

Noting
SUFFOLK, ss

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION
NO. 10-0079-A

MICHAEL J. CLARK

vs.

CIVIL SERVICE COMMISSION & another¹

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT TO MASS R. CIV. P. 12 (C)

This is a G. L. c. 30A, §14 and G. L. c. 31, § 2(b) appeal from a bypass of the plaintiff Michael J. Clark ("Clark") for promotion to the position of permanent full-time Police Lieutenant for the Barnstable Police Department ("Department"). For the reasons discussed below, Clark's motion for judgment on the pleadings is ALLOWED and the Commission's order is VACATED.

BACKGROUND

Clark is a graduate of University of Massachusetts at Amherst and has a Masters degree from Western New England College. He commenced employment with the Department in 1995 as a police officer. In 2000, he was promoted to the position of detective and in 2003 he was promoted to sergeant.

In November 2006, the Department had a vacancy for the position of Lieutenant which was created as a result of the then Lieutenant Paul MacDonald being appointed to the position of interim Chief of Police ("Chief MacDonald"). Chief MacDonald was subsequently appointed to the position of permanent Chief on August 16, 2007. As a result thereof, the Town of Barnstable ("Town") filed with the Civil Service Commission ("Commission") a request for a certification of eligible

¹ Town of Barnstable

Noting SENT
07.26.11
BES
RLQJK
AAG
rgw
TOH
CSM
(MTJ)

RECEIVED
JUL 27 2011
OFFICE OF THE
CLERK OF THE
SUPERIOR COURT
GENERAL
CIVIL

RECEIVED
2011 AUG -3 A 9:56
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

candidates from the Department to fill the vacancy for one permanent full-time Lieutenant. The Town subsequently received the certification list from the Human Resources Division ("HRD"). The certification list included the three highest scores:

1. Michael J. Clark - 90
2. Sean E. Balcom ("Balcom") - 88
3. Sean Sonnabend ("Sonnabend")² - 86

Prior to selecting the individual for appointment position, Chief MacDonald met with Sergeant Andrew McKenna ("Sgt. McKenna"), the President of the Superior Officers' Union ("Union"), to discuss and agree on the selection procedure. Chief MacDonald and the Union agreed that the candidates would have until December 11, 2007 to sign the certification list as a candidate and that the procedure would proceed as follows:

1. Submission of a career profile (each candidate would create a profile of his career and his accomplishments);
2. Oral board interviews (three member board from outside the Department would interview each candidate);
3. Input from immediate supervisors; and
4. Interviews with Chief MacDonald.

On November 27, 2007, Chief MacDonald sent an e-mail to Sgt. McKenna confirming the details of the procedure agreement that was reached. Thereupon, the selection process began. Notwithstanding Chief MacDonald's agreement with Sgt. McKenna and the Union, Chief MacDonald appointed one member of the oral board from the Department. He also introduced an additional writing component to the selection process, requiring each candidate to submit a community policing plan that he would evaluate. Lastly, Chief MacDonald requested from his staff and supervisors their input as to the candidates for the position.

²Sonnabend dropped out as a candidate along the way in the selection process. Thereupon, this opinion will hereinafter just discuss the candidates, Clark and Balcom.

On January 7, 2008, the Department promoted Balcom to the position of Lieutenant. In a letter dated January 8, 2008 to the HRD, Chief MacDonald stated the reasons for Balcom's appointment.³ The letter also outlined the selection process for the position. On March 3, 2008, the HRD accepted the reasons proffered by the Department to bypass Clark. Clark filed an appeal of this decision with the Commission and the Commission assigned the appeal to the Division of Administrative Law Appeals ("DALA").

Hearings were held before Magistrate Joan Friedman Fink ("Magistrate Fink") on July 30, 2008 and August 8, 2008. A twelve page recommended decision was issued on August 17, 2009, ruling in favor of the Department. On further appeal, the Commission affirmed Magistrate Fink's decision.

DISCUSSION

I. Standard of Review

The role of the Civil Service Commission is to determine whether "on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). A party aggrieved by a final decision of the Commission may seek judicial review under G. L. c. 31, § 44. Pursuant to G. L. c. 31, § 44, this court reviews "the commission's decision to determine if it violates any of the standards set forth in G. L. c. 31A, § 14(7), and cases construing those standards." Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 242 (2006). This court is "required to overturn commission decisions that are

³ In the bypass letter, Chief MacDonald omitted the supervisor's input of the process and did not provide any negative references as to why Clark was bypassed.

inconsistent with governing law.” *Id.* Pursuant to G. L. c. 30A, § 14(7)(c), the court may overturn a Commission’s decision if it is “based upon an error of law” or “unsupported by substantial evidence.”

For the appointing authority’s action to be reasonably justified, it must be based “upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Cambridge*, 43 Mass. App. Ct. at 304, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928). When political considerations or objectives unrelated to merit govern the appointing authority’s personnel decision, the Commission may intervene. *Cambridge*, 43 Mass. App. Ct. at 304. The Commission, however, does not have authority to “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.* When selecting public employees based on skill and integrity, appointing authorities are afforded broad discretion. *Id.* at 304-305.

II. Analysis

This Court has held a hearing, read all submissions and has given much thought and consideration to the record and transcript of the hearings before Magistrate Finks on July 30, 2008 and August 8, 2008. This Court determines that the appointing authority decision cannot stand because it applied an incorrect legal standard in determining which candidate to appoint. Several aspects of the selection process was flawed. First, Chief MacDonald erred in considering the

candidates' experiences in addition to their civil service examination scores. In particular, Chief MacDonald applied additional credit to Balcom for his experience as a police officer, which credit had already been considered by the Commission and applied to his initial score of 88. "Seniority is built into the test score as part of the training and experience grade and thus was weighted twice in this matter." See G. L. c. 31, §22. Second, Chief MacDonald never revealed Clark's performance evaluation. Clark's most recent evaluation was done by Lieutenant Cameron in 2005. (Exhibit 18, p.277-286). The written evaluation was sent to Chief MacDonald and a copy was retained in Clark's personnel file. While one Supervisor Officer indicated that he saw the evaluation in Clark's personnel file, nevertheless it had become "missing" when Chief MacDonald reviewed Clark's personnel file prior to interviewing Clark. Chief MacDonald testified that he never saw the evaluation prior to his bypass of Clark. This Court has read this ten page evaluation dated April 17, 2005 and it contains strong performance reviews for Clark. The performance evaluations were an integral part of the selection process. Chief MacDonald relied on the performance evaluations to decide which candidate was better for the position. Consequently, Chief MacDonald could not have been able to make a fair and impartial assessment without considering Clark's evaluation. Third, Chief MacDonald failed to create the oral board with proper composition. Notwithstanding Chief MacDonald's agreement with Sgt. McKenna and the Union that the oral board would be made up of three member board from outside the Department, Chief MacDonald appointed one member from the Department. The reason why the board should not be made up of persons who do or have served with the Department is to avoid any possibility or even appearance of partiality. There is no reason in the record to indicate why Chief MacDonald breached the agreement. Fourth, Chief MacDonald failed to record any of the interviews. Chief MacDonald admitted that the Department's policy

requires videotaping to provide a reliable record for later purposes of determining accuracy and impartiality. (Testimony of MacDonald, Tr. 86-87). Nevertheless, he did not do it. Therefore, it is difficult to establish the fairness and unbiased practice in the selection process. Fifth, the Department erred by considering the results of Chief MacDonald's interviews in the appointment decision. Chief MacDonald described the interview as a "setup interview" with no substance involved. (Testimony of MacDonald, Tr. 51-52). The purpose of the interview was "... to tell them we were in the process, what was going to happen next, and if they had any questions." (Testimony of MacDonald, Tr. 52). Despite their lack of substantive value, Chief MacDonald erred in considering the results in the interviews in determining which candidate to appoint. Finally, Chief MacDonald improperly introduced a community policing plan very late in the process. Chief MacDonald did not give advance notice to the candidates or the Union regarding the plan. In failing to provide such notification, Chief MacDonald violated the Department's policy to ensure fairness. Moreover, Chief MacDonald's opinion that Balcom's community policing plan was better than Clark was entirely subjective. Chief MacDonald has no training or education in community policing. Without proper training on the subject matter in question, Chief MacDonald's opinion that Balcom's community policing plan was better is unsound and unsupported by an objective standard.

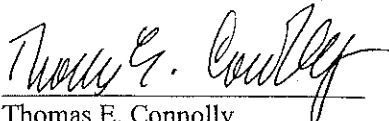
The Commission must focus on the fundamental purposes of the civil service system to guard against political considerations, favoritism, and bias in governmental employment decisions. Murray v. Second Dist. Court of E. Middlesex, 389 Mass. 508, 516 (1983). When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the Commission. Cambridge, 43 Mass. App. Ct. at 304.

In the instant case, Clark had a higher examination score than Balcom. The Department's application of an incorrect legal standard in determining which candidate to appoint and the obvious flaws in the selection process suggests unlawful bias was used in the appointment of Balcom

CONCLUSION

For the reasons stated above, it is ORDERED that Clark's motion for judgment on the pleadings be ALLOWED and the Commission's order be VACATED.

Accordingly, it is ordered that Clark's name be placed at the top of the eligibility list for the current or next promotional appointment of Police Lieutenant for the Town of Barnstable.


Thomas E. Connolly
Justice of the Superior Court

Dated: July 22, 2011

Notice
SENT
07.26.11
(md)