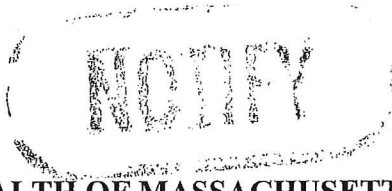


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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2014-03381-H

RECEIVED

NUIAS DAVEIGA

MAR 04 2016

vs.

MA OFF of Attorney General

Administrative Law Division

CIVIL SERVICE COMMISSION and
THE BOSTON POLICE DEPARTMENT

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

The plaintiff, Nuias Daveiga ("Daveiga") filed this action pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44 appealing a decision by defendant Massachusetts Civil Service Commission (the "Commission"). The Commission dismissed Daveiga's appeal of the Boston Police Department's ("the BPD" or "the Department") bypass for appointment to the position of police officer. Daveiga claims that the Commission's decision to affirm the BPD's decision was not supported by substantial evidence, was arbitrary, and was an abuse of discretion in violation of G. L. c. 31, §41.

Daveiga has now moved, pursuant to Mass. R. Civ. P. 12(c), for entry of judgment on the pleadings in his favor. The Department has filed an opposition to Daveiga's motion, and a cross-motion for judgment on the pleadings. For the following reasons, the Plaintiff's Motion for Judgment on the Pleadings is DENIED, the Department's cross-motion is ALLOWED, and the Commission's decision dated October 2, 2014 is AFFIRMED.

BACKGROUND

The following facts are taken from the Hearing Commissioner's findings:

Notice Sent 3.2.16

• SST
• CoAG
-RLQ

• OLA
-PMC

PC

On April 30, 2011, Daveiga passed the civil service examination for Boston police officers. He submitted his Student Officer Application to the Department in June 2013. Thereafter, pursuant to the BPD's standard procedures, the BPD initiated a background investigation.¹ Detective Erin Schroeder ("Schroeder") was randomly assigned to conduct the background investigation of Daveiga.² Thereafter, she presented her findings to a group of Department officials (referred to as the "Roundtable") who review the findings, and determine whether a candidate will move forward.³ Schroeder presented several concerns to the Roundtable on July 3, 2013: 1) Daveiga's separation from employment with the Essex County House of Correction; 2) Daveiga's criminal record; and 3) the testimonials of Daveiga's neighbors and his former supervisor.

According to Daveiga's employment application, he was previously employed at the Essex County House of Correction from September 2007 until March 2008. He denoted that his reason for leaving was "Temp Job; Discharge / Mutual Agreement." When asked about his separation, Daveiga conveyed to Schroeder that he was discharged under a "mutual agreement." When Schroeder contacted the Essex County House of Correction, the Director of Human Resources stated that Daveiga's separation was, in fact, a termination. Additionally, the then-serving Commissioner of Public Safety informed Schroeder that he personally terminated Daveiga for continuing to violate the direct order of his supervisor, which prohibited giving inmates additional, unauthorized food. When asked about this allegation, Daveiga claimed other correction officers were giving out extra food, and targeted him when he refused to do so. Both

¹ The background investigation includes, among other matters, review of an applicant's criminal history, driving record, employment records, neighbor references, and personal references.

² Schroeder has worked for the BPD for nineteen (19) years and has previously been assigned to various departments including the Sexual Assault Unit, the Homicide Unit, and the Crimes Against Children Unit. From February 2012 through February 2014, Schroeder was assigned to the Recruit Investigations Unit.

³ The Roundtable includes command level officials from the Internal Affairs, Human Resources, Medical, and Recruit Investigation divisions, as well as an attorney from the Legal Advisor's Office.

Schroeder and the Roundtable concluded that Daveiga was less than forthcoming with information regarding his termination, and were hesitant about moving forward with his application since his former position was similar and related to the position for which he was being considered.

Upon review of Daveiga's record, Schroeder discovered a charge of Indecent Assault and Battery from 1998. As student at Mt. Ida College, Daveiga was charged with two criminal offenses in Newton District Court: Indecent Assault and Battery on a person 14 years or older, and Assault and Battery. He admitted to sufficient facts to the offense of Indecent Assault and Battery, and received a continuance without a finding (CWOFF) on both counts; the Assault and Battery was subsequently dismissed in 1999. On November 9, 2010, Daveiga filed a motion for a new trial concerning his admission to the offense of Indecent Assault and Battery with the Newton District Court. The court allowed the motion, vacated Daveiga's CWOFF on the offense, and dismissed that charge at the request of the Commonwealth. To obtain information about the underlying incident, Schroeder contacted Mt. Ida College. However, the college was unable to locate the records. Schroeder also interviewed Daveiga regarding the incident. He explained that while living at Mt. Ida College, a physical altercation occurred between himself and his roommate during which, according to his roommate's allegations, Daveiga inappropriately touched him on the genitals. Daveiga's criminal record was of concern to the Roundtable since he admitted to sufficient facts, and was sentenced to probation on a charge of Indecent Assault and Battery. Additionally, that charge remained on his record for twelve years before it was vacated and dismissed.

Schroeder also spoke with Daveiga's neighbors and his former supervisor. Two female neighbors spoke negatively about him; an elderly woman described him as "rude," and a young

female stated that he ignored her. During an in-person meeting, Daveiga's former supervisor expressed concern that Daveiga had a problem with women, and that he acted "more aggressive" towards them. The Roundtable found these testimonials unsettling since police officers are expected to interact with all members of the community; an applicant with a predisposition to a certain group poses a public safety risk.

By letter dated February 12, 2014, the Department informed Daveiga of its decision to bypass him for appointment for the aforementioned reasons. Daveiga filed an appeal with the Commission on March 31, 2014. A pre-hearing conference was held on April 22, 2014, and was followed by a full hearing on June 19, 2014.⁴ On October 2, 2014, the Commission issued a 4-0 decision denying Daveiga's appeal, and ruling that the Department conducted an impartial and reasonably thorough review, and was justified in bypassing Daveiga. Daveiga appeals that decision to this court.

DISCUSSION

A. Standard of Review

General Laws chapter 31, section 44 provides that "[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter or chapter thirty-one A may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision." G. L. c. 31, § 44. The court reviews the commission's decision under the standards set forth in G. L. c. 30A, § 14 including whether there is substantial evidence in the record for the commission's decision, G. L. c. 30A, § 14(7)(e), or whether the decision is arbitrary, capricious, or otherwise not in accordance with law. G. L. c.

⁴ The Commission heard live testimony from two representatives from the Department, Erin Schroeder-Withington, Detective, BPD and Devin Taylor, Director of Human Resources, BPD; Daveiga; and Daveiga's witness, James O'Gara, Personnel Analyst III, Department of Correction.

30A, § 14(7)(g). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 242 (2006). That is a "heavy burden," *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264 (2001), since the court gives "due weight to the experience, technical competence, and specialized knowledge" of the commission in deciding these matters, and is "highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012), quoting *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992); see also G. L. c. 30A, § 14 (7).

The Civil Service Commission's review of a hiring decision is limited to determining whether the Department "has sustained its burden of proving that there was reasonable justification for [its] action." *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997). When a candidate for appointment appeals from a bypass, the Commission's role is not to determine whether that candidate should have been bypassed; rather, it determines "on the basis of the evidence before it, whether the appointing authority [has] sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification" for the decision to bypass the candidate. *Brackett*, 447 Mass. at 241, citing G. L. c. 31, § 2(b). For an 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 E. Middlesex*, 262 Mass. 477, 482 (1928). In determining whether the Department has shown a reasonable justification for a bypass, the Commission's primary concern is to ensure that the Department's action comports with "[b]asic merit principles," as defined in G. L. c. 31, § 1. *Police Dep't. of Boston*, 463 Mass.

at 688. “[T]he commission must focus on the fundamental purposes of the civil service system — 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.” *Sherman v. Randolph*, 472 Mass. 802, 810-811 (2015), quoting *Cambridge*, 43 Mass. App. Ct. at 304. In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion, *Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 320-321 (1991), and thus, the Commission owes substantial deference to the hiring authority below, in this case the BPD. See *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010).

The Commission, however, is tasked with finding facts afresh, and is not limited to the evidence before the appointing authority. *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727 (2003). “The reviewing court is . . . bound to accept the findings of fact of the commission’s hearing officer, if supported by substantial evidence,” *Id.* at 728, and should not substitute its judgment for the Commission’s. *Brackett*, 447 Mass. at 241. Accordingly, given the substantial factual record on which BPD and then the Commissioner based its determination, this court defers to the Commission’s findings of fact, and also to BPD’s judgment in applying the facts. See *Beverly*, 78 Mass. App. Ct. at 188 (“Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates”); See also, *Cambridge*, 43 Mass. App. Ct. at 305 (“[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer”), and cases cited.

B. Analysis

Daveiga argues that the Commission's decision to affirm the BPD's decision was not supported by substantial evidence, was arbitrary, and was an abuse of discretion in violation of G. L. c. 31, §41. In affirming the BPD's decision to bypass Daveiga, the Commission found that Detective Schroeder conducted a fair, thorough, and objective background investigation, and that her testimony was highly credible. Administrative Record ("AR"), Vol. I, p. 262; Commission's Decision ("Decision"), p.11. Credibility determinations and conclusions drawn therefrom are not open for review by this court. See *Retirement Bd. of Brookline v. Contributory Retirement Appeal Bd.*, 33 Mass. App. Ct. 478, 480 (1992) (credibility determinations lie solely with the fact finder and are not subject to de novo review). The Commission ruled that the Department's decision was not tainted by any personal or political bias against Daveiga. AR, Vol. I. p. 264; Decision, p.12. See *Cambridge*, 43 Mass. App. Ct. at 304. The Commission determined that the Department's review of Daveiga was fair and thorough, and upon its findings, the Department was reasonably justified in bypassing him for appointment. AR, Vol. I, p.265; Decision, p.14. The court discusses each of Daveiga's arguments in turn.

First, Daveiga contends that the Commission's decision failed to address whether Daveiga was untruthful on this application, and whether he had a negative work history at Essex County Sheriff's Department. This argument is without merit. In evaluating Daveiga's separation from employment, the Commission considered both Schroeder's and Daveiga's testimony. With its finding, the Commission specifically noted that,

Standing alone, portions of Daveiga's testimony regarding what occurred while he was employed at the Essex County House of Correction are highly plausible and cast doubt (for me) on what actually occurred. Even if his account is true, however, the preponderance of evidence still shows that the BPD, at the time, based on a thorough review of this matter, ultimately accepted the version of events conveyed to them by the facility's Director of Human Resources and the then-Commissioner of Public Safety.

Their judgment call was not tainted by any personal or political bias against Daveiga and, notwithstanding my observations that Daveiga may not have engaged in misconduct, I am not permitted to substitute my judgment for that of the BPD on this matter.

Decision, p.13-14. Thus, it cannot be said that the Commission failed to address this issue; rather, it credited the BPD's informed judgment on the matter.

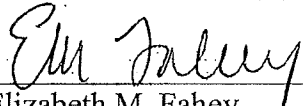
Next, Daveiga claims that the Commission's decision failed to address the fact that the BPD placed an inappropriate interpretation upon the disposition of the criminal charges against Daveiga by "admission to sufficient facts" to a charge of Indecent Assault and Battery. The Supreme Judicial Court has noted that "[n]o person who has been convicted of any felony shall be appointed as a police officer of a city, town or district." *City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 820 (2005), citing G. L. c. 41, § 96A. Further, "[i]t is the felonious misconduct, not a conviction of it, that is determinative." *Id.*, at 820-821 ("We fail to see how exoneration of some felonious conduct cleanses or mitigates other felonious conduct The Legislature has forbidden persons found to have engaged in such conduct from becoming police officers and, by implication, from remaining police officers."). See also *Cambridge*, 43 Mass. App. Ct. 304-306 (vacating the decision of the commission, and affirming the Administrator's bypass of an otherwise qualified candidate for police officer position based on her prior false testimony under oath and involvement in domestic violence dispute several years prior to her eligibility for appointment). In its review of the BPD's decision, the Commission found that its decision was not based solely on Daveiga's CORI report; rather, its investigation included communication with the Newton District Court, and a personal interview with Daveiga. From that assessment, the BPD determined that Daveiga's prior criminal charges were a legitimate reason for bypass. This was not error.

Finally, Daveiga argues that the Commission's decision failed to address the finding that Daveiga was hostile to women. On the contrary, the Commission considered the negative testimony of Daveiga's supervisor and two neighbors, in conjunction with Daveiga's testimony, in which he stated that he did not believe that the supervisor had any personal animus against him that would have caused him to make false allegations.

The Commission's decision outlined the fairness and thoroughness of the Department's review, and concluded that the Department was within its discretion to decide that it was unwilling to bear the risk of offering employment to an individual with the credible issues in this applicant's background. In light of the aforementioned discussion, this court finds that the Commission supported its decision to affirm Daveiga's bypass with substantial evidence, and its rationale was amply supported by documentation and testimony. In sum, Daveiga has not met his burden of establishing that the Commission's decision was unsupported by substantial evidence, was arbitrary or capricious, or was an abuse of discretion or otherwise not in accordance with the law.

ORDER

For the foregoing reasons, it is hereby ORDERED that the Plaintiff Nuias Daveiga's Motion for Judgment on the Pleadings is DENIED, and the Boston Police Department's cross-motion is ALLOWED. Judgment shall enter AFFIRMING the decision of the Civil Service Commission.


Elizabeth M. Fahey
Justice of the Superior Court

Dated: March / , 2016