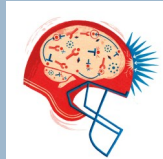




**SCHOOL CORNER**



**Sports Concussion  
Regulations Training**

Under the Massachusetts  
Regulations for Head  
Injuries and Concussions  
in Extra Curricular  
Athletic Activities

(105 CMR 201.000),  
select school staff

including coaches,  
trainers, nurses, and  
athletic directors are

required to complete a  
DPH approved head injury  
safety program each year.  
(105 CMR 201.007).

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**CONTACT US**

**Philip Collins**

[pcollins@collinslabor.com](mailto:pcollins@collinslabor.com)

**Michael Loughran**

[mloughran@collinslabor.com](mailto:mloughran@collinslabor.com)

**Leo Pelouquin**

[lpelouquin@collinslabor.com](mailto:lpelouquin@collinslabor.com)

**Tim Norris**

[tnorris@collinslabor.com](mailto:tnorris@collinslabor.com)

**Joshua Coleman**

[jcoleman@collinslabor.com](mailto:jcoleman@collinslabor.com)

**Melissa Murray**

[mmurray@collinslabor.com](mailto:mmurray@collinslabor.com)

**SJC Issues Important Decisions In Civil Service Bypass Cases:  
Flawed Selection Process Not Fatal If Bypass Decision Made On Merit**

In two promotion bypass cases decided on September 24, the Supreme Judicial Court (SJC) upheld the streamlined way that bypass letters are issued and made it clear that an employer's selection process can be flawed if the ultimate decision is based on merit. See Malloch v. Town of Hanover, 2015 WL 5599156 and Sherman v. Town of Randolph, 2015 WL 5599144. First, in Malloch, the Court approved the 2009 decision of the Commonwealth's Human Resource Division (HRD) to delegate its administrative function to receive bypass letters under G.L. c. 31, § 27, to local appointing authorities. But the Sherman decision was even better news for civil service employers as the Court ruled that even serious flaws in the local selection process---in this instance, the way interview performance was scored---is not enough to reverse a bypass that is ultimately justified on the merits.

In Sherman, the Town bypassed the Appellant for the position of sergeant in favor of three other patrol officers. The interview panel consisted of the outgoing Randolph Police Chief, a Randolph Sergeant who would take over as Chief, a Lieutenant and a Patrol Officer. The Appellant was reported to have had the "worst" interview, but the interview scoring system left much to be desired and interviews were not recorded. There was no complete and contemporaneous record of how the panel scored interview performance or any objective criteria for determining a right or wrong answer or whether one answer was better than another. As part of the selection process, the Chief and his successor spoke with two supervisors in the Randolph Police Department (RPD), both of whom reported the Appellant "had difficulty following through on cases" and "needed supervision." The Chief concluded, based on the panel's interview scores, the candidates' past performance, and his own "personal and informal list of [ten] to [fifteen] factors" having to do with "community involvement and professionalism," that the Appellant should be bypassed. Upon receiving this recommendation, and learning there was a bypass involved, the Town Manager reviewed the Appellant's file and spoke with supervisors. He concluded that Sherman was not ready to be a Sergeant. He advised the Appellant he was being bypassed based on his interview, a review of his personnel file and a discussion with his immediate supervisor.

The Commission found that the interview process was flawed because it was too subjective and that the evaluation of job performance was "possibly flawed", noting that the Department did not do annual performance evaluations. Nonetheless, the Commission found there were sufficient reasons to uphold the bypass based on the independent judgment of the RPD's senior commanders that the Appellant needed to improve critical aspects of his job performance that were essential to being a supervisor, and their view that the other applicants were ready to be sergeants. Critical to the Commission's decision was the lack of evidence that the supervisor's judgments were based on bias or some other unlawful pre-disposition against the Appellant. The Commission noted that the Appellant had not even alleged that the bypass decision was politically motivated.

The Court determined that there was substantial evidence to support the Commission's conclusion, particularly since the bypass was not based solely on interview performance. The Court wrote, "[A] promotional decision may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates...where the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process are not so severe that it is impossible to evaluate the merits from the record." The Court wrote that "procedural flaws conducive to subjective or arbitrary decision making could be a 'red flag' signaling that a bypass decision resulting from flawed procedures was motivated by political considerations, favoritism or bias." However, it noted that the Commission had considered the risk that such improper motivations could have affected the bypass decision and found no evidence to support it.

Additional analysis of these decisions is available on our website at [www.collinslabor.com](http://www.collinslabor.com).