

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108

MICHAEL KIELY,
Appellant

v.

G2-19-256

CITY OF SOMERVILLE,
Respondent

Appearance for Appellant:

James W. Simpson, Esq.
100 Concord Street, Suite 3b
Framingham, MA 01702

Appearances for Respondent:

Timothy D. Zessin, Esq.
KP Law
101 Arch Street, 12th Floor
Boston, MA 02110

Commissioner:

Christopher C. Bowman¹
Cynthia A. Ittleman

SUMMARY OF DECISION

The Commission dismissed the appeal of a Somerville Police Sergeant who was bypassed for promotion to Police Lieutenant after the Somerville City Council voted to not confirm the Mayor's conditional offer of promotion. A majority of the Commission conclude that the City Council was justified in relying on the Appellant's past untruthfulness, even it occurred many years ago, to bypass him for promotional appointment.

¹ Commissioner Ittleman conducted the full hearing regarding this appeal, but she retired from the Commission prior to drafting a decision. For that reason, the appeal was assigned to me. I have reviewed the entire record in this matter, including the recording of the full hearing and all exhibits.

DECISION

On November 25, 2019, the Appellant, Michael Kiely (Appellant), acting pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to bypass him for promotional appointment to the position of Lieutenant within the City's Police Department (Department or SPD). A pre-hearing conference was held on January 7, 2020, prior to which the City filed a motion to dismiss the Appellant's appeal, which was subsequently denied. A full hearing was held over the course of two days. The first day was held in-person at the offices of the Commission in Boston on March 4, 2020. The second day of the full hearing was held via video conference on May 13, 2020.² The full hearing was digitally recorded and both parties received a copy of the recording.³ All witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

At the hearing of this matter, thirty exhibits (marked 1-30) were entered into evidence for the City and eight exhibits (marked 31-38) were entered on behalf of the Appellant. Following the hearing, per the Commission's request, counsel for the Respondent produced a link to a video recording of the Somerville City Council Confirmation Committee's February 25, 2020 meeting, which was previously marked as Appellant's Exhibit 35. The Appellant produced a copy of a January 2, 2020 letter from SPD's Professional Standards unit to City Councilor J.T. Scott, post-

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

³ Should either party file a judicial appeal of this decision, the plaintiff is obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

hearing, which has been added to Respondent Exhibit 31. The Appellant produced documentation of his awards and commendations post-hearing, hereinafter marked Exhibit 39. Lastly, the Respondent produced documents requested by the Commission relating to grants the Appellant has helped obtain for the City, herein marked as Exhibit 40. All of these aforesaid documents have been incorporated into the record. Based upon the evidence and the testimony of the following witnesses:

Called by the City:

- Candace Cooper, Personnel Director, City of Somerville
- Jefferson Thomas (“J.T.”) Scott, Councilor, Somerville City Council

Called by the Appellant:

- Arthur White, Councilor, Somerville City Council
- Wilfred Mbah, Councilor, Somerville City Council
- Vernon Cotter, former Captain, Somerville Police Department
- Paul Trant, former Deputy Chief, Somerville Police Department
- David Fallon, Chief, Somerville Police Department
- Michael Kiely, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

Appellant’s Background

1. The Appellant has been a member of the Somerville Police Department since 1995. He was a member of uniform patrol from 1995-2005. Thereafter, he was a member of the Detective Unit, investigating major crimes from 2006-2014. He was promoted to Sergeant in 2014.

(Testimony of Appellant)

2. The Appellant has a Bachelor of Arts degree in Criminal Justice and two master's degrees, including one in Emergency Management. Prior to earning his degrees, he spent five years as a member of the United States Coast Guard and three years in the Coast Guard Reserves.

(Testimony of Appellant)

The City's Process Regarding Police Promotions

3. The Mayor of Somerville is the Appointing Authority for the City. *(Stipulated Fact)*
4. The City of Somerville Charter, Title 4 [EXECUTIVE DEPARTMENT], Section 2, entitled "Mayor to Appoint Certain Officers and Boards," provides in pertinent part:

"The mayor may appoint, subject to confirmation by the city council, the following officers and boards ... (iii) a chief of police, who shall be appointed in the manner provided by ordinance and shall have an employment agreement for a term of not more than 5 years, all other officers and members of the police department"

5. The Somerville City Council, formerly the Board of Aldermen, is the City's legislative department and is comprised of eleven members—seven members represent individual wards and four members serve at large. *(Somerville City Charter, Title I, §§ 2 and 3; Testimony of Scott)*
6. Individual city councilors are assigned by the President of the Somerville City Council to various committees. One such committee, the Confirmation of Appointments and Personnel Matters Committee (hereinafter "CAPM Committee") is comprised of five city councilors who are tasked with, among other responsibilities, evaluating candidates who have been conditionally appointed by the Mayor for original and promotional appointment to the Somerville Police Department. *(Testimony of Scott)*

7. The City of Somerville Charter, Title 7 [GENERAL PROVISIONS], Section 52, entitled “Civil Service Act to remain in force”, states:

“Nothing in this charter shall be construed to affect the enforcement of Chapter 31 of the General Laws in the City of Somerville.”

Appellant’s Promotional Process

8. On or about September 16, 2017, the Appellant took the promotional examination for Somerville Police Lieutenant. (*Stipulated Fact; Resp. Ex. 1*)

9. On or about December 21, 2017, the state’s Human Resource Division (HRD) established an eligible list of candidates for promotion to the position of Somerville Police Lieutenant. (*Stipulated Fact; Resp. Ex. 1, 3*)

10. On or about March 15, 2019, the City created Certification No. 04505 for promotion to the position of Police Lieutenant. (*Stipulated Fact; Resp. Ex.1, 3*)

11. The Appellant’s name appeared tied for second (with Sergeant H) on Certification No. 04505 putting him within the statutory “2N + 1” formula for the City to consider as part of the promotional hiring cycle. Sergeant C was ranked third. (*Stipulated Fact; Resp. Ex. 1*)

12. Six (6) individuals signed the certification as willing to accept promotion to the position of Lieutenant, including the Appellant. (*Stipulated Fact; Resp. Ex. 3*)

13. As part of the 2014 process for promotion to Sergeant, the Appellant was first promoted by the Mayor of Somerville and then was required to be confirmed by the Somerville City Council. (*Testimony of Appellant*)

14. In 2014, the City Council affirmed his promotion to Sergeant following a brief “meet-and-greet” with the Appellant. There was not much scrutiny by the City Council beyond what was presented by the Department regarding the Appellant’s background prior to confirmation of his promotion to sergeant, nor was there much scrutiny beyond the presentation by the

Department of any other candidates up for promotion. (*Testimony of Appellant*) The City Council did not review the Appellant's personnel file, but only examined the materials submitted by the Administration. (*Resp. Ex. 21*)

15. After being promoted to Sergeant, Mr. Kiely worked in the Special Operations Unit as a liaison with the Department of Homeland Security's Urban Area Security Initiative (hereinafter "UASI"). (*Testimony of Appellant and Fallon*)

16. Typically, representatives from other communities who are members of UASI are Chiefs of police, fire, or Deputy Superintendents. The Appellant, as a Sergeant, was one of the lowest ranking members of UASI, working above his grade, and was considered by his superiors to be an excellent representative of the Department in that role. The Appellant played a key part in obtaining substantial grants for the City of Somerville relative to the creation of a marine unit, funding for school security, and elderly initiatives. (*App. Ex. 40; Testimony of Appellant, Chief Fallon, and Deputy Chief Trant*)

17. Throughout his tenure with the Department, the Appellant has received numerous awards and commendations, including a 2003 Officer of the Month citation, the Honorable Service Medal as part of the Detectives Unit in 2007, and the Arthur W. Regan Memorial Achievement Award in 2015. (*App. Ex. 39; Testimony of Appellant*)

18. The Appellant has been disciplined by the SPD on two occasions, once in 2003 and the other time in 2005. (*Testimony of Appellant, Cooper, Scott, Fallon; Resp. Ex. 17-20*)

Prior Discipline of Appellant – 2003 Incident

19. On March 12, 2003, the Appellant was suspended for five (5) days by Chief George McLean of the Somerville Police Department due to an incident occurring on January 18, 2003, stemming from the Appellant's discharge of his service weapon. (*Resp. Ex. 17*)

20. On or about January 18, 2003, the Appellant was working a detail as a uniformed police officer at the East Cambridge Savings Bank in Somerville from 9 AM to 1 PM. A couple hours into his shift, the Appellant was visited by Somerville Police Officer A. Officer A was on duty at the time, yet he was not in his assigned sector when he was visiting with the Appellant. Officer A had been disciplined for not being within his sector while on duty just one month prior to this date. As the two chatted at the bank, a radio call came over the radio of a carjacking and police chase. Ultimately, the speeding vehicle approached the area of the bank where the Appellant was, causing the Appellant to discharge his firearm, as he was in fear for his life as the vehicle sped towards him. (*Resp. Ex. 17, 18*)
21. In the days following the discharge of his weapon, the Appellant was asked by his supervisors repeatedly to immediately write a report of the incident. The Appellant, who was shaken up by the incident, took three days to write the report. Within the report that the Appellant finally authored, he failed to ever mention that Officer A was at the bank with him that day.⁴ (*Resp. Ex. 18*)
22. The Appellant was charged in 2003 by the SPD with falsifying records, being untruthful, and two charges of not filing a timely report after discharging a service weapon.⁵ (*Resp. Ex. 17*)
23. In issuing the five (5) day suspension of the Appellant, then-Chief McLean wrote:

“The manner in which police officers use deadly force/firearms is an extremely critical issue to the department and one that generates intense public scrutiny. When these incidents occur they demand a thorough and complete inquiry into all aspects of the incident. Only when police personnel participate fully and truthfully can the facts

⁴ Officer A also falsely represented in his own report of the incident that he was never near the site of the shooting incident – that he had already reached his vehicle further down the street from the bank; however, video surveillance inside the bank places him inside the bank just moments before the carjacked vehicle approached and the discharge of the weapon occurred. (*Resp. Ex. 18*)

⁵ Officer A was also brought up on charges internally, as well. (*Resp. Ex. 18*)

of the incident evoke [sic] and public confidence be maintained. Your failure to respond appropriately has impeded an internal department investigation, and jeopardized the public trust and confidence of the citizens of the Commonwealth ... In imposing a five day suspension, without pay, I have considered your prior disciplinary history. Moreover the above noted is so serious in nature as to violate the very nature of the police profession, and require that traditional progressive discipline is not required.”
(*Resp. Ex. 17*)

24. Chief McLean further indicated in his 2003 disciplinary correspondence with the Appellant that “...given the nature of the violations committed, in my opinion, my statutory authority to discipline you for five days is not sufficient for the type of infractions you have committed.” Chief McLean turned “the matter over to the Appointing Authority, Mayor Dorothy Kelly Gay, for further action, up to an including termination.” (*Resp. Ex. 17*)
25. Thereafter, the Mayor increased the Appellant’s five (5) day suspension to a fifteen (15) day suspension and the Appellant timely appealed that discipline to the Civil Service Commission. (*Resp. Ex. 18*)
26. The Civil Service Commission denied Mr. Kiely’s appeal after a full hearing. The Commission found that the Appellant had indeed waited three (3) days to write a report of the incident in which he discharged his firearm and, once he did, he failed to mention Officer A was even once present at the bank, outside of his sector. The Appellant sought to conceal that Officer A was at the bank by not noting his presence in the official report and failing to do so constituted untruthfulness in violation of the rules and regulations regarding truthfulness and filing a report. The Commission found that the report was “not accurate, complete, or truthful.”⁶ (*Resp. Ex. 18*)

⁶ Mr. Kiely sought judicial review of the Commission’s Decision to deny his appeal in the Suffolk County Superior Court. On or about March 20, 2008, the Court allowed the defendant

27. As a result of the Civil Service Commission’s determination that the Appellant was untruthful in his incident report regarding the January 18, 2003 firearm discharge incident, Middlesex District Attorney Marian T. Ryan issued a document entitled “Commonwealth’s Notice Regarding Potential Commonwealth’s Witness,” pursuant to Massachusetts Rules of Criminal Procedure 14 and case law. The District Attorney’s Office attached the Civil Service Commission’s Decision, dated October 26, 2006, to the aforesaid Notice. This document is typically referred to as a “Brady Letter,” pursuant to the 1963 Supreme Court case of Brady v. Maryland.⁷ (*Resp. Ex. 19*)
28. The “Commonwealth’s Notice Regarding Potential Commonwealth’s Witness” notification is a means utilized by the District Attorney’s Office to inform any and all defendants of a prior finding of untruthfulness by a potential Commonwealth witness. As a police officer, the Appellant could be a potential Commonwealth witness in any case in which he was involved and the DA’s Office is required, under law, to disclose the Civil Service Commission’s decision since the Commission found the Appellant to have been untruthful.⁸ (*Resp. Ex. 19*)

Somerville Police Department’s Cross-Motion for Judgment on the Pleadings and denied the Appellant’s Motion for Judgment on the Pleadings. Judgment entered for the defendants, affirming the Commission’s Decision. (*Resp. Ex. 18A*)

⁷ The primary holding in Brady v. Maryland establishes that the government may not withhold evidence that is material to the determination of either guilt or punishment of a criminal defendant and such material should include evidence impeaching the credibility of an arresting or investigating police officer. Withholding such evidence is a violation of a defendant’s constitutional right to due process. Brady v. Maryland, 373 U.S. 83, 87 (1963).

⁸ See, e.g., Commonwealth v. Pope, 489 Mass. 790, 797 (2022) (“Under the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material to either guilt or punishment.”); Matter of Grand Jury Investigation, 485 Mass. 641, 647, 649 (2020) (stating that prosecutors “also have a broad duty under Mass. R. Crim. P. 14

29. The Middlesex DA’s “Commonwealth’s Notice Regarding Potential Commonwealth’s Witness” document relative to the Appellant’s status as a potential witness is a permanent part of Mr. Kiely’s Personnel File with the City of Somerville and is also a part of his Somerville Police Department Professional Standards File. (*Resp. Ex. 19*)

30. The Appellant was unaware that the Brady Letter executed by the DA’s Office existed until he was notified by the City’s Director of Personnel, Candace Cooper, in 2017. (*Testimony of Appellant; Resp. Ex. 19*)

Prior Discipline of Appellant – 2005 Incident

31. On or about November 23, 2005, Chief Robert R. Bradley notified the Appellant that he was suspended for five days for violating General Order 2002-2: City of Somerville Communications Policy, in a way that involved the inappropriate use of City computers. (*Resp. Ex. 20*)

32. The Appellant received this five-day suspension for having used a school computer at the Healy School (grades K-6) in Somerville to view pornography while working overtime. The Appellant failed to close out the pornographic images on the website and the inappropriate content was left visible on the computer. The Appellant claimed that the computer was not one that children could utilize; however, the password for the computer was “STUDENT.” The Appellant did not appeal this suspension. (*Resp. Ex. 15 and 20; Testimony of Scott*)

Appellant’s 2016 Filing of Internal Complaint and Subsequent Retraction of Allegations

(a)(1)(iii) to disclose “[a]ny facts of an exculpatory nature.”); Commonwealth v. Collins, 470 Mass. 255, 267 (2014) (“The Commonwealth is required to disclose exculpatory evidence to the defendant, including . . . evidence that would tend to impeach the credibility of a key prosecution witness.”).

33. On or about November 7, 2016, the Appellant filed an internal affairs complaint against a longtime colleague at the Somerville Police Department, Lieutenant M. The Appellant's sister, who was employed as a dispatcher at the Department, also filed a complaint against Lieutenant M for allegedly making disparaging statements about her father. (*Resp. Ex. 29*)
34. The Appellant's complaint to the SPD Professional Standards unit alleged that the Lieutenant, whom he had known and been friendly with for years, made specific allegations that the Lieutenant stated: (1) the Appellant had contacted "the Feds" regarding another officer and (2) that the Appellant swapped a shift for a detail. The Appellant also alleged that he had been victimized by the Lieutenant "for well over a year by several physical and verbal attacks against myself, my family and my girlfriend as well as her children." (*Resp. Ex. 29*)
35. The Appellant's complaint against Lieutenant M was investigated jointly by a lieutenant from the SPD Office of Professional Standards and by an outside investigator.⁹ Seven people were interviewed by the investigators, including Lieutenant M, the Appellant, and his sister. The interviews were recorded. Based on the investigation, the Department found that Lieutenant M made slanderous statements about the female dispatcher's father, that he made the false comment about the Appellant contacting "the Feds," and that the Lieutenant had indeed talked about the Appellant swapping a shift in order to work a detail. The Lieutenant underwent a disciplinary hearing, wherein only the two investigators testified. No percipient witnesses testified. Following the hearing, Lieutenant M was issued a five-day suspension, which he appealed to the Civil Service Commission. (*Resp. Ex. 29*)
36. Thereafter, Lieutenant M underwent a full hearing of his appeal at the Civil Service Commission in or about March of 2017. No percipient witnesses were called by the City at

⁹ Alfred P. Donovan, former Tewksbury Police Chief.

the appeal. The City only called the two investigators. As part of the evidence, the undersigned commissioner listened to the recorded interviews the City took during its local investigation into the complaint. I took note of the fact that many of the questions asked by the investigators were leading questions. (*Resp. Ex. 29*)

37. The Commission allowed Lieutenant M’s appeal and overturned the suspension. The Commission noted that the Appellant (Mr. Kiely) made three complaints against the Lieutenant based on hearsay – all comments that Mr. Kiely had not personally heard the Lieutenant make. The Commission noted that Mr. Kiely did not testify at the Commission hearing and that, in the recorded interview, he “appears to retract his allegation that (Lieutenant M) accused him of calling the Feds as he initially alleged in his email.” (*Resp. Ex. 29*)

38. The Commission, in its decision, further noted:

Mr. Kiely “explicitly stated in his email that he had been victimized by (Lieutenant M) ‘for well over a year by several physical and verbal attacks against myself, my family and my girlfriend as well as her children.’ During his statement to Mr. Donovan ..., he casually retracted any allegation related to physical attacks or any attacks against his girlfriend or her children by Lieutenant M. Had the police sergeant (Kiely) been called as a witness by the City, that troubling about-face likely would have been the subject of strenuous cross examination by counsel for Lieutenant M – as well as my own questions.” (*Resp. Ex. 29*)

39. As a result of the City not presenting any percipient witnesses and asking the Commission to simply adopt the credibility assessments made by the two City investigators, the Commission allowed Lieutenant M’s appeal based on lack of evidence, given that Lieutenant M gave a plausible rebuttal in his own testimony. (*Resp. Ex. 29*)

Interview Portion of 2019 Promotional Process

40. As part of the Appellant's 2019 Lieutenant promotional process, the Appellant was interviewed by a four-member interview panel that included Chief David Fallon, Deputy Chief Stephen Carrabino, Deputy Chief James Stanford, and the Director of Personnel for the City, Candace Cooper. All candidates underwent the same type of interview with the same questions. Each interviewer took detailed notes of each interview. (*Testimony of Cooper and Fallon*; Ex. 38A-38E)
41. Prior to the interview, the panel reviewed each candidate's Personnel Record. During the interview, the panel discussed any letters of recognition, commendations or awards, any discipline received, and any leadership roles. (*Testimony of Cooper*)
42. The Appellant was the only candidate of the four candidates considered for promotion in 2019 to Lieutenant who had a history of discipline at the SPD. (*Testimony of Cooper, Fallon and Scott*)
43. Candace Cooper, the Director of Personnel for the City, recalled that in their discussion about disciplinary history with the Appellant during his 2019 candidacy for promotion, he "very clearly took full responsibility" for his actions. She concluded that the Appellant had been "an amazing employee" since the last discipline more than a decade earlier, noting that he had brought in a lot of money for the City in the form of police grants. (*Testimony of Cooper*)
44. Chief David Fallon could not recall to what extent he looked at the Appellant's prior discipline when the Appellant was up for promotion to Lieutenant in 2019. He considered the Appellant's discipline to be stale since it occurred over ten years ago. (*Testimony of Fallon*)
45. When asked if he considered the "Brady Letter" from the Middlesex DA's Office relative to a finding of untruthfulness in the Appellant's personnel file, Chief Fallon indicated that he

was aware of the letter in the file, but that it did not affect his thinking about the Appellant.
(Testimony of Fallon; Resp. Ex. 19)

46. Only a “handful” of SPD officers have a Brady Letter in their file. None of the other officers up for promotion to Lieutenant in that round had a Brady Letter, other than the Appellant.
(Testimony of Fallon)

47. Chief Fallon considered the Appellant’s work performance after he was promoted to Sergeant in 2014 as one of the factors in recommending him for promotion to Lieutenant in 2019. Specifically, Chief Fallon was impressed by the Appellant’s work as the jurisdictional point of contact for the Urban Area Security Initiative and his success in bringing in hundreds of thousands of dollars in grants to the City for disaster preparedness. He considered his performance in that role to be excellent. *(Testimony of Fallon; Ex. 40)*

48. The interview panel had no concerns with the top three candidates on the certification (including the Appellant) and recommended the top three for promotion: Sergeant H, the Appellant, and Sergeant C. The panel did not rank the candidates following the interviews.
(Testimony of Cooper; Resp. Ex. 3)

49. Candace Cooper met with the Mayor to discuss the interview panel’s recommendations that the top three candidates on the list be promoted from Sergeant to Lieutenant. The Mayor agreed with the panel’s recommendations and all three Sergeants received a conditional offer of promotion from the Mayor. *(Testimony of Cooper; Resp. Ex. 4a, 4b and 4c)*

50. On or about June 20, 2019, Mayor Joseph Curtatone sent the Appellant a letter, informing him that he was being promoted to Police Lieutenant for the Somerville Police Department. The second paragraph of the letter informed the Appellant of an important caveat to his promotion:

“Please be aware that in accordance with Division 1, Title 4, Section 2 (iii) of the City of Somerville Charter ‘the mayor may appoint, subject to confirmation by the board of aldermen,... a chief of police, [AND]... all other officers and members of the police department.’” (*Resp. Ex. 4(b)*)

September 2019 Somerville City Council Meetings

51. On or about September 13, 2019, the Chief of the Somerville Police, David Fallon, sent a letter to the CAPM Committee, urging that committee to move forward with all pending police promotional candidates at their upcoming September 23, 2019 meeting. (*Resp. Ex. 5*)
52. On or about September 23, 2019, the CAPM Committee met to review and consider various pending promotions at the SPD, to include one potential promotion for Captain, three for Lieutenant, and two for Sergeant. (*Testimony of Scott*)
53. Since January 2018, under the direction of its Chairman J.T. Scott, the CAPM Committee sought to be more diligent in its review of the Mayor's recommended promotions than it had been in the past (prior to Councilor Scott becoming Chair of the committee). The CAPM Committee sought to review any and all documents the Mayor reviewed in his determination to promote a police officer, rather than simply vote based on the verbal presentation and representations of the Department's Administration. (*Testimony of Scott*)
54. In the past, such a thorough review was not the course of action the City Council took with police promotions. Councilor J.T. Scott, as the Chair, sought to have the committee undertake its own due diligence, rather than simply take the Mayor's recommendation at face value.¹⁰ Representatives of the City testified that the City Council had never not approved the Mayor's recommendation. (*Testimony of Scott*)
55. The very first round of potential promotions that the CAPM Committee undertook under the leadership of J.T. Scott was a January 2018 conditional promotion of the Appellant, Michael Kiely, to Lieutenant. As part of Councilor Scott's due diligence, he made a public records

¹⁰ When Councilor Scott first became a City Councilor in January 2018 and was assigned to the CAPM Committee, he testified: "I was trying to understand the scope of my responsibility. I didn't want to act outside of it or neglect my responsibility." (*Testimony of Scott*)

request to the Middlesex DA's Office, in which he sought any "Brady Letters" currently on file for members of the Somerville Police Department. In response to his request, the DA's Office provided the Appellant's "Brady Letter."¹¹ (*Testimony of Scott*)

56. The procedures the CAPM Committee undertook back in January 2018 are similar to those the CAPM Committee undertook to review potential promotions in September 2019, which is the subject of this appeal.¹² Sgt. Kiely was up for a promotion to Lieutenant in both January 2018 and September 2019 and the CAPM Committee declined to approve the Mayor's promotion of Mr. Kiely in 2018 and 2019, for the same reasons.¹³ (*Testimony of Scott; Testimony of Cooper*)

¹¹ Since 2018, Councilor Scott has renewed his public records request with the DA's Office for Brady Letters relative to all Somerville Police Officers. (*Testimony of Scott*)

¹² When Councilor Scott took office in 2018 and became the chairman of the CAPM Committee, he sought to establish written guidelines. In May 2018, after several meetings, of the CAPM Committee issued guidelines entitled "Committee of Appointments and Personnel Matters – Materials and Guidelines". Those guidelines have never been ratified formally by the City Council, as they were intended to be an internal document to guide the CAPM Committee. (*Testimony of Scott; Resp. Ex. 30*)

¹³ There was no appeal of the City Council decision not to approve the promotion of the Appellant in 2018 since no one below the Appellant on that certified list was appointed in his place – i.e., he was not bypassed. According to Councilor Scott's testimony, during discussions about the Appellant's potential promotion to Lieutenant in January 2018, the CAPM Committee discussed the fact that the Appellant was promoted to Sergeant in 2014, even after the discipline in 2003 and 2005, and was approved by the City Council for that promotion. Councilor Neidergang indicated in Executive Session in 2018 that he would have voted negatively against promotion in 2014 but he did not know the extent of the discipline. He indicated that his 2014 vote in favor of promotion was a mistake but that it is never too late to correct a mistake. (*Testimony of Scott*) Additionally, Alderman Rosetti, who was also a member of CAPM when it voted to confirm the Appellant for Sergeant in 2014, noted that the CAPM Committee did not review his Personnel File, but only reviewed the documents submitted by the Administration. She said that she would not have voted for his promotion had she known about the pornography he viewed at the elementary school. She said she no longer had confidence in Sgt. Kiely and could not support his 2018 promotion. Only one Councilor voted in favor of the Appellant's promotion in 2018, Councilor White. (*Resp. Ex. 21*)

57. For the September 23, 2019 CAPM Committee hearing, representatives from the SPD attended, including Chief Fallon, Deputy Chief Carrabino, and Deputy Chief Stanford. As at the January 2018 promotional hearing before the CAPM Committee, the Appellant's resume and work experience with the SPD was presented by the Department. The Department told the CAPM Committee that it had nothing new to report to committee members regarding the Appellant since they last discussed him in January 2018. The Appellant was in attendance, along with his attorney. *(Testimony of Scott)*
58. Following the introductions, the CAPM Committee entered Executive Session in order to discuss separately with the candidates their character and reputation. The CAPM Committee obtained the Internal Affairs file for each candidate up for promotion and was able to view its contents once in Executive Session. The Appellant's file was rather thick and included a number of incidents, unlike the other candidates presented by the Department for promotion to Lieutenant. The others had no prior discipline or Brady Letters. *(Testimony of Scott, Cooper, Fallon)*
59. During the September 23, 2019 Executive Session, the CAPM Committee became concerned, as it had in January 2018, with the Appellant's past discipline history, specifically: the 2003 firearm discharge incident, wherein the Civil Service Commission found that he had been untruthful in his report of the incident (by failing to ever mention that Officer A was there with him at the time of the incident); and the 2005 incident in which the Appellant viewed pornography on an elementary school computer while he was on duty. *(Testimony of Scott)*
60. Various members of the CAPM Committee were concerned with the Appellant's conduct in each incident. The committee asked the Appellant questions relative to each incident and

allowed him to respond. Councilor Scott testified that he was concerned with the Appellant's conduct, despite his expression of contrition, because the description Sgt. Kiely provided about the 2005 computer incident did not match the documents he had in front of him.

Councilor Scott found that the Appellant minimized, downplayed, and misrepresented the incident in his testimony before the CAPM Committee. For instance, the Appellant told the CAPM Committee that students could not access the computer on which he had viewed the pornography (and failed to close the screen when done); however, Councilor Scott noted that the password for the computer he used was "STUDENT". (*Testimony of Scott*)

61. The CAPM Committee discussed with the Department the length of time that had passed since the Appellant's discipline. Chief Fallon repeatedly stated that the discipline was not considered because of the time that had elapsed. This concerned the CAPM Committee because they deemed the discipline relative to untruthfulness and the viewing of pornography at a school so grave that it was difficult to disregard it, even with the time that had passed. (*Testimony of Scott*)

62. At the September 2019 Executive Session, the CAPM Committee members also discussed the Appellant's Brady Letter and whether the existence of such letter has meant that the Appellant's potential testimony in court has been a liability to the Commonwealth. Chief Fallon indicated that the Brady Letter did not have any bearing on the City administration when choosing to promote the Appellant to Lieutenant in either 2018 or 2019 and it had not appeared to have been an issue for the Appellant in court over the years – none that the Chief had heard about, at least. (*Testimony of Scott; Testimony of Fallon*)

63. Councilor Scott was surprised that Chief Fallon had indicated at the meeting that nothing new in the Appellant's work history had transpired since the January 2018 promotional

process, since there had been a decision published by the Civil Service Commission regarding M v. City of Somerville, in which the Appellant was the complainant who alleged that Lt. M had repeatedly threatened and physically hurt him, his family, his girlfriend, and her children, only to “casually retract his allegations” when interviewed by investigators about the case. The Civil Service Commission noted the Appellant’s recantation of the allegations he made against M when interviewed by investigators and noted that the City, in its defense of its case at the Commission, failed to even call the Appellant (Kiely) to testify at the hearing. (*Testimony of Scott; Resp. Ex. 29*)

64. The M case disturbed Councilor Scott since, as he testified, “either the attacks happened or they didn’t.” Councilor Scott noted that both things cannot be true at the same time and that this went to, once again, the Appellant’s veracity. The CAPM Committee believed that this was a pattern of behavior by the Appellant of not telling the truth and the M case unfolded as recently as 2016. (*Testimony of Scott*)

65. Chief Fallon testified relative to the M case and how the Appellant’s involvement in the case had little impact on the Chief’s recommendation to promote the Appellant in 2019. Chief Fallon testified that, “of course it’s important, but M was not even still in the Department” anymore.¹⁴ (*Testimony of Fallon*)

¹⁴ As a result of the discussions had during the Executive Session on September 23, 2019, Councilor Scott felt the history of the M case merited investigation because there was seemingly no consequence to the Appellant for his retraction of the serious allegations he had made. Councilor Scott contacted the Chief via email the following day to inquire as to whether the Department had made any subsequent finding that the Appellant lied in that case, following the Civil Service Commission’s decision to allow M’s appeal. The Chief asked Councilor Scott to file a formal complaint, which he did. Councilor Scott felt that the Appellant either made an untruthful statement when he alleged M had victimized him for “well over a year by several physical and verbal attacks” or the Appellant made a false statement during the departmental investigation when he retracted the allegations. Michael Kennelly of the Office of Professional

66. Following discussions in Executive Session, the five members of the CAPM Committee voted unanimously against confirmation of the Appellant when they returned to Open Session where the candidates were presented one final time. (*Testimony of Scott*)
67. Following the CAPM Committee vote not to approve the Appellant's promotion to Lieutenant, Personnel Director Candace Cooper emailed HRD asking for advice on how to proceed. (*Testimony of Cooper; Resp. Ex. 7*). Ms. Cooper informed HRD that she was faced with a novel situation, wherein the City Council voted not to approve the Mayor's promotion. She was asking HRD whether this amounted to a bypass of the Appellant and whether she should generate a Notification of Employment to HRD (hereinafter "NOE") with the Appellant's name on it. (*Resp. Ex. 7*)
69. On or about September 25, 2019, James Barron of the HRD Civil Service Unit responded to Ms. Cooper's email, advising her that it is a local decision as to who has the power to sign off on the promotion and if the City Council is the ultimate authority, then the City would need to provide reasons to the Appellant for his non-selection and specify his right to appeal to the Commission. (*Resp. Ex. 7*)

Standards investigated Councilor Scott's complaint by reviewing the documents and interviews of Mr. Kiely from the SPD's internal investigation and the subsequent Civil Service decision. Lt. Kennelly concluded that he could find no basis in the Civil Service Commission's decision for disrupting the Department's original conclusion finding M responsible for the original allegations the Appellant made. In his January 2, 2020 report, Lt. Kennelly noted, "[t]he Department found the Appellant credible in their original investigation and the Civil Service Commission did not make a credibility finding about the Appellant" (since he did not testify); therefore, Lt. Kennelly did not find "any evidence of untruthfulness" based on the allegations by Councilor Scott. Lt. Kennelly exonerated the Appellant. (*App. Ex. 31 and 29; Testimony of Scott, Fallon*) However, Lt. Kennelly did not conduct any interviews of his own, thereby never inquiring as to why the Appellant retracted his allegations.

70. On or about September 26, 2019, the full City Council voted by voice not to appoint the Appellant for promotion to Lieutenant, thereby adopting the recommendation of the CAPM Committee. The other two candidates up for promotion to Lieutenant, Sergeant H and Sergeant C, were both unanimously approved by the CAPM Committee and the full City Council. (*Testimony of Scott; Resp. Ex. 8*)
71. Thereafter, Ms. Cooper authored the NOE and indicated that the Appellant “did not complete process.” She testified that she viewed this in the same way as other conditional offers sent out to candidates – that if they did not complete the other conditions required (such as a medical examination or drug screening for an original appointment), the candidate would not be appointed despite their selection by the Appointing Authority. (*Testimony of Cooper; Resp. Ex. 7*)
72. The Appellant did not receive a written notice setting forth the reasons for his bypass and right of appeal to the Commission. He was aware, however, of the specific reasons for his non-promotion given his presence at the Executive Session concerning his candidacy both in 2018 and 2019. His attorney was present as well and the Appellant was given an opportunity to listen and respond to any and all discussions regarding his tenure as a police officer and regarding his pending promotion during all relevant City Council open meetings and executive sessions. He was present when the votes were taken not to approve his promotion by the CAPM Committee and the full City Council both in 2018 and 2019 and was aware of the concerns of the CAPM Committee relative to his prior discipline, the Brady Letter, and his involvement in the M case. (*Testimony of Scott, Appellant*)

73. On or about November 19, 2019, the Appellant sent Personnel Director Cooper an email, inquiring as to the status of his candidacy and whether he had been officially bypassed by the City. (*Resp. Ex. 9*)
74. On or about November 20, 2019, Ms. Cooper responded to the Appellant via email, noting that the Appellant's situation was a unique circumstance that she had not encountered in the past. Ms. Cooper pointed out that the Appellant's promotion was always conditioned on the approval of his candidacy by the City Council, and since the City Council did not confirm him, he did not complete the promotional process. (*Resp. Ex. 19*)
75. On or about December 9, 2019, the Appellant filed a bypass appeal with the Civil Service Commission. (*Resp. Ex. 2*)
76. The year before, the Appellant had filed a request for investigation with the Commission, asking the Commission to investigate the Council's first decision back in 2018 not to confirm the Mayor's conditional offer of promotion. Since no candidate selected in 2018 was ranked below the Appellant, that non-selection did not constitute a bypass. The Commission accordingly declined to initiate an investigation. Also, as part of the Commission's Response, the Commission wrote that: (a) it had come to the Commission's attention that the Appellant has subsequently retired from the City's Police Department; and (b) the Commission, based on the overlapping facts found in the investigation, would be unlikely to grant any relief in this bypass appeal, even if he were to prevail, beyond putting him at the top of the next certification to ensure reconsideration. Given that the Appellant had retired and such relief would effectively be meaningless to him, the Commission gave the Appellant 30 days in which to notify the Commission if he still wished to have a decision issued in this matter. Counsel for the Appellant subsequently notified the Commission that the Appellant

still sought the issuance of a decision regarding the instant appeal. (*Administrative Notice [In Re: Request for Investigation Against City of Somerville, CSC No. I-18-018 (June 30, 2022)]*)

LEGAL STANDARD

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. 300, 304 (1997). “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.

In order to deviate from the rank order of preferred hiring and appoint a person “other than the qualified person whose name appears highest”, an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a “reasonably thorough review” of the background and qualifications of the candidates’ fitness to perform the duties of the position and was “reasonably justified”. 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); 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); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

ANALYSIS

Appellant's Right to Appeal Pursuant to G.L. c. 31, § 2(b)

In its previously denied Motion to Dismiss and its proposed decision filed post-hearing, the City argues that the Commission lacks jurisdiction to hear this appeal, contending that the Appellant was not “bypassed” for promotion because the Appointing Authority—the Mayor—did in fact promote the Appellant to Lieutenant. The City argues that since the Mayor’s action in promoting the Appellant to Lieutenant was not confirmed by the Somerville City Council, the Appellant should be categorized as “failing to complete” the promotional process and not deemed a “bypassed candidate”. The City argues that the Appellant has no rights to appeal before the Commission under G.L. c. 31.

Title 4, Section 2 of the Somerville City Charter states: “[T]he mayor may appoint, subject to the city council, the following officers and boards ... (iii) a chief of police [and] ... all other officers and members of the police department.” The Somerville City Charter *requires* an additional step, or check and balance, in the promotional process before any officer within the Somerville Police Department is appointed or promoted. There is no dispute that the Mayor of Somerville is the Appointing Authority for the City. The Mayor of Somerville, however, may only conditionally appoint a candidate to the position of Lieutenant. The Mayor’s promotion of the Appellant was always conditioned upon the City Council’s confirmation, as the Mayor wrote to the Appellant in his June 2019 promotional letter.

Inherent in the power of the City Council to confirm the Mayor’s promotion is the power to thwart the Mayor’s promotion, so long as its decision is reasonably justified, as required under

the civil service law. The Appellant was officially bypassed on September 26, 2019, when the City Council voted not to confirm the Mayor's conditional promotion. The City Charter itself ensures that the Appellant's right to appeal remains intact as found in Title 7, Section 52 of the Charter which provides: "Nothing in this charter shall be constructed to affect the enforcement of Chapter 31 of the General Laws in the City of Somerville."

For these reasons, the Commission has jurisdiction to hear this appeal and the City has the obligation to defend its reasons for bypass. See Re: Request for Investigation Against City of Somerville, CSC No. I-18-018, 35 MCSR --- (2022) (confirming that City Council's rejection of Mayor's conditional promotion does constitute a bypass); Fairchild v. Somerville, CSC No. G1-21-097, 35 MCSR --- (2022) (also confirming that City Council's rejection of Mayor's conditional appointment does constitute a bypass.)

To ensure clarity, I reach this conclusion, in part, based on the rather unique circumstances of this particular appeal including that: a) the bypass in question occurred over three years ago; b) the Appellant has now retired and ordering a "re-do" to correct potential procedural missteps is not possible, nor would it change my conclusion that the reasons for bypass were valid; and c) I infer that the failure to provide bypass reasons was partially driven by a desire on the part of the Mayor's office to not defend the Council's decision to reject the Mayor's conditional appointment. Going forward, if such unique circumstances were to repeat themselves, it would be more prudent for the Council to provide the specific reasons for bypass, in writing, to the Mayor, with a copy to the candidate. It would be an error for any appointing authority to view this decision as applicable when such unique circumstances do not exist.

The Grounds for the Bypass

It is clear from the evidence presented at the Commission appeal that the City Council's CAPM Committee was primarily concerned by what they considered a pattern of untruthfulness by the Appellant, including the Appellant's prior discipline for untruthfulness in 2003, upheld by the Commission, and the ensuing Brady Letter; the 2005 discipline in which the CAPM Committee concluded that the Appellant misrepresented the access that grade school students had to the computer he used to view pornography; and the Appellant's apparent misrepresentations about Lieutenant M's actions, which he later retracted.

The Appellant argues that his prior discipline, including his untruthfulness while serving as a police officer, is too stale and that there is not a sufficient nexus between his prior misconduct and his present suitability for promotion. He points out that he was promoted to Sergeant after his suspension and, since the related Brady Letter was issued, he testified without complications in numerous cases since that time. Finally, he argues that the SPD command staff had expressly considered this prior discipline and discounted it as too stale and no longer indicative of the Appellant's present suitability for promotion.

When, as here, an incumbent police officer engages in untruthfulness regarding a material issue (i.e. – omitting information on a police report to protect another police officer), an Appointing Authority is justified in relying on that prior untruthfulness to bypass them for promotion, even if that untruthfulness occurred many years ago. In a series of decisions too long to list here, the Commission has consistently held that such misconduct (untruthfulness) provides just cause for discipline, up to and including termination. Put another way, if the Appellant's misconduct could have justified his *termination* at the time, that misconduct is a valid reason to

bypass him for *promotion* regarding this untruthfulness, regardless of the time that has transpired since the untruthfulness occurred.

Further, the CAPM was concerned that the Appellant's untruthfulness was not limited to filing the false police report. Specifically, they were troubled that the Appellant continued to insist that elementary school students were not able to access a school computer from which he viewed pornography (while working overtime) and failed to close out the sites he had been visiting. The fact that the login password to the computer was "STUDENT" undercuts the Appellant's argument and supports the CAPM's legitimate concern about whether the Appellant had a tendency to fudge the truth to portray himself in a more favorable light.

These two incidents alone provided the CAPM with reasonable justification for bypassing the Appellant for promotion. For that reason, it is not necessary to address whether the Appellant made false allegations against a police officer when he apparently stated that he and a family member had been subject to physical harassment by that officer, an allegation the Appellant subsequently recanted.

Allegations of Personal Bias

The Appellant alleges that Councilor J.T. Scott had a personal bias against the Appellant, citing to Councilor Scott's characterization of the M case and the fact that Councilor Scott filed an internal affairs complaint against the Appellant after he was denied confirmation of his promotion. Councilor Scott, indeed, contacted Chief Fallon the day after the Appellant was not approved for promotion via email, in an effort to inquire as to whether the Department made any further inquiries or findings as to whether the Appellant lied during the M investigation. It was the Chief, however, who advised Councilor Scott to file a complaint so as to trigger an investigation. Councilor Scott, based on the evidence presented at the September 2019 City

Council meeting, believed that the Appellant had either lied when he filed a complaint against Lieutenant M alleging physical assault or he lied when the Appellant retracted the allegations in his internal affairs interview. I do not find that Councilor Scott was personally biased against the Appellant. I believe he exhibited concern, as a representative of the City, with what he believed was the Department's failure to fully investigate the Appellant's statements. Nor do I find evidence of bad faith on the part of any of the CAPM Committee members or the City Council.

Conclusion

For all of the above reasons, the CAPM had reasonable justification to not confirm the Mayor's conditional offer of promotion to the Appellant. Accordingly, Appellant's bypass appeal under Docket No. G2-19-256 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 6, 2022.

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)(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. 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 Ma Mass. R. Civ. P. 4(d).

Notice to:
James Simpson, Esq. (for Appellant)
Timothy Zessin, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108

MICHAEL KIELY,
Appellant

v.

G2-19-256

CITY OF SOMERVILLE,
Respondent

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur with the majority's conclusion that the Commission has jurisdiction to hear this appeal under G.L. c. 31, § 2(b). I also agree with the majority that City Council's CAPM Committee was legitimately concerned by two prior instances of the Appellant's untruthfulness: (1) the Appellant's prior discipline for untruthfulness in 2003, upheld by the Commission, and the ensuing Brady Letter, and (2) the 2005 discipline in which the CAPM Committee concluded that the Appellant apparently misrepresented the access that students had to the computer he used to view pornography. However, the question of whether the City Council's decision to deny confirmation on the basis of those "concerns" can be reconciled with basic merit principles of civil service law is a closer question that I do not believe needs to be addressed as the matter has become moot by the Appellant's retirement, making him ineligible to be reconsidered for future promotions which is the relief to which I believe he could have been granted were his appeal to be allowed.

While it is not disputed that the Appellant has been disciplined for untruthfulness in the past, the Appellant makes the additional point that the preponderance of the evidence does not establish a sufficient nexus between all of the instances of prior misconduct and his present suitability for promotion. *See, e.g., Finklea v Boston Police Dep't*, 30 MCSR 93 (2017), *aff'd in relevant part sub nom., Finklea v Civil Service Commission*, 34 Mass.L.Rptr. 657, 2018 WL 1750039 (2018)

(Fahey, J.); Kodhimaj v Department of Correction, 32 MCSR 377 (2019). See also In Re Hiss, 368 Mass. 447, 453-57(1975) (“A fundamental precept of our system (particularly our correctional system) is that men can be rehabilitated. ‘Rehabilitation . . . is a ‘state of mind’ and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved ‘reformation and regeneration.’ [Citation] Time and experience may mend flaws of character which allowed the immature man to err. The chastening effect of a severe sanction . . . may redirect the energies and reform the values of even the mature miscreant. There is always the potentiality for reform . . .”).

In particular, the Appellant contends that the 2003 and 2005 prior discipline is too stale for the City Council to consider it as a reason for bypass. The Appellant was promoted to Sergeant after his 2003 suspension and, since the related the Brady Letter was issued, he has testified without complications in numerous cases since that time.¹⁵ The Somerville Police Department (SPD) command staff had expressly considered this prior discipline and discounted it as too stale and no

¹⁵ When it comes to considering the effect of the existence of a “Brady Letter”, it bears notice that the statutes and jurisprudence of the Commonwealth take a somewhat different path than the federal courts in construing the type of exculpatory evidence that must be disclosed in a criminal prosecution and, in particular, evidence “beyond information held by agents of the prosecution team”, including, in particular, internal affairs investigatory material, does not generally come within the sweep of the so-called “Brady” test, but is subject to other, stricter rules. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Torres, 479 Mass. 641, 647 (2018) (“The prosecutor's duty [to disclose exculpatory information] does not extend beyond information held by agents of the prosecution team.” (quoting Commonwealth v. Beal, 429 Mass. 530, 532 (1999)); Commonwealth v. Hollingsworth, 68 Mass. App. Ct. 1109 (2007) (internal affairs documents need not be disclosed if police department not obliged to provide investigative files to the prosecution). See also Reporter’s Notes - Revised, 2004, Subdivision (a)(1)(A), Rule 14(a)(1)(A). Thus, I doubt that the Appellant’s untruthfulness in the 2003 incident is likely to be construed as the type of “exculpatory evidence” that would come within the sweep of the “automatic disclosure” requirements of the so-called “Brady” rule; rather, it likely would be subject to stricter limits upon disclosure imposed on internal affairs investigation and personnel files. See, e.g., Worcester Telegram & Gazette Corp. v. Chief of Police, 58 Mass. App. Ct. 1, *rev. den.* 440 Mass. 1103 (2003) (employment applications); Commonwealth v. Wanis, 426 Mass. 639, 643-44 (1998) (internal affairs files); Commonwealth v. Thomas, 451 Mass. 451 (2008) (defendants not entitled to traffic stop statistical data not within the possession, custody, or control of the prosecution team).

longer indicative of the Appellant's present suitability for promotion. It seems a fair question under basic merit principles and the concept of rehabilitation, whether, because the Appellant could have been terminated in 2003 for untruthfulness, it is fair to hold him up for promotions throughout the rest of his career.

As to the 2005 discipline for serious misconduct in using a school computer to view pornography, the computer password "STUDENT" does fairly raise a substantial question about the truthfulness of the Appellant's statement that students did not have access to the computer. The CAPM Committee drew the inference that students did have such access, however, not from the disciplinary record, per se, but sua sponte from a "concern" that the Appellant was attempting to "fudge the truth" about the seriousness of his misconduct. I do not find that the evidence before the CAPM Committee supported such an inference.

In sum, to the extent that the CAPM Committee's conclusions were grounded on its own inferences and inquiries, rather than on the undisputed facts in the record presented to it, that process fairly raises a question as to whether the conclusions are based on a fair and impartial review of the facts and supported by a preponderance of the evidence, as basic merit principles require. As a general rule, these procedural problems might have required the Commission to order that the Appellant receive another opportunity for consideration. Here, however, the Appellant retired and his claim to receive another opportunity for promotion is now moot. Thus, I do not believe the Commission need to come to a conclusion as to whether further vetting was required in this case to satisfy basic merit principles under the preponderance of the evidence test.

In future, I would encourage the Mayor and the CPM Committee to collaborate for the purpose of reaching a viable solution to the tension between the City Council's prerogatives under municipal law and the right of a candidate for promotion or appointment to receive the same

impartial and thorough review at the City Council level as provided in the initial application process preceding a conditional offer. This is especially important when it comes to undertaking to investigate and make newly formed conclusions about potentially career-ending issues of untruthfulness once a candidate had received a conditional offer of promotion.

Thus, although the Appellant's history of untruthfulness is proved by a preponderance of the evidence, it is a close call whether that history provided a sufficient nexus to his suitability for promotion to Police Lieutenant nearly two decades later. Even if there were no such nexus, however, absent evidence of bias, unlawful motivation, or other extraordinary circumstances (none of which exist here), the relief granted by the Commission pursuant to Chapter 310 in a bypass appeal is confined to an order placing the candidate's name at the top of the next certification to ensure reconsideration. The Appellant's retirement means that he cannot now benefit from that relief and his appeal has become moot. Therefore, I would dismiss the appeal as moot.

/s/ Paul M. Stein
Commissioner