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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 15-2963-B

TOWN OF WILMINGTON

RECEIVED

vs.

JUL 15 2016

CIVIL SERVICE COMMISSION and WALTER DALEY

MA Off. of Attorney General

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Administrative Law Division

This dispute arises from the Town of Wilmington's ("the Town") decision to bypass defendant Walter Daley ("Mr. Daley") for a promotion to Lieutenant of its Fire Department from a certified Civil Service list. Daley appealed the Town's decision to the Civil Service Commission ("the CSC"). After consideration of the evidence and a hearing, the CSC vacated the Town's decision to bypass Daley ("the CSC Decision"). The Town seeks judicial review of the CSC Decision pursuant to G.L. c. 31, § 44. Before the court are cross-motions by the Town and Mr. Daley for judgment on the pleadings.¹ For the reasons that follow, Mr. Daley's motion is **ALLOWED** and the Town's motion is **DENIED**.

BACKGROUND

In July of 2014, the Town was seeking to fill four vacancies at the rank of lieutenant within its fire department. Mr. Daley was one of twelve candidates who took and passed the Wilmington Fire Lieutenant Promotional Examination in connection with the hiring process. Mr. Daley's exam score placed him in a tie for third rank among the twelve candidates. Fred Ryan, a competing candidate, also passed the exam. His score placed him in a tie for sixth place among

¹ The CSC has not filed any motions or oppositions to the motions before the Court. Its role in this matter is limited to a nominal party and it does not intend to participate in this action.

the candidates. Thereafter, eleven of the twelve candidates went through an interview process, which, at some point, became the controlling component of the hiring process. Mr. Ryan's interview was ranked first among the eleven candidates based on a consensus system adopted by the Town. Mr. Daley's interview was ranked fifth. The Town promoted the four candidates who ranked highest at the interview stage, thus bypassing Mr. Daley for promotion. Mr. Daley successfully appealed the Town's decision to the CSC.

FACTUAL RECORD

In reviewing the CSC decision, this court "is bound to accept the findings of fact of the commission's hearing officer." Malloch v. Hanover, 472 Mass. 783, 796 (2015) (quotations omitted). Consequently, the following facts are based on the CSC Decision and the exhibits relied upon therein.

Mr. Daley was originally hired as a firefighter in the Wilmington Fire Department in 1995. During his tenure, Mr. Daley completed courses to become certified as a Fire Officer I, an Incident Safety Officer, and a Fire Instructor I. Mr. Daley has also completed forty-six credit hours towards an Associate's Degree in Fire Protection and Safety. Prior to being hired by the Town, Mr. Daley graduated from the United States Military Academy at West Point and had held the rank of Infantry Lieutenant in the United States Army. Mr. Daley is also a law school graduate and is licensed to practice law in the Massachusetts.

At the outset of the promotion process at issue,² the Town possessed a certified Civil Service list ("the List") with only two names of eligible candidates on it: Fred Ryan ("Ryan") and Daley. Daley was ranked first.

² Initially, only one lieutenant position was vacant, but because the Town anticipated that three other positions would need to be filled by 2014, it expanded the process to include twelve candidates for four positions.

Mr. Ryan was appointed as a firefighter in 1998. He completed his Firefighter I and II Certification in 2000 and received his fire prevention certification in 2013. Prior to his appointment to the fire department, Mr. Ryan was a project manager for a construction company.

The Town initially decided to use a two-part testing method to fill the actual and anticipated vacancies at the rank of lieutenant. In the first phase, candidates were required to take an examination at an Assessment Center ("the Assessment Center exam") involving three exercises (a technical exercise, a personnel exercise, and an "In-Tray" exercise designed to measure the candidates' ability to prioritize responsibilities). The Town had used this method to hire the Fire Department Chief and found it an effective way "to identify leadership and people for command positions." After the examination, in the second phase of the process, candidates were required to undergo interviews with a six-member panel. The Town would rank the candidates based on their performance at the end of each phase.

On February 19, 2014, Mr. Daley and eleven other candidates, including Mr. Ryan, took the Assessment Center examination. Mr. Daley's score was third highest in the group, in a tie with another candidate. Mr. Ryan's exam score was sixth highest, also in a tie with another candidate.

On May 27, 2014, Fire Chief Rick McClellan ("Chief McClellan" or "the Chief") sent an e-mail to twelve candidates who took the Assessment Center exam in February 2014, notifying them that they would be interviewed on June 9, 2014.

Prior to the interviews, Kendra Amaral, Wilmington's Assistant Town Manager and Director of Human Services, discussed the interview process with representatives from the fire department. They decided that each candidate would be interviewed before a six-member panel consisting of Ms. Amaral, Chief McClellan, a Deputy Fire Chief, two Lieutenants of the fire

department, and the fire chief from the Town of Andover ("the Panel"). They also decided to allot a maximum of forty-five minutes per interview.

The Panel chose fourteen questions to use in the interviews. The questions were a combination of open-ended questions designed to assess leadership potential, technical questions, and background questions.³ On June 9, 2014, the Panel interviewed eleven candidates and asked each candidate the same questions.⁴

The Panel scored each candidate's by consensus. Each panel member might arrive at an individual, numerical score for each candidate, but the candidates were ranked based upon a consensus score from the Panel as a whole. The Panel determined the consensus score after discussing each answer that a given candidate given in response to each question immediately after his or her interview was complete. At some point in the process, the Town or the Panel decided that the candidates with the highest interview scores would be promoted. As applied, this decision meant that in the event of a discrepancy between the rankings based upon the exam scores and the rankings based upon the interview scores, the interview-based ranking would control.

Chief McClellan was unsure when the Panel decided to give what is effectively 100% weight to the interviews; he did not take part in the decision because he was a Deputy Fire Chief at the time. According to Ms. Amaral, she and the former Fire Chief made the decision to give controlling weight to the interviews during a meeting prior to the administration of the Assessment Center exam.

³ For example, Question No. 11 was a technical question ("How much water does E3 and the Squad carry in their tanks?"), whereas Question No. 9 was an open-ended question ("Can you name a past situation or experience where you acted in a supervisory role? Please describe it and what in the experience you thought you handled well and what you have could have improved.").

⁴ One candidate did not participate in the interview process.

After the interviews were complete, the top four consensus scores in descending order were awarded to Mr. Ryan, a Mr. Nansel, a Ms. Green, and a Mr. Cavanaugh. Mr. Daley scored fifth highest, with a consensus ranking of forty-five out of a possible seventy. Mr. Ryan's first-place consensus interview score was sixty out of the possible seventy. The Panel then conducted a "gut check" of the post-interview rankings by combining each candidate's Assessment Center exam score and interview score and dividing the number by two to yield the candidate's "average." The mathematical viability of this method of averaging is not clear from the record, especially given the different number of points available in the two phases of the process, but the following points are clear: The scores derived by this method mirrored the interview rankings and this "gut check" was the only occasion in the entire process at which the exam scores were given any weight at all.

On June 27, 2014, the Wilmington Town Manager sent a letter to Mr. Daley, notifying him that he had not been chosen for promotion. The Town Manager's letter indicates that the decision was based on the interview, the Assessment Center exam, and review of personnel file; however, the specific justifications given for bypassing Mr. Daley were based entirely on his interview performance.⁵ The letter additionally set out the Town's reasoning for choosing Mr. Ryan over Mr. Daley, which was based on Mr. Ryan's interview performance *and* his professional development.⁶

⁵ The Town Manager gave the following reasons for the bypass: (1) failing to excel at the oral interview; (2) showing a lack of respect for command staff by responding to the Deputy Fire Chief by first name during the interview; (3) focusing on golf shirts as the new uniforms as the one policy change Daley would implement; (4) responding to hypothetical of implementing an unpopular policy by deflecting responsibility by explaining "why command staff think it's a value" rather than demonstrating leadership by fostering the group's understanding of the policy; and (5) giving a non-descriptive answer that vaguely mentioned his military experience when asked to describe a situation when he acted in a supervisory role.

⁶ The following reasons were given as justification for Mr. Ryan's promotion: (1) He scored the highest on the oral interview and gave detailed answers during the interview; (2) he addressed each person in the interview in a respectful manner; (3) although Ryan also chose golf shirts as policy that he would implement, his reasoning was

According to the Panel, Mr. Daley performed poorly during the interview because his interview was short, lasting only fifteen to twenty minutes despite the allotted time of forty-five minutes. In addition, Ms. Amaral's notes from the interviews reflect negative impressions of Mr. Daley's interview based upon his non-descriptive explanation of his leadership experience, his informality in dealing with the Chief, and his inability to rank his preference for various lieutenant roles. In this regard, it is notable that Ms. Amaral's notes from Mr. Ryan's interviews reflect similar impressions. Both candidates discussed the need to change department uniforms to golf shirts to make them more conducive to the kind of work being performed. Both candidates said they would implement an unpopular policy and personally talk to anyone who was not onboard with it. Both discussed raising the issue of resistance to a policy to a superior (Mr. Ryan evidently said that he would talk to the Lieutenant, whereas Mr. Daley indicated that he would speak directly to the Chief). While Mr. Ryan received credit for his pre-employment professional construction experience, the CSC found no documented evidence that Mr. Daley's professional record, particularly his military leadership experience, was given due consideration in the comparison.⁷

On July 3, 2014, Mr. Daley sent a letter to the Town Manager in response to the notification letter dated June 27, 2014. In his letter, Mr. Daley explained his answers and conduct during his interview and gave notice of his intention to appeal the Town's decision to

clear and focused on improved response times in emergencies; (3) when presented with the hypothetical involving implementation of an unpopular policy, he focused on taking responsibility for the implementation of the policy; (4) he demonstrated good decision-making skills when asked to describe a situation where he acted in a supervisory role; and (5) his good standing as an employee since 1998, service as a Chair of the Advanced Life Support committee, six years of construction experience and license as a Construction Supervisor in the Commonwealth, and certification as a Fire Prevention Officer – Basic.

⁷ Mr. Daley had been an employee of the Fire Department in good standing for three years longer than Mr. Ryan. Mr. Daley had completed forty-six credits toward a Fire Associate degree, which included building construction, fire protection systems, and hazardous material training. Mr. Ryan was certified as a Fire Prevention Officer and Mr. Daley was certified by the Fire Academy as both a Fire Instructor I and an Incident Safety Officer. Mr. Daley had also passed the National Board on Fire Service Professional Qualifications exam to become certified as a Fire Instructor I. Mr. Daley also scored higher than Mr. Ryan on the Civil Service written exam for Fire Lieutenant.

the CSC. On July 8, 2014, Mr. Daley filed an appeal his appeal. On September 29, 2014, the CSC held a hearing pursuant to G.L. c. 31, § 2 (“the CSC Hearing”). Mr. Daley called two witnesses (the Fire Chief and Ms. Amaral) and the CSC accepted seventeen exhibits into evidence.

On September 3, 2015, the CSC issued its three-to-one decision vacating the Town’s bypass. The CSC reasoned:

[T]he record shows the [Town] nearly abandoned the Assessment Center Results in favor of the interview results. The Assessment Center provided a relatively objective method of evaluating the candidates’ qualifications for promotion. Having engaged the Assessment Center for this purpose, the [Town]’s determination to rely on the interview results instead, at least primarily, gives the appearance that the [Town] abandoned objective reasons for its ultimate decision. Although the [Town] compared the ranking of the candidates as a result of the interview as a “gut check,” the [Town] gave the Assessment Center results no further consideration. Further, the subjective effect of the interview results was magnified by the fact that instead of each interviewer ranking the candidates individually, the group of interviewers gave each candidate a consensus score. As a result, the [Town]’s decision was based primarily on the flawed subjective interviews To administer an objective Assessment Center [exam] only to then decide whom to promote on the basis of subjective interviews in the manner performed here does not assure fair treatment of all employees.

While recognizing that the Town was entitled to determine its hiring process and that some level of subjectivity is always present in hiring, the CSC found that the Town’s subjectivity “crossed the line and violated basic merit principles in a number of ways.”⁸ Based on what it found to be relatively slight differences between Mr. Ryan’s and Mr. Daley’s interviews and the heavy

⁸ The CSC gave the following four examples to illustrate what it described as the Town’s excessive reliance on subjective criteria: (1) the Town assigned negative weight to the facts that Mr. Daley did not wear a suit or sport jacket to the interview and addressed Chief McClellan by his first name after the Chief addressed Mr. Daley by his first name; (2) the Town ignored the similarity in responses by Mr. Daley and Mr. Ryan on at least two questions, and arbitrarily scored Ryan’s answers significantly higher; (3) the Town failed to give weight to Mr. Daley’s military experience which reasonably related to leadership or supervisory experience; and (4) the Town’s was unable to explain the large discrepancies between the scores given to Mr. Daley and scores given to other candidates based upon answers given in response to a question about a given candidate’s ranking of his or her preferences with regard to the performance of various lieutenant roles.

weight given to the subjective aspects of the interviews process, the CSC ordered that Mr. Daley be put placed at the top of all future certifications for promotion for Fire Lieutenant positions at the Town of Wilmington's Fire Department.

On September 30, 2015, the Town filed this action seeking to overturn the CSC Decision pursuant to G.L. c. 30A, § 14.

DISCUSSION

After review of the Administrative Record, the cross-motions filed by the parties for judgment on the pleadings and accompanying memoranda, and consideration of the parties' arguments at the hearing held on June 21, 2016, Court rules as follows.

I. Standard of Review

"Pursuant to G. L. c. 31, § 44, [the courts] review the commission's decision to determine whether it was in conformity with the standards set forth in G. L. c. 30A, § 14 (7)." Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 689 (2012). Given the "the experience, technical competence, and specialized knowledge of the agency . . . [and] [its] discretionary authority," courts "will not disturb the [agency's] decision unless it was made in excess of the [agency]'s statutory authority; is unsupported by substantial evidence; or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." G. L. c. 30A, § 14; J.M. Hollister, LLC v. Architectural Access Board, 469 Mass. 49, 55 (2014). Plaintiff bears the burden of demonstrating the invalidity of an agency decision. Merisme v. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989).

"Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon, Jr.'s Case, 69 Mass.

App. Ct. 167, 169. However, courts “must consider anything in the record that fairly detracts from the weight of the evidence supporting the [agency’s] determination.” Salem v.

Massachusetts Comm’n Against Discrimination, 44 Mass. App. Ct. 627, 641 (1998).

Nonetheless, “[t]his does not permit a court to treat the proceeding as a trial de novo on the record which was before the administrative board.” Southern Worcester Cnty. Reg’l Vocational Sch. Dist. v. Labor Relations Comm’n, 386 Mass. 414, 420 (1982).

The Town moves for judgment on the pleadings based on two arguments. First, the Town contends that the CSC Decision ignores the purpose of the CSC’s review of municipal decisions pursuant to G.L. c. 31, § 2(b) because the CSC did not find evidence of any favoritism or political bias. Alternatively, the Town avers that the CSC substituted its own judgment for that of the Town’s in the CSC Decision by criticizing the weight that the Town gave to the evidence.

Mr. Daley also moves for judgment on the pleadings, arguing that the CSC Decision was within the CSC’s purview to ensure the fair treatment of all employees pursuant to G.L. c. 31, § 1, and that the CSC’s weighing of the evidence is entitled to deference.

II. The CSC’s Review

General Laws Chapter 31 provides, in relevant part, that the CSC has the power “to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator” G.L. c. 31, § 2(b). “‘Persons aggrieved’ are defined by § 2(b) as those who claim that the administrator acted in violation of c. 31 and ‘the rules or basic merit principles promulgated thereunder.’” Staveley v. Lowell, 71 Mass. App. Ct. 400, 407 (2008), quoting G.L. c. 31, § 2(b). “Basic merits” includes “assuring fair treatment of all applicants and employees in all aspects of personnel administration . . . , and . . . assuring that all employees are protected

against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1.

Chapter 31 “requires the [CSC] to find 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). Reasonable justification requires an “adequate reason, supported by credible . . . evidence and application of common sense.” Beverly v. Civil Serv. Comm’n, 78 Mass. App. Ct. 182, 187-188 (2010), quoting Cambridge, 43 Mass. App. Ct. at 304. Although the CSC owes “substantial deference” to the appointing authority’s (in this case, the Town) exercise of judgment, the CSC is empowered “to guard against political considerations, favoritism, and bias in governmental employment decisions, including, of course, promotions, and to protect efficient public employees from political control.” Beverly, 78 Mass. App. Ct. at 188; Cambridge, 43 Mass. App. Ct. at 304.

The Town posits that the CSC decision ignores the purpose of the CSC’s review (to guard against political considerations, favoritism and bias) because there was no evidence offered to show favoritism or improper motive to promote Ryan. The court, however, is not persuaded that the CSC exceeded its authority with regard to Mr. Daley’s appeal. The Legislature has conferred the responsibility of ensuring “fair treatment of all applicants and employees in all aspects of personnel administration,” upon the CSC. The Commission is thus charged with a responsibility to guard against decisions based on “political considerations, favoritism, and bias.” G.L. c. 31, § 1; Cambridge, 43 Mass. App. Ct. at 304. In light of that obligation, the law recognizes the CSC’s authority to scrutinize and, where appropriate, limit an appointing authority’s subjectivity in the context of personnel matters such as the one at issue.

See Sherman v. Randolph, 472 Mass. 802, 812 (2015) (“procedural flaws conducive to subjective or arbitrary decision making could be a ‘red flag’ signaling that a bypass decision resulting from the flawed procedures was motivated by political considerations, favoritism, or bias”). The Court discusses *infra* whether there was sufficient evidence to support the CSC’s finding that subjectivity tainted the Town’s promotional process, but is satisfied that the CSC acted within its purview under the circumstances presented by this case.

III. Substantial Evidence

In reviewing a decision by the CSC, the court must determine whether the decision is supported by substantial evidence in the record, “taking into account whatever in the record would fairly detract from the supporting evidence’s weight.” Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 265 (2001). “Substantial evidence” is defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” G. L. c. 30A, §1(6). The Town’s challenge to the CSC’s decision in this regard is two-fold: first, the Town argues that the CSC Decision was not supported by any evidence of favoritism, and second, it maintains that the CSC improperly failed to consider or appropriately credit evidence supporting the Town’s decision. Neither argument prevails under the circumstances of this case.

With respect to evidence of favoritism, the Supreme Judicial Court has specifically recognized that a flawed selection process raises the possibility of unlawful decision making by the appointing authority. See Sherman, 472 Mass. at 812. In the case at bar, there is ample support in the record for the CSC’s determination that the Town relied almost exclusively on subjective preferences for Mr. Ryan over Mr. Daley without adequate explanation or factual support. This is evidence of favoritism. The CSC found support in the record for its

determination that the Town could not adequately explain the discrepancies between Mr. Ryan's and Mr. Daley's interview scores. The record also supports CSC's determination that the Town was unduly critical of, and applied unreasonable weight to, Mr. Daley's informal use of the fire chief's first name after the chief's informal use of Mr. Daley's first name at the interview, especially given the clear evidence that the two men had maintained a friendly professional relationship for more than a decade. The CSC's determination that the Town inexplicably minimized Mr. Daley's leadership experience in the military was also supported in the record before the Commission. The totality of these findings, give rise to a reasonable inference of favoritism and provide support for the CSC's decision. See Cambridge, 43 Mass. App. Ct. at 304 ("When there are, in connection with personnel decisions . . . objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.").

Finally in this regard, the Town's decision to use a scoring system that effectively negated the results of the Assessment Center (an exam testing the skills necessary to perform a lieutenant's duties) is, at best, difficult to understand under the circumstances, and gives rise to a reasonable inference of unfairness in the decision-making process.⁹ See id. at 811 (concluding interview process did not protect against "arbitrary action and undue subjectivity" where interviewers "did not agree in advance on criteria for scoring the candidates interview performance, but, rather, scored the candidates on the 'totality' of their performance"). Compare Ash v. Police Comm'r of Boston, 11 Mass. App. Ct. 650, 651-652 (1981) (finding valid scoring

⁹ Because discrepancies in ranking between Assessment Center exam phase and the interview phase were required to be resolved in favor of the interview rankings, the exam scores had no effective weight in the process. The Town thus chose to abandon the relatively objective component of its hiring process in order to make a determination based entirely upon subjective criteria. As a result, Mr. Daley's rank fell and Mr. Ryan's soared. This evidence supports a reasonable inference of favoritism. Compounding the issue, the Panel created a consensus score for each candidate's interview, wherein the individual evaluation of candidates' responses based on objective criteria by each panelist were lost.

system where it involved weighting exam components, conversion of raw scores on different assessments to standard scores, and averaging to reflect weighting). In light of the evidence of the subjectivity involved in the Town's decision-making, the court declines to rule that the administrative record lacked substantial evidence of favoritism.

Furthermore, the Court declines to find, as the Town urges, that the CSC improperly ignored or failed to credit certain evidence in support of the CSC Decision thereby substituting its own judgment for that of the Town. It is well-settled that "[t]he commission, and not the court, is the sole judge of the credibility and weight of the evidence before it." Police Dep't of Boston, 463 Mass. at 694, quoting School Comm'n of Brockton v. Massachusetts Comm'n Against Discrimination, 423 Mass. 7, 15 (1996). In this case the Town disagrees with the many of the CSC's determinations regarding the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence, but nothing about that disagreement provides sufficient grounds for the court to disturb the CSC's fact-finding determinations.

The CSC's decision to vacate the Town's hiring decision was based upon substantial evidence of a flawed and unduly subjective hiring process that unfairly favored Mr. Ryan over Mr. Daley. Moreover, the CSC was acting within its authority when it made that decision. Accordingly, Mr. Daley is entitled to judgment on the pleadings pursuant to G.L. c. 30A, § 14.

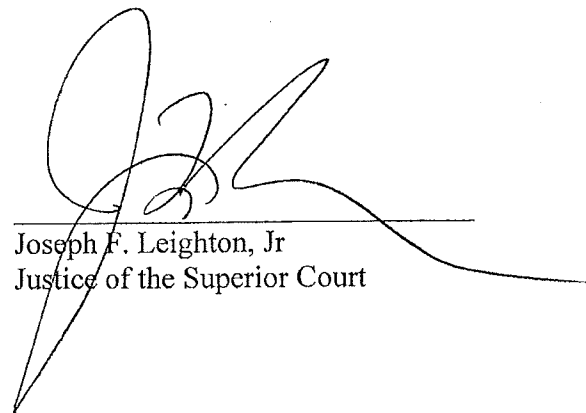
ORDER

For the foregoing reasons, defendant Walter Daley's Motion for Judgment on the Pleadings (Dkt. # 10) is **ALLOWED**, and the Plaintiff's Motion for Judgment on the Pleadings (Dkt. # 11) is **DENIED**.

JUDGMENT SHALL ENTER in favor of the defendants on all counts.

SO ORDERED.

Dated: July 8, 2016



Joseph F. Leighton, Jr
Justice of the Superior Court