with consideration of some objective assessment of candidates, as part of the promotional process.

### Conclusion

For these reasons the appeal of the Appellant, Walter R. Daley, under Docket No. G2-14-16 is ***allowed***.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Walter R. Daley, shall be placed at the top of all future certifications for promotion to the position of Fire Lieutenant in the Wilmington Fire Department until he is selected for appointment or bypassed. If and when Mr. Daley is selected for promotion and commences employment as a Fire Lieutenant in the Wilmington Fire Department, his civil

service records shall be retroactively adjusted to show, for civil service seniority purposes, as his starting date, the earliest Promotion Date of the other persons promoted from Certification.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - NO; Ittleman, Commissioner – Yes; McDowell, Commissioner – Yes; and Stein, Commissioner - Yes) on September 3, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:  
Walter Daley, Esq. (Attorney)  
Nicholas J. Dominello, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

**WALTER DALEY,**

*Appellant*

*v.*

**G2-14-161**

**TOWN OF WILMINGTON,**

*Respondent*

**OPINION OF CHRISTOPHER BOWMAN**

I respectfully dissent.

This appeal involves the bypass of a candidate to the leadership position of Fire Lieutenant. Mr. Daley scored only three (3) points higher (82) on a civil service examination than the candidate who bypassed him (79). Consistent with the practice of many Appointing Authorities, the Town convened a panel to interview all of the candidates whose scores placed them within the statutory “2N + 1” formula based on their civil service examination scores, including Mr. Daley.

The six (6)-member interview panel was composed of representatives from management, command staff; mid-level command staff, union members and an outside perspective represented by the Fire Chief of Andover. According to the Town’s Fire Chief, he was looking to promote individuals who could demonstrate, through the interview, that they could effectively lead the department in the potential future role of Fire Lieutenant. Each candidate was asked the same fourteen (14) questions and the candidates’ responses were graded on a scale of 0 to 5. The majority makes much of the fact that the individual ratings were not averaged, but, rather, the

final ratings were done by consensus. First, although it can be argued that the averaging of individual scores is a better practice than scoring through consensus, there is nothing in the civil service law or rules that requires such. Second, the Town, as part of its post-hearing brief, provided the Commission with a secondary matrix which did indeed average the individual scores in a manner most favorable to the Appellant. This second matrix demonstrates that even in the most favorable mathematical scenario, the Appellant did not outscore the candidate who bypassed him when individual scores were averaged.

The majority's decision also rests on the conclusion that the Town effectively disregarded the civil service examination scores, in which the Appellant received a score 3 points higher than the candidate who bypassed him. The record shows otherwise. Every member of the interview panel was aware of each candidates ranking and score on the civil service Certification. Further, after forming a list based solely on the candidates' interview scores, the panel averaged the candidates' interview scores and the candidates' civil service examination scores, giving each score a weighting of 50%. Even under that scenario, the Appellant ranked below the candidate who bypassed him.

The majority labels the interview process as "unduly subjective" in part due to the consensus scoring process. As referenced above, the same rankings would have resulted if the Town had averaged the individual scores. Other reasons used to label the interview process as unduly subjective are not supported by the record, including the conclusion that the panel "seemed to arbitrarily give no consideration to Mr. Daley's military experience." First, the civil service law provides veterans with an additional two (2) points in their score. Second, the panelists were provided with the resumes of the individual candidates.

The remainder of the reasons cited to support the conclusion of an unduly subjective interview process read more like a laundry list of reasons why, *if the Commission, had been evaluating the candidates*, more points would have been awarded to the Appellant. It is not the Commission's role to evaluate the candidates and years of precedent-setting decisions have established that the Commission is not permitted to act as a super-Appointing Authority. That is particularly true when, as here, the Appellant opted *not* to testify at his own hearing before the Commission regarding his interview performance. Respectfully, I believe it was an error not to consider the Appellant's failure to testify when reaching findings and conclusions here, particularly those related to the Appellant's interview performance.

The Commission's role, while important, is mostly limited to assessing whether the Appointing Authority conducted a reasonably thorough review and produced valid reasons that are free of personal or political bias. That leads to the final issue in which the majority decision concludes that the Appellant's non-selection represents "collateral damage" as a result of the Town's desire to promote the lower-ranked candidate presumably to prevent that lower-ranked candidate from pursuing a lateral transfer to another appointment. Respectfully, that conclusion relies on a high degree of speculation and unsupported assumptions related to a brief meeting that the lower ranked-candidate had with the Assistant Town Manager. When the Assistant Town Manager was informed by the lower-ranked candidate that he was considering a lateral transfer to another Department, she simply conveyed factual information to him: that the promotional process was not over and that interviews still needed to be conducted. From this, the majority reaches the conclusion that the interview panel scored that candidate higher, presumably to keep him from pursuing a lateral transfer. Put simply, that is a stretch (at best),

and surely cannot form the bedrock of a conclusion that the selection process was tainted by personal or political bias.

When applying the correct standard, the Town has shown that it had reasonable justification to bypass the Appellant for a promotional appointment and there is insufficient evidence to show that the decision-making process here was tainted by personal or political bias. For these reasons, the Commission's intervention here is unwarranted. The Town's decision should have been affirmed and the appeal should have been denied.

/s/ Christopher C. Bowman

Chairman

September 3, 2015