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COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT

MIDDLESEX, ss. DOCKET No.: 08-CV-3418-F

MATTHEW C. EDSON

v.

CIVIL SERVICE COMMISSION et al[1]

PAIRED FOR DISPOSITION WITH:

MIDDLESEX, ss. DOCKET No.: 09-CV-0111-F

TOWN OF READING

v.

CIVIL SERVICE COMMISSION et al[2]

MEMORANDUM OF DECISION AND ORDER

Introduction

These cases, paired with one another for disposition by order of this court (MacLeod-Mancuso, J.) dated January 13, 2009, arose out of the Town of Reading's ("Reading") promotion of several police officers to the sergeant level. In the first of those promotions, Reading's appointing authority, Patrick Hechlenbleikner ("Hechlenbleikner"), bypassed Matthew C. Edson ("Edson") in 2005 by choosing a candidate ranked lower than Edson on a certified promotion list. After Edson filed a bypass appeal, the Civil Service Commission ("Commission")

[1] Town of Reading.

[2] Matthew Edson.

disapproved of the bypass and ordered the state's Human Resources Division ("HRD") to place Edson at the top of the next certified promotion list of Reading Police Department ("Department") candidates for promotion to sergeant. Reading seeks judicial review of the Commission's decision and order pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14, moving for judgment on the pleadings under Mass. R. Civ. P. 12(*c*).

In the second sergeant promotion at issue, Hechlenbleikner in 2007 appointed a candidate tied with Edson on a different certified promotion list. Edson filed a bypass appeal with the Commission, which granted Reading's motion to dismiss the appeal. Pursuant to G. L. 31, § 44, and G. L. c. 30A, § 14, Edson seeks judicial review of the Commission's dismissal of his bypass appeal, and moves for judgment on the pleadings under Mass. R. Civ. P. 12(*c*).

For the following reasons, Reading's Motion for Judgment on the Pleadings is **ALLOWED**, and Edson's Motion for Judgment on the Pleadings is **DENIED**.

BACKGROUND

The facts according to the administrative record before the Court are as follows.

I. The 2005 Sergeant Appointment

In October 2004, the HRD administered a civil service promotional examination to establish a list of candidates for promotion to the rank of sergeant in the Department. Edson took the examination. In March 2005, Hechlenbleikner requested from the HRD a certified list of candidates for a vacant sergeant position, which the HRD provided on April 1, 2005. The certified promotion list included the following names: (1) Edson, with a final civil service examination score of 87; (2) David J. Clark ("Clark"), with a score of 85; and (3) John T. McKenna ("McKenna"), with a score of 85. The candidates' final examination scores reflect

their examination scores plus credit for their past relevant training and experience, under the Commission's rules. All the candidates signed the list, indicating they were willing to accept the sergeant promotion.

Once he received the certified promotion list, Hechlenbleikner, as Reading's appointing authority, had the authority to choose which candidate to appoint to the vacant sergeant position. To assist him in making his decision, Hechlenbleikner asked the following people to be on a panel with him to interview the three candidates on the certified promotion list: (1) outgoing Department chief Robert Silva ("Silva"); (2) Department chief-appointee Richard Cormier ("Cormier"); and (3) human resources administrator Carol Roberts ("Roberts"). In advance of the interviews, each of the candidates submitted materials regarding their candidacy ("promotion submission"), which included their resumes and letters from the community. All the interviewers reviewed the promotion submissions, but only Hechlenbleikner reviewed the candidates' personnel files and evaluations ahead of the interviews. Cormier, however, having written some of Clark's evaluations, was familiar with their tenor. No one attempted to confirm the information contained in any of the candidates' promotion submissions.

Interviews were held on April 6, 2005. The interview panel did not ask a standard set of questions—except that Cormier asked each candidate how they would handle a police officer who abused sick time—nor did they compare the candidates' answers to a standardized set of answers. After the interviews and a discussion amongst the panel, Hechlenbleikner asked each of the other interviewers to rank the candidates. Roberts ranked McKenna first, then Clark, then Edson; Silva ranked Clark first, then Edson, then McKenna; and Cormier ranked Clark first, then Edson, then McKenna. Hechlenbleikner then stated his intent to appoint Clark, but waited until

April 8, 2005, to notify the HRD of his bypass of Edson and appointment of Clark. The HRD approved Hechlenbleikner's actions by letter dated April 15, 2005. Pursuant to G. L. c. 31, § 2(b), Edson filed a bypass appeal with the Commission on June 7, 2005.

After a hearing on Edson's bypass appeal, which included both written evidence and oral testimony, the Commission found the following flaws in the process used to choose among McKenna, Edson, and Clark. First, the Commission found that, because only Hechlenbleikner reviewed the candidates' personnel files and evaluations before the interviews and because he retained for himself the sole power to appoint a candidate, "[t]he interview panel employed here was a mere formality or window dressing." Second, it found the interview process to have been "overly subjective . . . . it was closer to a personality contest or the hiring of a salesman," based on the fact that the candidates' answers were not measured against a predetermined set of standard answers. It further concluded that, because of the interview process' subjectivity, it "did not measure the knowledge, abilities, and skills which are rationally related to the position of police sergeant." Finally, the Commission found that the composition of the interview panel "created an unfair advantage for [Clark]" because of Cormier's familiarity with Clark, resulting in a lack of fair opportunity for Edson.

The Commission also concluded that Hechlenbleikner and Cormier did not testify credibly about Clark's leadership experience. On cross-examination, Hechlenbleikner corrected his direct examination testimony on the source of information regarding Clark's military leadership experience.[3] On cross-examination, Cormier acknowledged that he did not know the

[3] Specifically, Hechlenbleikner had testified on direct examination that Clark's resume included an indication that he had been a squad or platoon leader in the military. On cross-examination, however, Hechlenbleikner said he could not remember whether the information came from Clark's personnel file or his interview.

source of information regarding Clark's military leadership experience, and that he did not have full information regarding Clark's leadership experience at the police academy.

The Commission voted 3-2 to allow Edson's bypass appeal.[4] It ordered the HRD to place Edson's name "at the top of the existing and/or next certification list of individuals eligible for promotion to the rank of Police Sergeant in the Town of Reading Police Department . . . so that he shall receive at least one opportunity for consideration." Reading timely appealed the Commission's decision and order pursuant to G. L. c. 31, § 44, which provides for judicial review of final Commission decisions or orders under G. L. c. 30A, § 14. Reading's appeal is now before the Court on a Motion for Judgment on the Pleadings.

II. The 2007 Sergeant Appointment

In April 2007, Reading sought from the HRD a certified list of candidates to fill two vacant sergeant positions in the Department. The HRD issued a list of candidates in the following order: (1) McKenna, with a final civil service examination score of 91; (2) Edson, with a score of 88; (3) Mark D. Segalla ("Segalla"), with a score of 88; (4) Michelle E. Halloran, with a score of 81 (who indicated she was not willing to accept the sergeant promotion); and (5) Michael R. Lee, with a score of 81. After interviews conducted by four members of the Department's command staff, three members ranked Edson third out of the four candidates, while the fourth member ranked him last. Hechlenbleikner appointed McKenna and Segalla. Hechlenbleikner did not believe he had bypassed Edson in favor of Segalla, who received the same civil service examination score as Edson, so he did not submit to the HRD written reasons

[4] The Commission minority submitted a three-page dissent that contains many of the same doubts about the Commission's decision that the Court discusses below.

for appointing Segalla over Edson. G.L. c. 31, § 27, requires an appointing authority to provide written reasons for bypassing a candidate, *i.e.*, choosing "any qualified person other than the qualified person whose name appears highest." G. L. c. 31, § 27 (2007). The HRD approved Hechlenbleikner's appointments by letter dated June 6, 2007.

Edson filed a bypass appeal with the Commission dated July 25, 2007. Reading filed a motion to dismiss Edson's appeal based on the fact that Edson was not bypassed because he and the candidate ultimately chosen received the same civil service examination score. The Commission voted 3-2 to allow Reading's motion to dismiss. Edson timely appealed the Commission's decision pursuant to G. L. c. 31, § 44, which appeal is now before the Court on Edson's Motion for Judgment on the Pleadings.

DISCUSSION

I. Standard of Review

Pursuant to G. L. c. 30A, a court may reverse, remand, or modify an agency decision if the substantial rights of any party have been prejudiced because the agency's decision was based upon an error of law, not supported by substantial evidence, or arbitrary and capricious. G. L. c. 30A, § 14(7)(c),(e),(g). Under the substantial evidence test, the court determines "whether, within the record developed before the administrative agency, there is such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 721 (1988); *see also* G. L. c. 30A, § 1(6) (defining substantial evidence). "A decision is not arbitrary and capricious unless there is no ground which 'reasonable men might deem proper' to support it." *T.D.J. Dev.*

Corp. v. Conservation Comm'n of N. Andover, 36 Mass. App. Ct. 124, 128 (1994) (citation omitted).

Judicial review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(5). A court must give due weight to the experience, technical competence, and specialized knowledge of the agency in reviewing an agency decision, and may not substitute its own judgment for that of the agency on questions of fact. G. L. c. 30A, § 14(7); *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992); *Southern Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420–421 (1982) (citation omitted). The court "must apply all rational presumptions in favor of the validity of the administrative action," *Consolidated Cigar Corp. v. Department of Pub. Health*, 372 Mass. 844, 855 (1977), and may not engage in a *de novo* determination of the facts. *Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 347, 351 (1987). The party appealing an administrative decision under G. L. c. 30A bears the burden of demonstrating its invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

II. Analysis

In an appeal before the Commission, the appointing authority bears the burden of proving, by a preponderance of the evidence, "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 means the appointing authority's actions were based on "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Commissioners of*

Civil Serv. v. Municipal Court of the City of Boston, 359 Mass. 211, 214 (1971) (internal quotations and citation omitted). In cases involving the bypass of a candidate on a civil service list in favor of another candidate ranked lower on the list, it is appropriate to consider the comparative qualifications of each candidate in determining whether the appointing authority has demonstrated reasonable justification. The Commission, however, may not "substitute its judgment about a valid exercise of discretion based on merit or policy considerations" as weighed by the appointing authority. *Cambridge*, 43 Mass. App. Ct. at 304.

The Court will address Reading's motion first, and then Edson's.

A. Reading's Motion for Judgment on the Pleadings

Reading asks the Court to overturn the Commission's decision that Hechlenbleikner improperly bypassed Edson in 2005 by appointing to a vacant sergeant position a candidate ranked lower than Edson on a certified promotion list. Reading asserts that Hechlenbleikner's appointment of Clark over Edson was a valid exercise of his discretion as the appointing authority, and that the process he used to fill the vacant sergeant position was not impermissibly flawed, as the Commission concluded. The Court agrees.

While the Court does not engage in a *de novo* review of the facts found by the Commission, *see Vaspourakan, Ltd.*, 401 Mass. at 351, nevertheless, it is not required to accept those facts if they are unsupported by substantial evidence. *See Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) ("The reviewing court is, therefore, bound to accept the findings of fact of the commission's hearing officer, *if supported by substantial evidence*." (emphasis added)). Here, the Court concludes that several of the key fact findings made by the Commission are not

supported by substantial evidence, namely "such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." *Seagram Distillers Co.*, 401 Mass. at 721.

First is the Commission's finding that "[t]he interview panel employed here was a mere formality or window dressing" because only Hechlenbleikner reviewed the candidates' files before the interviews and he had the ultimate decision-making power in choosing a candidate. The administrative record does not reflect substantial evidence to support this conclusion. Hechlenbleikner testified several times that his general practice in asking other Reading officials to participate in candidate interviews is meant to assist him in making his appointment decisions, because he relies on the officials' opinions and expertise. Hechlenbleikner asks for the other interviewers' opinions, and based on those and his own views, designates an initial candidate. He does not, however, immediately appoint that candidate. Rather, he waits at least a day to finalize his choice, in order to allow him and the other members of the interview panel to fully consider the appointment.

While Hechlenbleikner testified that he had no specific recollection of the interview process that resulted in Clark's appointment, there is no indication in the record that his typical procedure was not followed. In fact, Cormier testified that the interviewers discussed the candidates at the conclusion of the interviews, and that Hechlenbleikner asked each of the interviewers to rank the candidates. These rankings are reflected in the record in Hechlenbleikner's notes. Also, Hechlenbleikner waited two days to submit his appointment to the HRD, in accordance with his usual practice. Clearly, if Hechlenbleikner meant the interview process to be a mere formality, he would not have gone through the process of discussing the candidates with the interview panel and asking each interviewer to rank the candidates before

indicating which one he chose, nor would he have waited to submit his final decision to the HRD. Additionally, the fact that only Hechlenbleikner reviewed the candidates' personnel files and evaluations does not render the interview process meaningless. The failure of the other interviewers to review the files prejudiced all the candidates equally, including Clark, despite the presence of Cormier—Clark's former supervisor—on the panel.[5]

The Court next addresses the Commission's finding that, because the candidates' answers were not measured against standard responses, the interview process was overly subjective and did not measure the candidates' abilities, knowledge, and skills rationally related to the sergeant position. Rather, the Commission concluded, the best measure of those qualities is the civil service examination, not Hechlenbleikner as the appointing authority. This conclusion misses the mark, however, as it is well-established that appointing authorities have broad discretion in choosing candidates for civil service positions. *See Cambridge*, 43 Mass. App. Ct. at 304–305 ("In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.").

[5] As discussed below, the Court concludes that Cormier's presence on the interview panel did not result in bias in favor of Clark.

As Hechlenbleikner testified, if civil service examination scores were the end of the matter regarding who is the best candidate, there would be no need for the appointing authority to exercise its discretion. Interview results are necessarily subjective, but that does not render them useless.[6] How well McKenna, Edson, and Clark expressed themselves and answered the interviewers' questions is certainly rationally related to the candidates' abilities and skills given that they were applying for a position that necessarily involves interaction with the public and other municipal employees.[7] Both Hechlenbleikner and Cormier testified that during their respective interviews, Edson appeared nervous, had to have several questions repeated, and lost his train of thought during several answers, while Clark was focused and relaxed. In fact, Hechlenbleikner testified that Clark's interview was one of the better interviews he conducted, while Edson's interview was one of the poorest. He also stated that Edson spoke negatively of the other candidates, resulting in an uncomfortable interview. In addition, Cormier felt that Edson's answers regarding questions on Department diversity and abuse of sick time by police officers were not in line with the Department's policies (whether written or not). Again, a police officer's adherence and loyalty to the Department's policies are rationally related to his abilities to serve as a sergeant, where he will be called upon more frequently to apply those policies. Finally, there is no indication that any Reading or Commission policy required the interview panel to compare the candidates' answers to standardized answers.[8] Accordingly, there is no

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[6] Indeed, Hechlenbleikner acknowledged the subjectivity of interviews, and testified that "[w]e try to make it as un-subjective [sic] as possible by having a panel so it's not just me making the decision."

[7] The Court notes that the administrative record contains many letters from community members in support of both Edson and Clark.

[8] The administrative record includes a Department policy that requires promotion candidates' interview questions to be judged against a predetermined set of standards. This policy governs interviews conducted by the Department, though, and therefore does not apply to Hechlenbleikner.

evidence in the record, acceptable to a reasonable person, that adequately supports the Commission's finding that the interview process was impermissibly subjective.

The Court also determines that the Commission's finding that Cormier's presence on the interview panel created an unfair advantage for Clark lacks substantial evidence. There is no evidence whatsoever in the administrative record that Cormier was biased in favor of Clark because of his familiarity with him, and the Commission's finding is therefore merely an unsupported inference. Cormier testified that he had worked with all three of the candidates prior to the interview process, and that, going into the interviews, he believed both McKenna and Edson were sergeant material. Every indication from Cormier's testimony is that his ranking of Clark ahead of Edson was based in large part on their demeanors and answers during the interviews, not on his level of familiarity with them.[9] Additionally, even if Cormier was biased in favor of Clark, two of the other interviewers ranked Clark ahead of Edson (Roberts ranked him last), and Hechlenbleikner—who, while relying on the other interviewers' opinions and expertise, ultimately had sole discretion to choose amongst the candidates—also chose Clark ahead of Edson. Thus, there is no substantial evidence to support the Commission's finding that

[9] Cormier's ranking was also based in part on Clark's military and police academy leadership experience, a factor the Commission calls into question by pointing out that Cormier failed to confirm Clark's leadership experience, and that both Hechlenbleikner and Cormier were unsure of the source of the information on Clark's leadership experience. The Commission's focus on the source and accuracy of this information appears to the Court to be rather petty, as the Commission noted earlier in its decision that Cormier failed to confirm *any* of the information contained in all three candidates' promotion submissions. Regardless, Cormier placing weight on Clark's leadership experience did not arise out of his familiarity with Clark, but rather out of the selection process, during which time Cormier learned of this experience.

Clark benefited from Cormier's presence, thereby depriving Edson of a fair chance at the promotion.

Without the unsupported fact findings discussed above, the Court is left to review a decision in which the Commission overruled Hechlenbleikner's choice between two qualified candidates.[10] The Commission cannot "substitute its judgment about a valid exercise of discretion based on merit or policy considerations" made by the appointing authority. *Cambridge*, 43 Mass. App. Ct. at 304. Given that Hechlenbleikner exercised his discretion as the appointing authority in choosing between two qualified candidates, the Commission acted arbitrarily and capriciously by substituting its judgment regarding who should have been appointed to the vacant sergeant position. Accordingly, the Court concludes that the Commission's allowance of Edson's bypass appeal and its order that the HRD place Edson's name at the top of the next certified promotion list Hechlenbleikner requests must be overturned.

B. Edson's Motion for Judgment on the Pleadings

Edson moves the Court to reverse the Commission's decision dismissing his bypass appeal arising out of Hechlenbleikner's 2007 appointment of a candidate with the same civil service examination score as Edson. He argues that the Commission's conclusion—that Hechlenbleikner did not bypass Edson because he chose a candidate with the same score—is incorrect based on the relevant case law. The Court disagrees.

[10] The Commission itself acknowledged in its decision that Edson was at least as qualified as Clark for the sergeant promotion.

Edson bases his assertion on *Cotter v. Boston*, 73 F. Supp. 2d 62 (D. Mass. 1999), where the United States District Court of Massachusetts examined G. L. c. 31, § 27, which states that when an appointing authority chooses from a certified list "any qualified person other than the qualified person whose name appears highest," the appointing authority must provide a "written statement of his reasons for appointing the person whose name was not highest."[11] The federal district court concluded that G. L. c. 31, § 27, "presupposes that there will only be one person for an appointing authority to select, *i.e.*, the highest scoring candidate," and held that "[a]ny selection among equally-scoring candidates is therefore a 'bypass' because all of their names 'appear highest.'" *Id.* at 66. Edson also cites *Rodrigues v. Massachusetts Civil Serv. Comm'n*, SUCV2007-2529 (Mass. Super. July 24, 2008) (Cratsley, J.), in which this court stated, "A bypass is where one candidate is chosen over another who has the same score." *See also Monteiro v. Massachusetts Civil Serv. Comm'n*, SUCV2007-2632 (Mass. Super. July 24, 2008) (Cratsley, J.) (same).[12] *But see Thompson v. Massachusetts Civil Serv. Comm'n*, MICV1995-5742 (Mass. Super. Feb. 21, 1996) (Chernoff, J.) (concluding that selection among tied candidates does not present a bypass); *see also Massachusetts Ass'n of Minority Law*

[11] The Commission minority also relied on *Cotter v. Boston* in concluding that Hechlenbleikner had bypassed Edson without filing a written statement of reasons for the bypass in violation of G. L. c. 31, § 27.

[12] In neither *Rodrigues* nor *Monteiro* did this court cite any authority for its assertion that a bypass occurs where one candidate is chosen over another with the same score. Additionally, the plaintiffs in those cases did not in fact receive the same score as the candidates chosen; they received a lower score and did not even appear on the certified list from which the candidates were chosen. Accordingly, this court's statements in *Rodrigues* and *Monteiro* that choosing between candidates with the same score is a bypass is in the nature of *dicta*.

Enforcement Officers vs. Abban, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for *selecting lower scoring candidates over higher scoring candidates* . . . ." (emphasis added)).

The Court is neither bound by the *Cotter* decision, nor by the prior decisions of this court cited above.[13] Rather, the Court "give[s] due weight to the experience, technical competence, and specialized knowledge" of the Commission, which has asserted for many years that the appointment of a candidate among several with the same score on the civil service examination is not a bypass. *See, e.g.*, *Bartolomei v. Holyoke*, No. G2-07-386 (2008); *Coughlin v. Plymouth Police Dep't*, No. G2-05-244 (2006) ("[T]he Commission . . . continues to believe that selection among a group of tied candidates is *not* a bypass under civil service law." (emphasis in original)); *Kallas v. Franklin Sch. Dep't*, 11 MCSR 73 (1996). Certainly, it is reasonable for the Commission to interpret the statutory language "any qualified person other than the qualified person whose name appears highest" as meaning a candidate lower on the list, not one with the same score. The Commission is entitled to deference in this interpretation. *See Attorney Gen. v. Commissioner of Ins.*, 450 Mass. 311, 319 (2008) (noting review of agency's statutory interpretation *de novo*, but that court gives "substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement") (citations omitted).

[13] Additionally, the Court notes that the U.S. District Court, in a later decision in *Cotter*, stated that "when a civil service exam results in a tie-score, and the appointing authority . . . promotes some but not all of the tied candidates, no actionable 'bypass' has taken place in the parlance of the Civil Service Commission." *Cotter v. Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing Commission's guide), rev'd in part on other grounds, 323 F.3d 160 (1st Cir. 2003).

Therefore, based on the Commission's rational position regarding candidates with the same civil service examination score, the Court finds that Hechlenbleikner did not bypass Edson for a sergeant position. Accordingly, the Commission did not act arbitrarily and capriciously, nor did it make an error of law, in dismissing Edson's bypass appeal, and its decision must be affirmed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Reading's Motion for Judgment on the Pleadings be **ALLOWED** and Edson's Motion for Judgment on the Pleadings be **DENIED**. It is further **ORDERED** that the Commission's order to the HRD to place Edson's name "at the top of the existing and/or next certification list of individuals eligible for promotion to the rank of Police Sergeant in the Town of Reading Police Department" be **VACATED**.

BY THE COURT,

DENNIS J. CURRAN
Associate Justice

September 18, 2009