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COMMONWEALTH OF MASS
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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
2015CV03462-B

BOSTON POLICE DEPARTMENT

vs.

MICHAEL GANNON & another¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

The Plaintiff, Boston Police Department, appeals the Civil Service Commission's ("Commission") decision ordering the Plaintiff to appoint Michael Gannon ("Mr. Gannon") as a permanent police officer. This matter is now before the Court on the Plaintiff's motion for judgment on the pleadings, pursuant to Mass. R. Civ. P. 12(c). For the following reasons, the Plaintiff's motion is **allowed**.

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BACKGROUND

The following facts are drawn from the Commission's administrative record. For the purposes of a Rule 12(c) motion for judgment on the pleadings, this Court accepts the facts alleged by the non-movant as true and draws all reasonable factual inferences in favor of the nonmoving party. See Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984).

¹ Massachusetts Civil Service Commission

In April 2009, Mr. Gannon passed the civil service examination for police officers. The Plaintiff's human resources department subsequently issued Certification 202233, which included Mr. Gannon's name as an eligible applicant for hire. On March 27, 2010, Mr. Gannon submitted to a pre-employment hair drug test as part of the hiring process. Psychemedics Corporation tested Mr. Gannon's hair three separate times. Each test was positive for cocaine. Mr. Gannon's hair drug test results indicated that his hair contained 12.2 nanograms ("ng") of cocaine per 10 milligrams ("mg") of hair, exceeding the 5 ng per 10 mg cutoff.

On April 20, 2010, Mr. Gannon was shocked to learn that his hair tested positive for cocaine. He denied undergoing any recent medical procedures that could explain the positive test. The next day, Mr. Gannon performed a second hair drug test at the Boston Municipal Court's Probation Department. Twenty-six percent of Mr. Gannon's second hair sample contained hair from his first sample. Psychemedics analyzed the second hair sample and determined that it tested negative for drugs.

Mr. Gannon was not hired from the Certification 202233 list because the Plaintiff has a policy against hiring individuals who use illegal drugs. On October 20, 2011, Mr. Gannon appealed the hiring decision (docket number G1-11-309) to the Commission. This appeal was later withdrawn.

On April 30, 2011, Mr. Gannon passed a second civil service examination. In June 2012, Mr. Gannon's name appeared on Certification 202869 in the first tie group. On August 4, 2012, Mr. Gannon took a third hair drug test that yielded negative results.

On January 25, 2013, Mr. Gannon learned that he was not selected from Certification 202869. Two candidates who ranked below Mr. Gannon and a third

candidate whose name did not appear on the certification list were selected from Certification 202869. These three candidates were previously hired as police officers but were forced to withdraw from the Police Academy due to injuries. The Plaintiff hired these candidates from Certification 202869 in accordance with their policy at the time that allowed candidates hired from a previous cycles to be re-appointed if they were unable to complete training at the Police Academy due to injuries sustained in their training. Mr. Gannon appealed (G1-12-329) his non-selection from Certification 202869 to the Commission. This appeal is the subject of the instant case.

In March 2013, Mr. Gannon's name appeared on Certification 00746. On February 7, 2014, the Plaintiff informed Mr. Gannon that he was bypassed for appointment because of his March 27, 2010 positive cocaine test result. Mr. Gannon filed a third appeal (G1-13-181) with the Commission, which is currently being held open by the Commission pending resolution of this action.

Mr. Gannon's appeal was heard before the Commission on March 17, 2014 and March 26, 2014. On October 29, 2015, the Commission allowed Mr. Gannon's appeal and ordered the Plaintiff to place his name at the top of the current or future certifications for permanent police officers within the Boston Police Department until he is selected or bypassed. In the event that Mr. Gannon is selected for appointment, the Commission ordered that he receive a retroactive civil service seniority date that matches individuals appointed from Certification 202869.

The Plaintiff appealed the Commission's decision to this Court on November 30, 2015.

DISCUSSION

A. **Standard of Review**

A police department's hiring decision need only be supported by "reasonable justification." City of Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 188 (2010); citing Brackett v. Civil Serv. Comm'n, 447 Mass 233, 241 (2006). When an applicant appeals the police department's decision to the Commission, the police department must demonstrate by a preponderance of the evidence that it had reasonable justification. Beverly, 78 Mass. App. Ct. at 187.

In reviewing a police department's hiring decision, the Commission's concern is not whether it would have made the same decision as the police department. Beverly, 78 Mass. App. Ct. at 187, citing Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). Rather, based on the facts that the Commission finds, it must determine whether there was reasonable justification for the police department's actions in the circumstances found to have existed when the police department made its decision. Id. The Commission must grant substantial deference to the police department's exercise of judgment in determining whether there was reasonable justification. See Beverly, 78 Mass. App. Ct. at 188.

A party aggrieved by the Commission's decision may seek judicial review in the Superior Court. G.L. c. 31, § 44. This Court may affirm, reverse, remand or modify the Commission's decision when a party's substantial rights were prejudiced because the decision was based on an error of law. G.L. c. 30A, § 14.

B. Error of Law

The Commission committed an error of law when it relied on Boston Police Department Hair Drug Testing Appeals (“D” Cases), D-01-1409, et al. (26 MCSR 73 (2013)), to invalidate the Plaintiff’s decision to reject Mr. Gannon’s application. In that case, the Commission considered whether hair drug tests were reliable enough evidence to allow the Plaintiff to terminate tenured police officers solely based on test results that are positive for drugs. Id. at 107. Commissioner Paul Stein’s majority opinion determined that while hair testing is an appropriate tool to enforce the Plaintiff’s substance abuse policy and that the hair test results could be used as some evidence of drug use, the hair testing methodology was not sufficiently reliable to be the sole basis for a tenured police officer’s termination. Id. The Appeals Court subsequently upheld the Commission’s decision.² Thompson v. Civil Service Comm’n, 90 Mass. App. Ct. 462, 465-466 (2016), rev. denied 476 Mass. 1106.

The Commission’s extension of the “sole basis” test from tenured employees to new hires is in direct conflict with police departments’ well established hiring discretion. See Beverly, 78 Mass. App. Ct. at 188. The courts have recognized that the Commission’s substantial deference to an appointing authority’s hiring decisions is especially appropriate when it comes to hiring police officers. See id. This is because police officers occupy a “sensitive position” in our society, and are thus held to a higher standard than ordinary people. See id. at 188-189.

² The Plaintiff argues that the Commission should have applied the “rebuttable presumption” test as set forth in the Boston Police Department Hair Drug Testing Appeals (“D” Cases) concurrence opinion to Mr. Gannon’s case, but the Appeals Court confirmed that Commissioner Stein’s “sole basis” test is the correct standard.

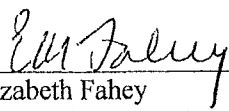
The positions of a tenured police officer and an applicant are categorically different circumstances that prevent the “sole basis” test from applying equally to both situations. A tenured police officer has already passed the initial hiring scrutiny and is appropriately accorded more protection from potentially faulty drug test results than an unknown applicant. The courts’ willingness to treat the two positions differently is evidenced in the separate standards of review accorded to the police departments’ decisions regarding tenured officers versus applicants. A police department’s decisions regarding applicants need only be supported by “reasonable justification,”³ whereas a tenured police officer’s termination requires “just cause.” See Beverly, 78 Mass. App. Ct. at 191. As the Appeals Court recognized, “a municipality should be able to enjoy more freedom in deciding whether to appoint someone as a new police officer than in disciplining an existing tenured one.” Id.

The Commission should have determined whether the Plaintiff established by a preponderance of the evidence that its decision to reject Mr. Gannon’s application was supported by reasonable justification. See Brackett, 447 Mass at 241; Beverly, 78 Mass. App. Ct. at 187. The hair drug test provided evidence that Mr. Gannon ingested cocaine around the time that he initially applied to be a police officer. See Thompson, 90 Mass. App. Ct. at 465-466. Given the Plaintiff’s policy against hiring individuals who use illegal drugs, the Plaintiff’s decision to reject Mr. Gannon’s application was reasonably justified.

³ At least in this Court’s opinion, a police department has reasonable justification for not hiring those who ingest illegal drugs. Illegal drug abuse is an ongoing issue for police departments, as evidenced in Thompson, 90 Mass. App. Ct. at 469-470, where ten tenured police officers tested positive for cocaine use and four officers were ultimately discharged.

ORDER

It is therefore **ORDERED** that the Plaintiff's motion for judgment on the pleadings be **ALLOWED**. Judgment is to enter for the Plaintiff. The Commission's October 29, 2015 decision is **REVERSED**.



Elizabeth Fahey
Justice of the Superior Court

DATED: March 13, 2017