

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
617) 727-2293

MARK S. ANTHONY,
Appellant

v.

G2-09-262

CITY OF SPRINGFIELD,
Respondent

Appellant's Attorney:

William J. Fennell, Esq.
84 Park Street
West Springfield, MA 01089

Respondent's Attorney:

Maurice Cahillane, Esq.
67 Market Street
P.O. Box 9035
Springfield, MA 01102-9035

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Mark S. Anthony, (hereinafter "Anthony" or "Appellant"), seeks review of the Human Resources Division's (hereinafter "HRD") decision to accept reasons proffered by the Respondent-Appointing Authority, City of Springfield (hereinafter "City" or "Appointing Authority"), for the bypass of the Appellant for promotional appointment to the position of Deputy Police Chief in the Springfield Police Department (hereinafter "Department"). A pre-hearing conference was held on June 24, 2009 and a full hearing was held on October 28, 2009 at the Springfield State Office Building. All of the witnesses were sequestered with the exception of the Appellant and Springfield Police Commissioner William Fitchet.

The full hearing was digitally recorded and 1 CD was made of the proceeding. A copy of the CD was provided to the parties. The parties submitted post-hearing briefs on December 28, 2009 (Appellant) and December 31, 2009 (Appointing Authority).

FINDINGS OF FACT

Fourteen (14) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- William Fitchet, Police Commissioner, City of Springfield;
- Charles Arpin, Police Captain, City of Springfield;
- Joseph Parylak, Police Captain, City of Springfield;

For the Appellant:

- William Noonan, Police Captain, City of Springfield;
- Mark S. Anthony, 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 1985. He has served in the position of Police Captain since 1998. He received a masters degree in criminal justice from Anna Maria College in 1995 and a bachelors degree in criminal justice from Westfield State College in 1988. (Testimony of Appellant and Exhibit 10)
2. The Appellant was one of eight (8) candidates who took and passed the Springfield Deputy Police Chief examination over a two-day period in January 2009 competing for four (4) vacant positions. The examination did not take the form of a traditional civil service examination, which typically consists of written multiple-choice

questions. Rather, the examination was administered as an Assessment Center.

(Stipulated Fact)

3. An Assessment Center is a method of selection that emphasizes performance in simulated job situations. While HRD typically administers written civil service examinations, it delegated the responsibility of creating and conducting the Assessment Center-type examination to the City.
4. The City contracted with a private consulting firm, MMA Consulting Group, Inc., (hereinafter “the consultant”) to develop the Assessment Center. The Assessment Center was developed by the consultant based on the specifications and requirements provided by the City. (Testimony of Fitchet)
5. The Assessment Center included an in-basket exercise, a program development exercise where a paper had to be written and defended before a panel, a city council meeting, a press conference and several situational response / scenario exercises. (Testimony of Appellant, Noonan and Arpin)
6. The City was provided with a numerical rating by the consultant of the eight (8) candidates who received a passing score on the Assessment Center examination. After including the statutory promotional preference points and/or employment and experience credits, the eight candidates were ranked as follows and placed in this order on Certification No. SPRO 09-0001:

1) William Cochrane	87 (ultimately selected)
2) William Noonan	86
3) John Barbieri	82 (ultimately selected)
4) Mark Anthony	81 (Appellant, ultimately not selected)
5) Robert Cheetham	80
6) Robert McFarlin	79 (ultimately selected)

7) Kevin Dudley	75 (ultimately selected)	
8) Peter Dillon	74	(Exhibit 6)

7. The Appellant has approximately twenty-four (24) years of seniority. The two candidates ranked below him, who were ultimately selected, have approximately thirty-three (33) years (McFarlin) and thirty (30) years (Dudley) of seniority. (Exhibits 7D, 7E and 7H)
8. After receiving the above-referenced rankings, Police Commissioner Fitchet set up an interview process whereby each of the successful eight candidates would be interviewed by a panel of three persons including himself. The panel consisted of the Commissioner, Captain Joseph Parylak and Captain Robert Arpin, the most senior officers in the Department. (Testimony of Fitchet)
9. Each candidate was asked the same series of six (6) questions and each member of the panel graded their responses from 0 to 5, with 0 being the worst score possible and 5 being the best score possible. Thus, the highest possible score that any panelist could give to a candidate was 30. (Exhibit 7A – 7E and Exhibit 9)
10. Commissioner Fitchet gave the Appellant a total of 20 points based on his interview performance. Commissioner Fitchet rated the interview performances of Robert McFarlin and Kevin Dudley higher than the Appellant, giving both of them a total of 26 points. As referenced above, both McFarlin and Dudley were ranked below the Appellant on the civil service Certification. (Exhibits 7D, 7E and 7H)
11. Captain Arpin gave the Appellant a total of 22 points based on his interview performance. Captain Arpin also rated the interview performances of McFarlin and

Dudley higher than the Appellant, giving both of them a total of 26 points. (Exhibits 7D, 7E and 7H)

12. Captain Parylak gave the Appellant a total of 18 points based on his interview performance. Captain Parylak also rated the interview performances of McFarlin and Dudley higher than the Appellant, giving McFarlin 23 points and Dudley 24 points. (Exhibit 7D, 7E and 7H)

13. Commissioner Fitchet, who is the Appointing Authority, also reviewed the personnel records of each of the candidates as part of the review process. (Testimony of Fitchet)

14. After reviewing the civil service assessment scores of each candidate, the ratings of their interview performances and their personnel records, Commissioner Fitchet, who is the Appointing Authority, selected Captain Cochrane (first on the civil service Certification, tied for third in the interviews); Captain Barbieri (third on the civil service Certification, tied for third in the interviews); Captain McFarlin (sixth on the civil service Certification, second in the interviews); and Captain Dudley (seventh on the civil service Certification, tied for first in the interviews). (Stipulated Facts and Exhibits 7D, 7E and 7H)

15. A “bypass” occurs when an Appointing Authority selects “a person or person whose name or names, by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a Certification than a person or persons who are not appointed and whose names appear higher on said certification.” (PAR.02)

16. 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))¹

17. On April 1, 2009, the City notified HRD of the four candidates it was selecting for promotion to Deputy Police Chief. As part of the two and a half page letter to HRD, the City listed the positive reasons for its selection of candidates Robert McFarlin and Kevin Dudley, both of whom were ranked lower on the civil service Certification than the Appellant, who was ranked fourth. (Exhibit 3)
18. As part of the positive reasons submitted to HRD, the Commissioner noted the superior interview performances of both McFarlin and Dudley and gave specific examples of how they both performed better during the interviews than the Appellant. (Exhibit 3)
19. The Commissioner, in his letter to HRD, also cited the extensive work experience of McFarlin and Dudley, including service as uniform division commanders and their extensive assignments in the field of narcotics enforcement. The positive reasons submitted further state: “Capt. Dudley has been qualified by Judges in the Superior Court as an ‘expert witness’ in the prosecution of rape and narcotic investigations. Furthermore, Captain Dudley has been assigned to the Internal Investigations Unit and has been involved in many important internal investigations. Capt. McFarlin has

¹ 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.

been in charge of the Detective Bureau for several years. His knowledge regarding forensics makes him a well rounded Police commander well suited to be a Deputy Chief of Police. Captain Dudley has been the commander of Juvenile and Special Victims (sexual assault). While serving as the commander of the Crime Prevention Bureau, Capt. Dudley showed initiative by becoming a certified 'Rape Investigator'. This knowledge and work experience makes him well qualified to be a Deputy Chief." The Commissioner also cited the strong interpersonal skills of McFarlin and Dudley, their strong work ethic and the high respect they have from their colleagues as positive reasons for their selection. (Exhibit 3)

20. HRD notified the Appellant and the City on April 30, 2009 that the positive reasons offered to justify the bypass of the Appellant were accepted. (Stipulated Fact)
21. The Appellant filed a timely appeal with the Civil Service Commission on May 28, 2009. (Stipulated Fact)
22. The Appellant argues that the selection process was flawed due to a personal bias or lack of qualifications of two of the three (3) panelists. Further, the Appellant argues that the positive reasons proffered by the City regarding the selected candidates ranked below him apply equally to him.

Interview Panel Personal Bias / Qualification Issues

23. As referenced above, Commissioner Fitchet is the Appointing Authority for the Police Department and he served as one of the three interview panelists. Fitchet has worked for the Department for thirty-seven (37) years, working his way up the ranks from police officer to Commissioner. He was appointed as the Acting Police Commissioner in July 2005 and served in that capacity until March 2006 when

Edward Flynn, the state's former Secretary of Public Safety, was appointed permanent Police Commissioner. Fitchet returned to his previous rank of Deputy Chief. In January 2008, Commissioner Flynn left the Department at which time Fitchet was again appointed as Acting Police Commissioner. He was subsequently appointed as the permanent Police Commissioner in April 2008. (Testimony of Fitchet)

24. Commissioner Fitchet was a good witness. He is an accomplished, sincere professional who has dedicated most of his professional life to the City and its Police Department. His integrity and professionalism were palpable throughout his testimony and I found no evidence of any personal bias or animus toward the Appellant. (Testimony, demeanor of Fitchet)
25. Captain Arpin has served in the Department for approximately forty (40) years and has held several different positions. He was appointed as a provisional Deputy Police Chief in 2005 by Acting Police Commissioner Fitchet. In March 2006, newly-appointed Commissioner Flynn demoted Arpin to Captain. (Testimony of Arpin)
26. In November 2006, then-Commissioner Flynn conducted interviews to fill three provisional Deputy Chief positions. When the Appellant was selected for one of these three positions and Arpin was not, Arpin filed a complaint with the Massachusetts Commission Against Discrimination (hereinafter "MCAD"). This MCAD complaint was dismissed on October 31, 2008. (Testimony of Arpin)
27. In August 2008, Arpin was selected by Commissioner Fitchet to serve as a provisional Deputy Police Chief. In January 2009, Arpin applied for one of the permanent Deputy Police Chief positions that are the subject of the instant appeal and

took the same Assessment Center examination as the Appellant. Arpin did not receive a passing score and was not considered for promotional appointment.

(Testimony of Arpin)

28. The Appellant offered direct, forthright testimony regarding the above-referenced MCAD complaint that he filed during the tenure of then-Commissioner Flynn and the fact that he failed the recent Assessment Center examination. In regard to the MCAD complaint, the Appellant testified that he never had any “ill-will” toward any of the candidates, including the Appellant, who were selected as provisional Deputy Police Chiefs. Rather, he found fault with then-Commissioner Flynn for “disregarding the seniority principle in the Department that had served for many decades...that was the basis of my complaint.” He testified that this MCAD complaint in no way impaired his ability to fairly and impartially evaluate the candidates for the permanent Deputy Chief positions that are the subject of this appeal. In regard to his not receiving a passing grade on the Assessment Center examination, the Appellant testified that he felt constrained by the limited time to complete the various role play scenarios.

(Testimony of Arpin)

29. Captain Arpin was a good witness. I did not observe or detect any personal animus or bias on his part toward the Appellant. I credit his testimony that his MCAD complaint was meant to address what he perceived as a failure by then-Commissioner Flynn to recognize an officer’s seniority when making acting or provisional promotions, rather than questioning the qualifications of the Appellant. In regard to him not passing the recent Assessment Center examination, I find that this did not compromise his ability to serve as an effective interview panelist nor did it create a

personal bias against the Appellant or any of the other interviewed candidates, *all* of whom passed the Assessment center examination. (Testimony, demeanor of Arpin)

30. Captain Parylak, the third interview panelist, has also been with the Department for approximately forty (40) years and has served in several different positions. He currently serves as the Assistant to the Police Commissioner. (Testimony of Captain Parylak)

31. During 1999 and 2000, Parylak filed numerous grievances about departmental action taken against him during the tenure of former Police Chief Paula Meara. During this time period, the Appellant was Meara's administrative aide. (Testimony of Parylak and Appellant)

32. Like Captain Arpin, Parylak was not selected by former Commissioner Flynn for one of the provisional Deputy Police Chief vacancies that occurred during Flynn's tenure. (Testimony of Parylak) He also filed an MCAD complaint against the Department, which was dismissed on October 31, 2008. (Stipulated Fact) Parylak testified that the MCAD complaint had no bearing on his ability to perform as an interview panelist and noted that one of the individuals chosen for promotion (Cochrane) was also the subject of the MCAD complaint. (Testimony of Parylak)

33. Captain Parylak was also a good witness. He has a military-like demeanor and often answered questions with a "yes, sir; no sir" response. Prior to answering, however, he considered each question carefully and wanted to ensure that his answer was accurate. He testified that he strives to be "fair and professional". He was genuinely perplexed as to how the grievances he filed during the tenure of former Chief Meara would have any bearing on his performance as an interview panelist. He testified

credibly that he had no knowledge regarding what, if any, role the Appellant had in processing those grievances when the Appellant served as the assistant to former Chief Meara. I credit his testimony and I did not observe or detect any personal bias or animus on his part toward the Appellant. (Testimony, demeanor of Parylak)

City's Reasons for Bypass: Interview Performance

34. As referenced above, each of the candidates was asked the same six questions and each panelist scored the applicants on a scale of 1 to 5 for each question, for a total possible score of 30. The panelists all recorded their scores and took written notes. The ratings and notes regarding the Appellant and the two selected candidates who were ranked below him were entered as Exhibits 7D, 7E and 7H.

35. The following six questions were asked of all candidates:

- 1) Describe how a Deputy Chief of Police should assist the Police Commissioner in the administrative functions of the Police Department.
- 2) In your opinion what should be the duties of a Deputy Police Chief in a modern Police Department?
- 3) What actions would you take to improve morale within the Springfield Police Department?
- 4) How would you increase the efficiency of both sworn and civilian personnel in the Police Department?
- 5) How would you handle inappropriate political interference in Police operations?
- 6) How would you promote diversity within the Springfield Police Department? (Exhibits 7D, 7E and 7H)

Commissioner Fitchet's Ratings of the Interviewed Candidates

36. Commissioner Fitchet's higher numerical rating of candidates McFarlin (26) and Dudley (26) over the Appellant (20) was based on the candidates' different responses to Questions 2, 3, 5 and 6. For each of those questions, Commissioner Fitchet gave a

higher numerical score to McFarlin and Dudley than he did to the Appellant.

(Exhibits 7D, 7E and 7H)

37. There was ample testimony regarding the candidates' responses to Question 2, in which Fitchet gave the Appellant a score of 3 and candidates McFarlin and Dudley a higher score of 5. Fitchet wrote in his notes that McFarlin and Dudley supported making assignments by "function" while the Appellant supported making assignments through a combination of "time, function and geography." (Exhibits 7D, 7E and 7H) Fitchet testified that he agreed with McFarlin and Dudley that assignments by function were more effective and that both of these candidates simply did a better job of explaining their answer to Question 2 than the Appellant.

(Testimony of Fitchet)

38. In regard to Question 3, regarding improving morale, Fitchet gave the Appellant a score of 3 and candidates McFarlin and Dudley a higher score of 5. Fitchet's notes indicate that he was impressed by McFarlin's focus on "coaching, teaching and complimenting" and Dudley's focus on "leading by example" and "performance recognition". Fitchet's notes indicate that the Appellant gave only a "fair response" to this question, focusing on sending emails to officers and encouraging citizens to write letters. (Exhibits 7D, 7E and 7H) Fitchet testified that he was not impressed with the Appellant's answer to this question, including the emphasis on emails.

(Testimony of Fitchet)

39. In regard to Question 5, regarding how to handle inappropriate political interference, Fitchet gave the Appellant a score of 3 and candidates McFarlin and Dudley a higher score of 4. Fitchet's notes state that the Appellant gave a "brief response" to this

question and that he stated he “would not be involved” and would “notify [the Commissioner]”. (Exhibit 7D) Fitchet testified that McFarlin and Dudley gave a more thorough response to this question. His notes state that McFarlin gave a “detailed” response that “covered appropriate areas of concern” and that Dudley provided a “good common sense response” focusing on having the “courage to speak up”. (Testimony of Fitchet and Exhibits 7E and 7H)

40. Fitchet also scored candidates McFarlin and Dudley higher regarding their responses to Question 6, regarding promoting diversity, giving Dudley and McFarlin a score of 4, with the Appellant receiving a lower score of 3. Fitchet’s notes state that the Appellant gave an “adequate response” while McFarlin’s response was “well thought out” and Dudley provided a “good response”. (Exhibits 7D, 7E and 7H)

Captain Arpin’s Ratings of the Interviewed Candidates

41. Captain Arpin’s higher numerical rating of candidates McFarlin (26) and Dudley (26) over the Appellant (22) was based primarily on the candidates’ different responses to Questions 2, 4 and 5. For each of those questions, Arpin gave a higher numerical score to McFarlin and Dudley than he did to the Appellant. (Exhibits 7D, 7E and 7H)

42. In regard to Question 2, regarding the duties of a Deputy Police Chief in a modern police department, Arpin gave the Appellant a score of 3, McFarlin a 5, and Dudley a 4. (Exhibits 7D, 7E and 7H) Arpin testified that, beyond his notes, he does not recall the specific reasons for assigning these scores. He testified, however, that he reached his scoring decisions independently without consulting with Commissioner Fitchet. (Testimony of Arpin)

43. In regard to Question 4, regarding how to increase efficiency, Arpin gave the Appellant a score of 3, McFarlin a 4 and Dudley a 5. His notes indicate that he found the Appellant's answer to be "good", McFarlin's answer to be "very good" and Dudley's answer to be "excellent". (Exhibits 7D, 7E and 7H)
44. In regard to Question 5, regarding how to handle inappropriate political interference, Arpin gave the Appellant a score of 3 and McFarlin and Dudley a 5. (Exhibits 7D, 7E and 7H)

Captain Parylak's Ratings of the Interviewed Candidates

45. Captain Parylak's higher numerical rating of candidates McFarlin (23) and Dudley (24) over the Appellant (18) was based primarily on the Appellant's answers to questions, 5 and 6, in which Parylak gave the Appellant a low score of 2. (Exhibits 7D, 7E and 7H) Parylak testified that the Appellant "started to lose his luster" and was "not as motivated [as the other candidates]" when answering Question 5 and that the Appellant appeared "burnt out" when answering the final question, Question 6. Parylak testified that the Appellant was not able to expound on his answers regarding these final two questions. (Testimony of Parylak)

Appellant's Testimony Regarding Interview

46. The Appellant testified that he thought he had done well on the interview despite being advised to limit his answers to 2-3 minutes. He had a "good feeling" when he left the interview. (Testimony of Appellant)
47. In regard to Question 2, where he indicated a preference for assigning work based on a combination of geography, function and time (as opposed to primarily by function

only), he felt that this was “right in line” with Commissioner Fitchet’s philosophy on how to best manage the Department. (Testimony of Appellant)

City’s Reasons for Bypass: Experience and Expertise of McFarlin and Dudley

48. As previously referenced, the City also cited the extensive work experience of McFarlin and Dudley as a reason for selecting them over the Appellant, including their service as uniform division commanders and their extensive assignments in the field of narcotics enforcement. The City also stated that Dudley had been qualified by Judges in the Superior Court as an ‘expert witness’ in the prosecution of rape and narcotic investigations; that he had been assigned to the Internal Investigations Unit and had been involved in many important internal investigations. Also according to the City, McFarlin had been in charge of the Detective Bureau for several years and had a strong knowledge regarding forensics. Dudley had been the commander of Juvenile and Special Victims unit and served as the commander of the Crime Prevention Bureau. The City also cited the strong interpersonal skills of McFarlin and Dudley, their strong work ethic and the high respect they have from their colleagues as positive reasons for their selection. (Exhibit 3)

49. The Appellant testified that he was appointed as a provisional deputy chief in November 2006 by then-Commissioner Flynn and served in that position for 28 months. His duties for the first 14 months were as head of the Operational Support Division deputy chief overseeing the Detective Bureau, Youth Assessment Center, Narcotics, Vice, Traffic, Street Crime Unit and all the Tactical Operation Bureaus. He also handled disciplinary cases for the commissioner. (Testimony of Appellant)

50. In January 2008, the Appellant was assigned to the South Division. His responsibilities included making crime presentations for his sectors at the weekly comp-stat meetings, submitting deployment plans, strategizing on crime prevention tools, and attending “beat management” team meetings. (Testimony of Appellant)
51. The Appellant served for four years as the commanding officer (Captain) of the Youth Assessment Center and during two of those years he was also with the commanding officer of the Crime Prevention Bureau (CPB). The Youth Assessment Center was responsible for investigating juvenile crime, school resource officers and processed all juveniles arrested at this off site facility. The CPB investigated sexual assaults, child abuse, domestic violence and liquor violations. Appellant was the department’s representative to the license commission for liquor violations. The CPB was located in police headquarters. (Testimony of Appellant)
52. As previously referenced, the Appellant served as former Chief Paula Meara’s administrative captain for four years. His responsibilities included overseeing the budget, payroll and labor relations. (Testimony of Appellant)
53. The Appellant also served as an aide to former Chief Paula Meara for two years as a lieutenant. His responsibilities included a daily review of all correspondence, reports and information that came into the Chief’s office, prioritized them and met with the chief on matters needing her attention. He oversaw the payroll, budgeting and grants.. (Testimony of Appellant)
54. The Appellant served in the patrol division on the 12am-8am shift as a lieutenant. He served as the acting uniform division commander for at least two days a week for

three years. He was paid division commander pay for this duty. Appellant supervised entire shift of officers in the patrol division. (Testimony of Appellant).

55. The Appellant served as a patrol sergeant in the uniform division for three years, police officer for four years and was a member of the tactical response unit. Appellant graduated first in his police academy class. (Testimony of Appellant)

56. The Appellant collaborated with the Dept. of Justice, Bureau of Alcohol Tobacco and Firearms (ATF), District Attorney, Probation, Dept. of Youth Services (DYS) and Springfield School Dept. Appellant worked with the ATF to bring the GREAT (Gang Resistance education and training) program to Springfield. (Testimony of Appellant)

57. Commissioner Fitchet testified that there is a significant distinction between serving as an “acting” commander of a uniform division (as the Appellant has done) as opposed to serving as the permanent commander of a uniform division (as McFarlin and Dudley have done). (Testimony of Fitchet)

CONCLUSION

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 v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). 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.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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, 43 Mass. App. Ct. at 304.

The City, by a preponderance of the credible evidence, has shown that it had reasonable justification to bypass the Appellant for promotional appointment to Deputy Police Chief. Commissioner Fitchet, a 37-year veteran of the Department who has worked his way up the ranks from police officer to Commissioner, instituted a fair, merit-based process in order to select four Deputy Chiefs to help him lead the Department.

The review and selection process began with an Assessment Center examination conducted by an independent, outside consultant, instead of a traditional written multiple choice examination. The Assessment Center examination included an in-basket exercise, a program development exercise where a paper had to be written and defended before a panel, a city council meeting, a press conference and several situational response / scenario exercises.

After including promotional preference points and/or employment and experience credit, the Appellant was ranked fourth among those candidates who passed the examination, with a score of 81. Four passing candidates scored lower than the Appellant with scores of 80, 79, 75 and 74. Although the Appellant was ranked fourth, this alone does not demonstrate that he was the most qualified candidate for the position of Deputy Police Chief. (See Francis E. Murphy, III v. Cambridge and Mass. Civ. Serv. Comm'n, No. 03-0815, Middlesex Super. Court (2004). (City was not required to given any particular weight to the 8-point score differential on the civil service exam for two candidates competing for the position of Fire Chief.) Here, Commissioner Fitchet did consider the civil service scores of each of the candidates, but also wanted to consider other factors, including an interview of each of the candidates. The authority to interview candidates is inherent in G.L. c. 31 § 25. Flynn, 15 Mass. App. Ct. 206, 208 (1983).

The 3-member interview panel consisted of Fitchet and the two most senior captains in the Department. The interview process provided a meaningful additional review and all applicants who were interviewed were on a level playing field. Although subjectivity is inherent in the evaluation of interviews, I conclude that there was no undue subjectivity on the part of the panelists. It is an error to require adequate indicia of objectivity for the

statutorily authorized interviews. Neither the statute authorizing interviews, nor the Flynn case, nor any other authority...imposes such (a) requirement on appointing authorities.” Westfield v. Civil Service Comm’n & another., No. 98-601, Hampden Superior Court (1999).

I carefully considered the Appellant’s argument regarding the potential bias of the two panelists who had filed an MCAD complaint that related to the Appellant’s prior provisional promotion to the position of Deputy Police Chief. Captain Arpin and Captain Parylak credibly testified that their MCAD complaints were based on former Commissioner Flynn’s decision to disregard seniority when making provisional promotions and were not meant as a personal attack on the Appellant and/or his qualifications. I believe that these two Captains, both of whom have been with the Department for approximately forty (40) years, showed no personal bias or animus toward the Appellant in relation to their MCAD complaints.

I also accept Captain Parylak’s testimony that he had no knowledge regarding whether the Appellant played an administrative role as part of a series of grievances that Parylak filed during the tenure of former Police Chief Paula Meara. I credit his testimony that these prior grievances never even entered his mind when he was evaluating the Deputy Police Chief candidates.

Finally, I conclude that the fact that Arpin failed the Assessment Center did not impact his ability to serve as a fair, impartial and competent member of this review panel. Commissioner Fitchet’s decision to select the two most senior Captains to serve on the interview panel was rooted in a genuine desire to receive advice and counsel from the most experienced members of his command staff.

As a result of this interview process, all three panelists ranked candidates McFarlin and Dudley higher than the Appellant. They provided sound reasons for their ratings, both as part of their written notes as well as their credible testimony before the Commission. Thus, the City, in regard to the superior interview performances of McFarlin and Dudley, has substantiated a valid reason for bypassing the Appellant.

The City proffered other reasons for selecting McFarlin and Dudley over the Appellant, including their extensive service as uniform division commanders. Although some of these positive reasons appear to apply equally to the Appellant, I credit Commissioner Fitchet's testimony that he considered McFarlin and Dudley's performance of these duties on a permanent basis to be of more value than the Appellant's performance in an "acting" capacity. Thus, the City, in regard to the issue of relevant command and other experience, has substantiated another valid reason for bypassing the Appellant.

There was reasonable justification for the City's decision and there is no evidence of bias or improper motive. Thus, the City's decision to bypass the Appellant is "not subject to correction by the Commission." Cambridge, 43 Mass. App. Ct. at 305. For this reason, the Appellant's appeal under Docket No. G2-09-262 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner –Yes; and Taylor, Commissioner - No) on April 8, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

William J. Fennell, Esq. (for Appellant)
Maurice Cahillane, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
617) 727-2293

MARK S. ANTHONY,
Appellant

v.

G2-09-262

CITY OF SPRINGFIELD,
Respondent

CONCURRING OPINION OF PAUL M. STEIN

I concur in the conclusion that, based on the preponderance of the credible evidence, the City of Springfield (Springfield) sustained its burden of proof to justify bypassing the Appellant for “sound and sufficient reasons” consistent with basic merit principles i.e., after appropriately consideration of the evidence, properly weighed, the principal reason proffered for bypassing the Appellant (namely, his relatively less impressive performance in the internal interview process) met the well-established test for sufficiency under basic merit principles, .i.e., they were not proved “untrue, apply equally to [selected candidates] are incapable of substantiation, or are a pretext for other impermissible reasons.” E.g., Borelli v. MBTA, 1 MCSR 6 (1988). See also G.L.c.31,§1 (definition of “basic merit principles”). See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”)²

² The secondary reason for bypassing the Appellant because of a “significant distinction” between the Appellant’s command experience in an “acting” capacity from the selected candidate’s assignment as a “permanent commander” seems less justified, but discounting that reason does not change my view that the bypass is justified on this record, based on interview performance.

I have come to this conclusion after a careful review of the interview process that Springfield used to distinguish among the candidates, all of whom were highly-accomplished superior officers worthy of promotion to a position of Deputy Chief.

The initial ranking of the candidates based on their Assessment Center performance (which involved both written and oral examination exercises, as well as credit for experience and training) creates, in my view, a standing presumption that candidates will be selected according to their rank ordering based on their scores on the that objective, independently administered examination. See, e.g., Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (“A civil service test score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.”).

However, as the Commission’s Decision recognizes, a candidate has no vested right to a civil service appointment solely based on his or her performance on a civil service test (or, in this case, assessment center). Especially in making appointments at the highest level of responsibility – Deputy Police Chief is clearly one such position – Appointing Authorities must have sound discretion to refine and supplement the evaluation of candidates so as to take into appropriate account a community’s unique requirements and priorities.

I do believe, however, that the Commission must be vigilant to ensure that, whenever an Appointing Authority chooses to bypass a candidate based heavily on the relative performance during internal interviews, the interview process be fair and objective, and meets a minimum standard of due process. To the extent that the principle Decision suggests that the interview process is exempt from Commission scrutiny for “indicia of

objectivity”, I do not square that concept with basic merit principles as developed by the Commission’s prior decisions and applicable judicial precedent. See, e.g., Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”) See also Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme requiring approval by HRD, subject to appeal to the Commission, was “sufficient to satisfy due process”); 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) (the appointing authority must submit “sound and sufficient” reasons that affirmatively justify picking a lower ranked candidate, which must be supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the 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.”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action has been taken ‘consistently with ‘basic merit principles’ as provided in G.L.c.31,§1, which gives assurances to all civil service employees that they are ‘protected from arbitrary and capricious actions’ ”)

As the interview process in this case does have the necessary indicia of objectivity, I am satisfied that the Appointing Authority's unbiased use of the interview results may properly support its bypass decision. Each particular appointment process must be considered on its specific facts. I note several indicia in this case that persuade me to make the requisite finding that, here, the process was both subjectively and objectively fair and impartial.

First, the interview panel members included the Police Commissioner and the two most senior superior officers under his command; the hearing thoroughly explored the issue as to whether any of these thoroughly experienced officers had any indicia of favoritism or bias against the Appellant, and the hearing commissioner found explicitly to the contrary.

Second, the interviewers each kept notes and made an independent assessment and numerical ranking of each of the candidates. The notes include many favorable comments about the Appellant by all interviewers, supporting the credibility of the finding that none of the interviewers harbored any subjective bias toward him. While a verbatim record of the interviews would have been preferable, the level of detail and recollection of the interviewers minimized this one shortcoming.

Third, the use of objective scoring reveals sufficient variability in the scoring that makes it unlikely that the numerical results could have been predetermined. It also shows a consistency across and within the individual interviewers that give the assessments considerable credibility. For example, while all candidates (including the Appellant) received predominantly "good" marks ("4"s), the Appellant received an aggregate of nine "Adequate" answers ("3"s) and two "Fairs" ("2"s); none of the selected candidates

received more than four grades below “Good” (“4”) on any question. Similarly, the Appellant scored only one “Excellent” answer; two of the successful candidates who bypassed him scored an aggregate total of six “Excellent” answers. While these data may not (and need not) rise to the level of establishing statistically significant differences, they did serve as an important objective indicator to me, together with the other credible evidence, that the distinctions perceived by the interviewers were rationally supported, sound and reasonable.

Accordingly, I concur in the result.

Paul M. Stein
Commissioner