

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

DANIEL B. McNEIL,
Appellant

v.

TOWN OF SALISBURY,
Respondent

Case No.: G2-12-339

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Town of Salisbury to bypass the Appellant for promotional appointment is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Daniel B. McNeil (Appellant)

Darren Klein, Esq. (for Respondent)

John Marra, Esq. (HRD)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
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Docket Nos.: G2-12-339, CS-13-322

DANIEL B. McNEIL,
Appellant

v.

TOWN OF SALISBURY,
Respondent

Appearance for Appellant:

Pro se

Appearance for Respondent:

Darren Klein, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

Administrative Magistrate:

Angela McConney Scheepers, Esq.

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

SUMMARY OF TENTATIVE DECISION

The Town of Salisbury had reasonable justification to promotionally bypass the Appellant for the position of sergeant. The Appellant had a long history of discipline and lacked higher education. I therefore recommend that the Civil Service Commission dismiss the appeal.

TENTATIVE DECISION

INTRODUCTION

Pursuant to the provisions of G.L. c. 31, § 2 (b), the Appellant, Daniel B. McNeil (Appellant), seeks review of the decision of the appointing authority, Town of Salisbury (Town or appointing authority) in its delegated capacity, for bypassing him for promotional appointment to the position of Sergeant in the Salisbury Police Department (Department).

The appeal was timely filed on December 13, 2012. A pre-hearing conference was held on January 8, 2013 at the offices of the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. Pursuant to 801 CMR 1.01(11)(c), on June 10, 2013 a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at DALA, One Congress Street, Boston, MA 02114 in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01. The hearing was digitally recorded. The witnesses were sequestered.

The Appellant called Sergeant Robert Roy and Dispatcher Scarlette Balkus as witnesses. He also testified on his own behalf. Chief Thomas W. Fowler, Town Manager Neil Harrington, and Detective Sergeant Anthony King testified for the Respondent. Sixteen (16) exhibits were admitted into evidence. I ordered that the parties submit post-hearing briefs on or before July 19, 2013. The Respondent submitted its post-hearing brief on July 19, 2013, whereupon the administrative record closed.

FINDINGS OF FACT

Based on the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. On October 10, 1983, the Appellant Daniel B. McNeil was appointed to the Department as a permanent intermittent police officer. On November 8, 1993, the Town appointed him to the position of permanent patrol officer. (Exhibits 3 and 10; Testimony of the Appellant.)
2. Neil Harrington has been the Town Manager since May 2003 and is the appointing authority for the Department. (Exhibit 3; Testimony of Harrington.)

3. The Appellant has no post-secondary education. (Exhibit 3; Testimony of the Appellant.)

4. The Appellant served as union president for five years. (Testimony of Appellant, Testimony of Chief Fowler.)

A. Appellant's Disciplinary History

5. The Appellant has been disciplined several times. On June 21, 1996, the Appellant received a written reprimand for vulgarity toward a citizen. (Exhibit 3.)

6. On May 12, 1997, the Appellant was involved in a motorcycle accident (within one week of graduation from a two-week motorcycle operator's school) and in a May 21, 1997 incident wherein he punched a hole in an interior wall in the police department's communication area. After losing the Lieutenant Governor while assigned as an escort in a special overtime detail, the Appellant collided with another officer and fell while "hotdogging" in the presence of the governor. The motorcycle accident resulted in \$2,400 in damage to the motorcycle and the Appellant also sustained personal injuries. (Exhibit 10; Testimony of the Appellant.)

7. On July 5, 1997, then-Chief Street imposed a three-day suspension on the Appellant for "reported and repeated "like" violations of this department's rules and regulations." The chief cited two acts which took place in May 1997, finding that the Appellant had violated the following Department Rules and Regulations on May 12, 1997:

Section 1, subsection G. PROHIBITED CONDUCT:

1. (3) Abuse of Department Property
2. (10) Incompetence – Repeated infraction of department Rules and Regulations
3. 3 (11) Incurring department liability

Section 1, Subsection I. DEPARTMENT PROPERTY AND EQUIPMENT

1. (8) Safe Driving of Police Vehicle

(Exhibit 10.)

The Department found that the Appellant had violated the following Department Rules and Regulations on May 21, 1997:

Section 1, subsection G. PROHIBITED CONDUCT:

1. (1) Conduct unbecoming an officer
2. (3) Abuse of Department Property

Section 1, Subsection I. DEPARTMENT PROPERTY AND EQUIPMENT

1. Care of Department Buildings
2. Failure to report damaged department property

(Exhibit 10.)

In his suspension letter to the Appellant, the chief wrote:

This conduct has demonstrated an articulable pattern of negligent and disrespectful conduct towards this department, this community and the public in general. This conduct has further been personally disturbing, publicly eroding and contrary to the mission of this department.

... Despite repeated warnings, which have included employer/employee counseling sessions, psychological evaluations and the repeated reassignment of shifts, you have continued this pattern of conduct apparently undaunted by any potential consequence.

... you operated the motorcycle recklessly, negligently and with a wanton disregard for government property. In so doing, you damaged department equipment, unnecessarily endangered yourself, Officer Roy and innocent members of the public.

(Exhibit 3.)

8. On April 9, 1999, the Appellant received a thirty-day suspension for a course of misconduct after signing a waiver of his statutory rights. The Appellant had to successfully complete an anger management program before his return to work would be approved by the Department and a clinical psychiatrist. (Exhibit 3.)

9. On September 6, 2004, the Appellant received a three-day suspension after the interim Chief Richard C. Simmons caught him sleeping in the recreational room while he was supposed to be on duty. (Exhibits 3 and 8.)

10. On December 20, 2011, the Appellant was counseled for associating with a known female drug user, identified by a confidential informant, after Sgt. Roy completed Internal Affairs investigation into the matter. This woman had been seen in the Appellant's cruiser on occasion; she was friends with McNeil's daughter. The Appellant agreed to de-friend this woman on Facebook, discontinue all contact with her, and change his telephone number. (Exhibits 3 and 6; Testimony of Appellant, Testimony of Chief Fowler.)¹

11. On February 6, 2012, while working the 11:00 p.m. to 7:00 a.m. shift, the Appellant responded to a domestic violence call. When he arrived on the scene at 3:11 a.m., the Appellant was flagged down by a male whose face was bleeding from numerous cuts on his face. The male told the Appellant that his girlfriend had attacked him with a kitchen knife and cut him up; she also stomped on his left foot. The Appellant arrested the female for domestic assault and battery and assault and battery with a dangerous weapon. As the Appellant escorted the female out of the home, the male threw himself on the floor and screamed that he had lied and cut himself up. The Appellant had Officer Michael Tullercash transport the female in a cruiser to a local hospital to treat a deep cut on a finger of her right hand. After she received several stitches, Officer Tullercash took the female to Salisbury police station and booked her. (Exhibits 5, 11-13.)

12. The Department remained unaware of the seriousness of the incident until contacted by the District Attorney's Office about a videotape of the event, which revealed the male as the primary aggressor. (Testimony of Chief Fowler.)

¹ During the hearing, the Appellant, in violation of the chief's December 20, 2011 order, informed DALA that he had contacted this woman. Further, he had informed the Town's counsel that she would be appearing on the hearing date to testify on his behalf. The woman appeared at the hearing.

13. Nonetheless, the male later secured a restraining order on February 21, 2012, with a return date of March 5, 2012. (Exhibit 14.)

14. In March 2012, the female's mother filed a complaint with the Department, alleging that her daughter had been improperly arrested and seeking an apology from the Department. After discussing the matter, Acting Chief Roy and Mr. Harrington agreed that Detective Sergeant King should conduct an internal investigation of the incident. (Exhibits 5 and 13; Testimony of Chief Fowler, Testimony of King.)

15. Det. Sgt. King submitted his investigative report to Mr. Harrington on May 16, 2012. Det. Sgt. King found that the arrest in itself was not improper, but that the Appellant had failed to follow Department procedure afterwards. (Exhibit 5.)

16. First, Det. Sgt. King found that the Appellant violated the Department Policy and Procedure "Transportation and Custody of Arrestees," having the female transported to the hospital in a police cruiser rather than in an ambulance. Department Policy and Procedure, Section III, Subsection G(2)(a)(i and ii) provides:

... if medical care is necessary, the officer shall arrange for Emergency Medical Technicians to come to the scene to evaluate the prisoner's medical needs. The prisoner will either be transported by ambulance to a hospital or treated and released to the officers' custody. ... If hospital care is necessary, one officer shall accompany the prisoner in the ambulance.

(Exhibit 5; Testimony of Chief Fowler, Testimony of Harrington, Testimony of King.)

17. During the investigation, the Appellant told Det. Sgt. King that he made a "judgment call" in having the female transported to the hospital in a cruiser. (Exhibit 5; Testimony of the Appellant.)

18. Second, Det. Sgt. King found that the Appellant had failed to notify the Criminal Investigation Division (CID) about the matter. According to General Order:

Number SDPDM-DD-09-10. C.I.D. Callouts – Section III. PROCEDURE
Subsections 4. Calls on which on call C.I.D. personnel are to be notified,
... (d) Violent crimes with serious bodily injury and/or death; ...
(g) Serious Domestic.

(Exhibit 13.)

19. According to Section III, subsection 5 of the General Order, the decision to call CID is to be made by the Sergeant or the OIC. However, if the decision is made not to call a detective, the officer must still give CID a “heads up.” Det. Sgt. King concluded that the Appellant did not exercise his discretion properly in not calling an investigator to the scene, and his lack of judgment was compounded when he failed to call CID the following day pursuant to Section III, subsection 5(c) of the General Order. (Exhibits 5 and 13; Testimony of King.)

20. In his statement to Det. Sgt. King, the Appellant said that he did not notify CID because “through the years, I have been involved in numerous incidents and arrests where CID was not notified by my superiors.” (Exhibit 5.)

21. Det. Sgt. King found that because the Appellant failed to contact CID, Officer Leavitt was not assigned to the matter until February 14, 2012, six days later. By then, the female had languished at MCI Framingham. She was pregnant. (Exhibits 5 and 13; Testimony of Chief Fowler, Testimony of King.)

22. Because of the delay caused to CID, Det. Sgt. King found that Officer Leavitt and the Department could not employ proper investigatory techniques at the scene. The result was an incomplete search of the residence; incomplete scene photography; and an incomplete collection of the evidence, including but not limited to blood samples and the alleged weapon. (Exhibit 5.)

23. On July 10, 2012, Town Manager Harrington found that the arrest was unfortunate rather than malicious. However, given the Appellant’s long tenure in the

Department, his failure to follow established policies and procedures warranted a letter of reprimand. (Exhibit 3.)

24. The female has since filed a civil action against the Town. (Testimony of Mr. Harrington, Testimony of Chief Fowler.)

B. Department History

25. Around December 2010, after he was placed on a leave of absence, the then-Police Chief resigned from his position. Sergeant Kevin Sullivan was appointed as Acting Police Chief at that time. He retired shortly thereafter in the spring of 2011. Sergeant Richard Merrill was appointed as Acting Police Chief. (Testimony of Harrington.)

26. Because of the retirement of one sergeant and the appointment of another as Acting Police Chief, there was a need for an acting sergeant in spring 2011. There was no active civil service list for sergeant. Because the Appellant was related to the Acting Police Chief Merrill and was in the pool of candidates for the position, Merrill could not participate in the selection process. Thus on July 12, 2011, Mr. Harrington provisionally appointed the most senior patrol officer at the time, which was the Appellant. (Exhibit 1; Testimony of Harrington.)

27. The next civil service examination for the position of sergeant was scheduled for fall 2011. (Testimony of Harrington.)

C. The Bypass

28. The Appellant took the civil service examination for sergeant on October 15, 2011. He received a score of 80. (Exhibits 2 and 15; Testimony of Harrington.)

29. The Town conducted its own assessment center to test candidates' skills as part of the September 6, 2011 delegation agreement with the state Human Resources Division (HRD). (Exhibit 2.)

30. On March 1, 2012, HRD issued Certification # 202242 for the position of sergeant was established. There were two names on the list, the Appellant ranked first and Hunter was second. (Exhibits 3, 4 and 15.)

31. Hunter had become a permanent full-time patrol officer on July 15, 2007. He served as a Special Police Officer in the town of Nantucket from 2001 to 2002, served as a Special Police Officer in the town of Salisbury from 2002 to 2005 and served as a full-time patrolman in the town of Methuen from 2005 to 2007 before returning to the town of Salisbury as a full-time patrolman in 2007. He has received numerous commendations for his service in Salisbury. (Exhibit 4.)

32. Hunter earned his Bachelor's degree in 2003 and his Master's degree in 2005, both in Criminal Justice. Hunter has also served many times as the Department's officer-in-charge. (Exhibits 3 and 4; Testimony of Chief Fowler.)

33. Hunter has never been disciplined. (Exhibits 3, 4 and 15.)

34. At this time, Mr. Harrington delayed making a permanent sergeant appointment because Acting Police Chief Merrill had announced his retirement. Sergeant Robert Roy was named Acting Police Chief. The Town commenced a search for a permanent police chief, which was expected to end in June/July of 2012. Mr. Harrington decided that the new chief would participate in the choice of the new permanent sergeant position. The Appellant remained in the acting sergeant position. (Testimony of Harrington.)

35. On July 16, 2012, Thomas Fowler was appointed Police Chief for the Town. Chief Fowler has a bachelor's degree in criminal justice and a master's degree in public administration. (Testimony of Chief Fowler, Testimony of Harrington.)

36. Chief Fowler decided to delay the sergeant appointment until he became familiar with the two candidates' job performance, work experience, and backgrounds. (Testimony of Chief Fowler.)

37. In September in 2012, Chief Fowler was ready to begin the appointment process. On September 24, 2012, the Town requisitioned a civil service list from HRD. (Exhibit 3; Testimony of Chief Fowler.)

38. Before making his recommendation, Chief Fowler reviewed each candidate's job performance, history of discipline, rank on the civil service list, and education and training. He also interviewed each candidate. (Exhibit 3; Testimony of Chief Fowler.)

39. In October of 2012, the Police Chief recommended Hunter for the position of permanent police sergeant. The Chief and Mr. Harrington had not discussed the candidates before Chief Fowler's decision. (Testimony of Chief Fowler, Testimony of Harrington.)

40. Mr. Harrington accepted Chief Fowler's recommendation. Chief Fowler and Mr. Harrington created the statement of selection reasons for the bypass. (Exhibit 3; Testimony of Harrington.)

41. On October 16, 2012, Mr. Harrington sought approval from HRD's Civil Service Unit² for the appointment of Timothy Hunter. (Exhibit 3.)

42. On October 18, 2012, Mr. Harrington sent the Appellant a bypass letter. The following negative reasons were listed:

1. Performance as Acting Sergeant: Officer McNeil was assigned acting sergeant by the appointing authority. During this time, there was one domestic violence case, in particular, in which he demonstrated a lack of sound judgment as an acting supervisor, poor decision making and a lack of adherence to protocol. During this case, as acting supervisor on scene, a

² This notice was incorrectly addressed to the Civil Service Commission, rather than the Civil Service Unit of HRD. (Exhibit 3.)

decision to arrest was made based on questionable probable cause.³ Investigators were not called to the scene of a serious domestic involving a weapon. The Department policy states that the investigators should have been called and exculpatory statements were never investigated further. These actions and inactions have exposed the Town to serious civil liability.

- 2. Previous Discipline: Officer McNeil has an extensive negative discipline record, which includes, but is not limited to, numerous supervisory counseling, remedial training, multiple written reprimands and multiple suspensions as follows:

July 10, 2012	Written Reprimand	DV Case
May 25, 2010	Written Reprimand	Yelling in PD ⁴
Dec. 20, 2011	Documented Counseling	Assoc. w/ known drug user
Sept. 6, 2004	Three (3) Day Suspension	Sleeping on duty
April 9, 1999	Thirty (30) Day Suspension	Series of incidents
July 5, 1997	Three (3) Day Suspension	Motorcycle Accident
June 21, 1996	Written Reprimand	Vulgarity towards Citizen
- 3. Discipline of this employee began shortly after he was hired full-time and continued up until the most recent incident, which occurred in February of 2012.⁵
- 4. Limited education within the field: While Officer McNeil has more years of experience than the other candidate, he does not possess any formal education in the Criminal Justice Field. He does have specialized training in several areas of police work but that training was geared towards line personnel.

(Exhibit 3.)

43. Mr. Harrington concluded:

In conclusion, after comparing the civil service results, the relevant qualifications, training, experience, education performance history, and observed performance of Officer Hunter to Officer McNeil, the Police Chief recommended the promotion of Officer Hunter. Based on the Police Chief's recommendation and the information listed above, including giving due consideration to the civil service results, I concurred with the Police Chief's recommendation and selected Officer Hunter for the sergeant's vacancy, since he is clearly the better qualified candidate warranting the bypass of Officer McNeil.

³ Det. Sgt. King's investigation revealed that while the arrestee was not improperly arrested, the arrest was "unfortunate." The Appellant was disciplined for failing to follow Department procedure in the transportation of an arrestee for medical care and notification of CID. (Exhibit 5.)

⁴ The Appellant was advised that he could ask to have this reprimand removed from his file if he had no further infractions within one year. (Exhibit 7.)

⁵ The Appellant was hired on November 8, 1993 as a full-time permanent police officer; his first instance of discipline was a written reprimand on June 21, 1996. (Exhibit 3.)

(Exhibit 3.)

44. On October 19, 2012, Hunter was appointed as a permanent police sergeant.

(Exhibits 3 and 15.) The Town stated the following positive reasons:

1. Relevant Experience and Educations: Timothy Hunter has been a full-time member of the Salisbury Police Department for five (5) years and has no disciplinary record. He has worked in the capacity of Officer in Charge for about three (3) years and has proven he can be successful in that position. Prior to being a full-time officer in Salisbury, Officer Hunter worked full-time for one (1) year in the Methuen Police Department. Methuen PD is a much larger police department and his experiences there prepared him for being a supervisor in Salisbury. Officer Hunter also holds both a Bachelor's and Master's degree in the criminal justice field.
2. Relevant Training: Officer Hunter has numerous hours of law enforcement training including DNA collection, Criminal Interdiction Drug Trafficking, Forensic Digital Photography, Latent Fingerprint Recovery, Response to Terrorist Suicide, and Preventing Harassment in the workplace. This current training applies to both the patrol officer functions and the sergeant functions. Additionally, Officer Hunter has numerous letters in his personnel file commending his work from previous chiefs, area departments and the public.

(Exhibits 3 and 4.)

45. Three of the four current sergeants have college degrees, including the sergeant promoted before the appointment of Hunter. (Testimony of King, Testimony of Roy.)

46. The Appellant filed an appeal with the Commission on December 13, 2012.

(Exhibits 15 and 16.)

CONCLUSION AND ORDER

A. Applicable Legal Standards

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. at 259, citing *Cambridge v.*

Civil Serv. Comm'n, 43 Mass. App. Ct. at 304. “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. *Cambridge* at 304.

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *Cambridge* at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928). *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” *Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 (1991). G.L. c. 31, § 43.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 332 (1983). See *Commissioners of Civil Service v. Municipal Ct.*

of Boston, 369 Mass. 84, 86 (1975) and *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 189, 190-91 (2010), citing *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). See also *Methuen v. Solomon*, Docket No. 10-01813-D, at *10 n.7 (Essex Sup. Ct. July 26, 2012). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown.

B. Reasonable Justification for Bypassing the Appellant

I find that the Town of Salisbury has proven by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for promotion to Sergeant. The Town's negative reasons for the bypass were the Appellant's performance as Acting Sergeant, his disciplinary record and its time span, and his lack of higher education.

The Appellant was appointed as Acting Sergeant on July 12, 2011, and served in that capacity until Hunter was promoted on October 19, 2012. On February 6, 2012, he responded to a domestic violence call at 3:11 a.m. It is undisputed that in violation of Department General Orders and Rules and Regulations, the Appellant had a female civilian transported to the hospital in a cruiser, rather than calling for an ambulance and failed to call the Criminal Investigation Division to a violent crime and serious domestic violence scene. The Department remained unaware of the serious nature of the incident until contacted by the District Attorney's Office days later with a videotape of the event. Because the Appellant did not contact that division, CID was unable to conduct a thorough investigation – resulting in an incomplete search of the

residence; incomplete scene photography; and an incomplete collection of the evidence, including but not limited to blood samples and the alleged weapon. During the investigation, the Appellant admitted that he had made a “judgment call” in not contacting CID. He also testified during the hearing that he had not called CID because the division frequently failed to show up at the scene.

Because of the Appellant’s “judgment call” not to contact CID, the civilian remained at MCI–Framingham for over a week. The video starkly documented that the male was the aggressor in the February 6, 2012 domestic violence incident. The civilian was also pregnant. Nonetheless, Mr. Harrington found that Det. Sgt. King’s investigation revealed that the arrest in and of itself was proper, but “unfortunate,” and the Appellant had had no specific or malicious intent to deprive the civilian of her freedom. However, the Appellant failed to follow proper procedures in handling the matter from start to finish. Because the arrest was proper, the Town only issued a letter of reprimand.

The Appellant did not display good judgment on the morning of February 6, 2012, a quality sought by the Town in the promotion of superior officers. I find that the Appellant’s performance as Acting Sergeant on February 6, 2012 is a sound and sufficient reason for bypass. Not only did the Appellant’s “judgment call” expose the Town to serious liability, but CID could not conduct a proper investigation of the crime scene, and possibly the civilian’s civil rights were violated. The civilian has since filed a lawsuit against the Town for violation of her civil rights.

It is well settled that an appellant’s disciplinary history can stand as a valid reason for bypass. *See Burns v. Holyoke*, 23 MCSR 162, 166 (2010) (appellant had been disciplined on two separate occasions for using sick time in order to perform paid details); *Buzalsky v. Hanover*, 23 MCSR 152, 154-55 (2010) (appellant had been verbally warned by supervisor to cease operating

his personal vehicle without a valid inspection sticker); *Kennedy v. Pittsfield*, 22 MCSR 729 (2009) (Appellant had problematic disciplinary record in contrast to the selected candidate's superior background); *Dowling v. North Andover*, 6 MCSR 98, 98 (1993) (appellant was suspended for refusing to follow an order). The Appellant has an extensive disciplinary history, beginning in the third year of his nineteen year tenure. He has received at least two written reprimands, two three-day suspensions and a thirty-day suspension. After the thirty-day suspension, the Appellant had to complete an anger management course and have his return approved by the Department and a clinical psychiatrist. Also of note, the Appellant's most recent discipline was imposed on July 10, 2012, and the sergeant's appointment was made on October 19, 2012. *See Barlow v. Framingham*, 26 MCSR 354 (2013) (recent disciplinary history is sound and sufficient reason for promotional bypass). Hunter has been a police officer for eight years (Methuen 2005-2007 and Salisbury since 2007) and has no record of discipline.

Because a sergeant is expected to set an example for his subordinates, Chief Fowler testified that a strong work record is important for being promoted to sergeant. Police officers are held to a higher standard than other employees, and sergeants are held to an even higher standard than patrol officers. Both Chief Fowler and Mr. Harrington testified that a poor disciplinary record potentially undermines a sergeant's supervisory authority and ability to lead. The Appellant presents with a serious disciplinary history, while the selected candidate has none. Given the egregiousness of the Appellant's disciplinary record, that alone warrants a reason for bypass.

It is well settled that an appointing authority has met its burden in a bypass appeal if the Appellant did not possess a similar educational background as the selected candidate. *See Tuohey v. Barnstable Police Dep't*, 11 MCSR 50, 51 (1998) (appointing authority improperly

bypassed candidate with “an impeccable academic history which included a Bachelor’s as well as a Master’s Degree in criminal justice”).

Chief Fowler testified that educated officers are likely to be better employees and have less disciplinary problems and that many law enforcement employers now require a post-high school degree as a hiring requirement. Not only did the sergeant appointment prior to Hunter possess both a bachelor’s degree and a master’s degree, three of the Department’s four sergeants have college degrees. The Appellant has not pursued formal education beyond high school. I find that the educational achievement of the selected candidate is a sound and sufficient reason for bypassing the Appellant.

The Appellant showed his lack of good judgment again during the Commission proceedings. The Appellant disclosed to DALA that he had contacted the subject of his December 20, 2011 discipline, the known drug user that he had been ordered to stay away from. He also informed DALA that he let the Town’s counsel know that he would be calling her as a witness. To excuse his behavior, the Appellant testified that this person was a friend of his daughter’s and that she didn’t have a criminal record. He excused the behavior that had led to his discipline by saying that he was not the only officer to give her rides in his cruiser. The Appellant admitted that he had not sought permission from the Chief before contacting this person. Alternatively, the Appellant could have sought a subpoena from the Commission pursuant to G.L. c. 31, § 72 and the Standard Adjudicatory Rules of Practice and Procedure. 801 CMR 1.01.⁶ The Town expects better judgment from those seeking to become superior officers.

⁶ Effective October 11, 2001, the Commission adopted a rule which states, “parties may request the authority to issue subpoenas from the Commission by motion at least ten (10) days prior to the scheduled hearing. Such request shall identify the individuals or documents sought and describe its relevance to the proceedings. Within seven (7) days of the request for subpoenas, a party may object to the issuance of subpoenas.”

The Department was reasonably justified in not promoting the Appellant and has stated sound and sufficient grounds for doing so. The decision to promote an employee to a position of leadership and trust deserves a studied look at the employee's work performance, disciplinary history and education. Based on the testimony and documents, the Appellant has neither displayed the requisite judgment of, nor conducted himself in a manner befitting, a superior officer.

There is no evidence that the Town's decision was based on political considerations, favoritism or bias. Thus, the Town's decision to bypass the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that Town of Salisbury was reasonably justified in bypassing the Appellant Daniel B. McNeil.

Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Angela McConney Scheepers
Administrative Magistrate

DATED:

NOV 20 2013