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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-01989

BOSTON POLICE DEPARTMENT

vs.

JEFFREY CORDEIRO & another¹

Notice sent
1/31/2011
A. E. W.
S. G.
N. R.
R. & R.
R. L. Q., JR.

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

(sc)

The plaintiff, Boston Police Department ("BPD"), seeks judicial review under G. L. c. 31, § 44 of defendant Massachusetts Civil Service Commission's ("Commission") decision to allow defendant Jeffrey Cordeiro's ("Cordeiro") appeal of the BPD's decision to bypass him for appointment as a Boston Police Officer. For the reasons discussed below, the BPD's motion for judgment on the pleadings is allowed and the Commission's order to place Cordeiro at the top of the next certification list for appointment is vacated.

BACKGROUND

I. BPD Hiring Process

Prior to submitting an application to the BPD, candidates participate in a three-hour orientation conducted by the Recruit Investigations Unit ("RIU"). At the orientation, the RIU explains the BPD's application, advises the applicant to disclose everything, including negative employment history or criminal record, and instructs the candidate to disclose any forthcoming information after his application is submitted. Once a candidate submits an application to the BPD, detectives from the RIU conduct a background investigation on the applicant. The

¹ Massachusetts Civil Service Commission

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information gathered is then presented to a hiring committee, also known as a "roundtable," typically consisting of the Commander of the RIU, the Director of Human Resources, a Deputy Superintendent from Internal Affairs, and an attorney from the Legal Advisor's Office. If the applicant is deemed suitable, he receives a conditional offer of employment, i.e., an offer of employment contingent on successful completion of the medical and psychological components of the BPD's screening process. When a recruit's application is unclear or the results of the background investigation need further clarification, a candidate may be asked to participate in a discretionary interview. The results of the discretionary interview are presented to a reconvened roundtable.

II. Cordeiro's Bypass

Cordeiro, like every other candidate, participated in the process detailed above. He attended the orientation, submitted an application, and was subject to the RIU's background investigation.

On April 9, 2007, following a meeting of the roundtable, Cordeiro received a conditional offer of employment. The BPD subsequently scheduled his medical and psychological processing for April 17, 18, and 20, 2007. In order to attend the processing, Cordeiro requested time off from his then-current employer, the Department of Corrections ("DOC"). His request, however, was denied.

On April 13, 2007, Cordeiro, who is also a member of the National Guard, submitted a request to the DOC for time off to attend mandatory National Guard pre-school testing at the National Guard Armory on April 17, 2007. Two days later he submitted another request for time off to attend National Guard pre-school testing on April 18 and 20.

On April 17, 18, and 20, 2007, Cordeiro did not go to the National Guard Armory. He called the appropriate Staff Sergeant and was informed he did not have to appear there. Instead, he went to complete the BPD processing on those dates.

Following Cordeiro's completion of the BPD processing, the DOC commenced an investigation into whether Cordeiro had actually attended the National Guard pre-testing. Finding that he did not, the DOC commenced a disciplinary action on April 26, 2007 and terminated him. Importantly, at the time the disciplinary action had commenced, Cordeiro had already submitted an oral resignation effective April 24, 2007.² Apparently, upon learning that Cordeiro was applying to the BPD, Lieutenant Raymond Gonsalves ("Lt. Gonsalves"), a member of the training staff at the DOC, told Cordeiro that he expected him to resign. Cordeiro did not inform the BPD either of his resignation or termination.

While the DOC's investigation was proceeding, Lt. Gonsalves made two phone calls to the BPD's Director of Human Resources, Robin Hunt ("Hunt"), through which she learned of the DOC's investigation and its decision to terminate Cordeiro. Based on this information, Hunt recommended that RIU investigators conduct a discretionary interview so that Cordeiro could explain his situation. The interview took place on May 24, 2007, was videotaped, and lasted approximately thirteen minutes.

During the interview, Cordeiro admitted that he had not been forthcoming with the DOC and basically admitted that he planned with his military contacts to have his National Guard pre-testing dates coincide with the BPD processing. Cordeiro also admitted at the interview that the DOC had sent him a termination letter. He offered to present documentation of his resignation, but the detectives declined the offer.

² A letter dated May 21, 2007 memorialized the oral resignation.

On May 29, 2008, the roundtable was reconvened to reconsider Cordeiro's suitability for employment in light of the discretionary interview. A decision was made to bypass Cordeiro.

The BPD submitted reasons for Cordeiro's bypass in a letter to the Human Resources Division of the Civil Service Unit ("HRD") on July 12, 2007. The letter indicated that the BPD wanted to bypass Cordeiro because: (1) he "failed to voluntarily disclose his recent termination by the DOC" and (2) "his lack of judgment in lying twice to his current employer (DOC) show[ed] a deceptive personality trait . . . unsuitable and unbecoming in a Police Officer."

A few months later, Hunt was provided with a letter dated October 15, 2007 from the DOC indicating that Cordeiro had in fact resigned and had not been terminated. The letter acknowledged that the effective resignation date was April 24, 2007.

III. The Commission's Decision

After the bypass, Cordeiro filed an appeal with the Commission under G. L. c. 31, § 2(b). The Commission, after a full hearing over two days, issued a decision on January 15, 2009 in which it ordered the HRD to place Cordeiro's name at the top of the next certification list for appointment to the position of permanent full-time police officer, until such time as Cordeiro receives at least one consideration for the position of police officer.

In its written opinion, the Commission observed that several of Cordeiro's actions exhibited poor judgment. It noted that he: (1) took advantage of the formalities of the National Guard pre-school testing and arranged with his military contacts to have the pre-school testing coincide with his BPD processing dates; (2) refused to cooperate with the DOC investigation into the fact that he attended BPD on days he had been allowed off in order to fulfill his military commitments; (3) was, admittedly, less than truthful to the DOC; and (4) failed to keep the BPD

abreast, either orally or in writing, about the change in his employment status as he was told to do at the RIU orientation.

Nevertheless, the Commission allowed Cordeiro's appeal, concluding that, "the bypass was based on erroneous information in regard to [Cordeiro's] separation from the DOC." It found that DOC had not terminated Cordeiro, as stated in the BPD's letter to the DOC, but that he had resigned prior to the DOC's disciplinary action. The BPD now seeks judicial review of the Commission's decision.

DISCUSSION

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, the court reviews "the commission's decision to determine if it violates any of the standards set forth in G. L. c. 30A, § 14(7), and cases construing those standards." *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). The court is "required to overturn commission decisions that are 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."

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 the 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.

Here, the Commission erred as a matter of law in applying the reasonable justification standard. The Commission essentially found the reasons for the BPD's bypass existed at the time the decision was made, yet concluded that the BPD's decision was not reasonably justified.

In its letter to the HRD, the BPD offered two reasons for its bypass: (1) Cordeiro's failure to voluntarily disclose his termination; and (2) that Cordeiro had lied to the DOC. The Commission concluded that the first reason for the bypass, and therefore the bypass decision, was invalid because the BPD erroneously determined that Cordeiro had been terminated from the DOC. This conclusion, however, misconstrues the BPD's first reason for bypassing Cordeiro. As noted above, the BPD's first stated justification for bypass was not Cordeiro's termination, but his failure to disclose it.³ Therefore, the Commission's conclusion that the BPD's bypass was based on an erroneous finding of fact was mistaken.

More importantly, regardless of the merits of the BPD's first reason for bypass, the Commission also erred by overlooking the second reason for the bypass, namely, Cordeiro's admitted lack of truthfulness to the DOC. Nowhere in its written opinion did the Commission address whether Cordeiro's lack of candor constituted reasonable justification for bypass. Indeed, the Commission noted that Cordeiro's lack of truthfulness with the DOC was "not an exercise of good judgment[.]"

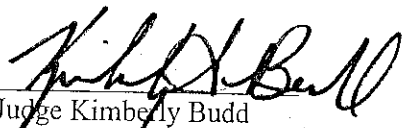
³ Notably the Commission also concluded that Cordeiro failed in his affirmative duty to inform the BPD of DOC's decision to terminate him and his oral resignation.

Based on this second reason alone, the BPD was justified in bypassing Cordeiro. The BPD regarded Cordeiro's untruthfulness to the DOC as a significant indicator that he had poor judgment and a deceptive personality. When an individual has displayed poor judgment and dishonesty, it is for the BPD, not the Commission, to decide whether to take on the risk inherent in hiring that individual. *Id.* at 304-305. The BPD's decision involved no "overtones of political control or objectives unrelated to merit standards." *Id.* at 304. Consequently, the Commission impermissibly substituted its judgment for that of the BPD when it made its determination.

ORDER

For the foregoing reasons, it is hereby ordered that the BPD's motion for judgment on the pleadings is ALLOWED. The Commission's order to place Cordeiro's name at the top of the next certification list for appointment to the position of permanent full-time police officer, until such time as Cordeiro receives at least one consideration for the position of police officer is

VACATED.


Judge Kimberly Budd
Justice of the Superior Court

Dated: January 31, 2011