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COMMONWEALTH OF MASS.
CIVIL SERVICE COMMISSION
SUPERIOR COURT
CIVIL ACTION
NO. 2014-2097-C

Notice sent

6/24/2015

E. T.

S. & T.

R. L. Q., JR.

K. E. D.

NICHOLAS FELIX

v.

(sc)

CIVIL SERVICE COMMISSION
and THE CITY OF PITTSFIELD

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

Nicholas Felix (the "plaintiff") has appealed, pursuant to G.L. c. 30A, § 14, from a decision of the Massachusetts Civil Service Commission (the "Commission") upholding the City of Pittsfield's (the "City") decision to bypass and remove him from consideration for employment with the Pittsfield Police Department ("Pittsfield P.D."). The plaintiff has now moved for a Judgment on the Pleadings in his favor, claiming the Commission's decision was not supported by substantial evidence, was erroneous as a matter of law and was arbitrary and capricious. The City opposes the plaintiff's motion and requests that this court affirm the Commission's decision.¹ For the following reasons, the plaintiff's motion is denied, the Commission's decision is affirmed, and the plaintiff's appeal is dismissed.

¹ The Commission asserts that it is a nominal party to this dispute and has chosen to rely on the administrative record for purposes of responding to the plaintiff's motion for judgment on the pleadings.

BACKGROUND

The following relevant facts are taken from the administrative record. The plaintiff attended and graduated from the Police Academy, and has been certified to be a full-time police officer since April 8, 2011. In December 2011, the plaintiff applied for a full-time police officer position with the Pittsfield P.D. Prior to releasing the employment applications, Pittsfield P.D. officers reviewed the application questions with each applicant to ensure that all applicants understood the questions. Applicants were instructed that untruthful responses or failure to disclose information would negatively affect their chances of being hired. The plaintiff submitted his application packet on December 22, 2011.²

Pittsfield Police Captain David Granger ("Granger"), performed the plaintiff's background check. After completing the background check, Granger met with Pittsfield Police Sergeant Michael Maddalena³ ("Maddalena"), to review applications and they found deficiencies in the plaintiff's application. The officers noted that the plaintiff failed to list his full residence history, did not provide complete information concerning his past employment and did not answer the question "have employers.

² As part of the application, the plaintiff signed a "Certification of Responses," which acknowledged that the plaintiff read and understood each question, that his answers, including his resume, were true, correct and complete, and that he understood that willfully withholding information or making false statements could lead to rejection or dismissal.

³ Maddalena performed the background checks of the three candidates who were ultimately hired.

always treated you fairly.” The officers also noted that the plaintiff unlawfully received Taser certification without being employed as a police officer, that the plaintiff failed to disclose discipline while he was in the military and that the plaintiff did not divulge information about his volunteer position with the Great Barrington Police Department.

After further investigating the plaintiff’s application responses and meeting with him, the City requested that the Human Resources Division (“HRD”) remove the plaintiff from the 2011 certification pursuant to Personnel Administrator Rule .09 (“PAR .09”).⁴ The plaintiff was removed from the City’s eligible police officer list and the plaintiff was not considered for employment during the duration of the eligible list. Ultimately, three candidates were hired for the open positions. The plaintiff appealed the City’s decision and the Commission heard his appeal on June

⁴ On January 22, 2013, Pittsfield Police Chief Michael Wynn (“Chief Wynn”) sent a written statement pursuant to G.L. c. 31, § 27 to notify HRD of the City’s decision to bypass the plaintiff. Included in that written statement were the following reasons: (1) failure to provide specific details of a Department of Children and Families investigation; (2) failure to provide personal reference or the name of a person who knew him at each residence for the prior ten years; (3) failure to provide dates of employment for previous positions held; (4) failure to provide specific reasons regarding removal, or dismissal from previous employment; (5) failure to provide any answer to the question “have your employers always treated you fairly”; (6) failure to provide/untruthful in providing residential information accurately; (7) failure to provide accurate information regarding disciplinary action taken against him in the military; (8) obtaining Taser certification when he should not have; (9) not providing specific information why he was separated from Great Barrington Police Department; and (10) concerning patterns in the plaintiff’s driving and credit history to which he did not provide written explanations or specifics.

26, 2013 and July 10, 2013.⁵

The Commission's Decision

After the hearing, the Commission concluded that three of the City's reasons for bypassing the plaintiff were not supported by the evidence.⁶ However, the Commission found that the City provided enough reasons, supported by substantial evidence, to justify the bypass and make its request to HRD that he be removed from consideration. The Commission affirmed the City's decision to bypass the plaintiff on the following grounds: (1) the plaintiff failed to provide an accurate residence history; (2) the plaintiff failed to disclose specific information concerning removal or dismissal from previous employment, which hindered the City's investigation of the plaintiff; (3) the plaintiff failed to fully complete the employment application by not answering a question about whether past employers treated him fairly or questions concerning past military discipline; (4) the plaintiff unlawfully obtained Taser certification; and (5) the plaintiff did not provide explanations and specifics concerning his driving and credit histories. Further discussion of the Commission's

⁵ The Commission heard testimony from the Chief Wynn, Holland Police Chief Brian Haughey ("Haughey"), West Stockbridge Police Chief Tom Rubino ("Rubino"), Granger, Maddalena, the mother of the plaintiff's son and the plaintiff.

⁶ The Commission rejected the following reasons the city stated for bypassing the plaintiff: (1) that plaintiff failed to provide specific details about a DCF investigation; (2) that plaintiff did not establish residence in Pittsfield at the pertinent time he applied for the position; and (3) that plaintiff failed to provide dates in his employment history.

decision is included *infra*.

DISCUSSION

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989). In reviewing the agency decision, the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. *Flint v. Commissioner of Public Welfare*, 412 Mass. 416, 420 (1992). The reviewing court may not substitute its judgment for that of the agency. *Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420-21 (1982), citing *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n*, 372 Mass. 152, 154 (1977). A court may not displace an administrative agency's choice between two conflicting views, even though the court would justifiably have made a different choice if it were reviewing the decision *de novo*. *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 657 (1982).

In reviewing the Commission's decision, the court must consider "the entire record, or such portion of the record as may be cited by the parties." G. L. c. 30A, § 14(7). "A court reviewing a decision made by the commission is bound to accept the findings of fact of the commission's hearing officer, if supported by substantial

evidence.” *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010), citing *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (internal quotation omitted). Moreover, “[i]n light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. . . .” *City of Beverly*, 78 Mass. App. Ct. at 188.

The plaintiff claims that the Commission’s decision to affirm the City’s bypass and PAR.09 of the plaintiff was erroneous as a matter of law, not based on substantial evidence, and was arbitrary and capricious.⁷ Furthermore, the plaintiff maintains that the Commission erred in concluding that the plaintiff attempted to hinder the City’s investigation by securing an NDA with the Great Barrington Police Department pursuant to G.L. c. 149, § 52C.

The plaintiff contends that six of the Commission’s findings are not supported by substantial evidence and are arbitrary and capricious: (1) the plaintiff’s failure to complete his application; (2) failure to disclose his prior military disciplinary; (3) failure to provide truthful and complete residence information; (4) unlawfully

⁷ The plaintiff also makes a claim that the City failed to meet its burden for bypassing and removing the plaintiff from certification. Consideration of this claim is incorporated into the plaintiff’s specific challenges to the Commission’s determinations. Further, the plaintiff challenges the Commission’s affirmance of the PAR.09 because the Commission did not include a substantial discussion of that issue. However, the record indicates the plaintiff withdrew his motion to include HRD, the division that removed plaintiff’s certification pursuant to PAR.09, as a party and did not present challenges to the PAR.09 in his appeal to the Commission. Therefore that claim is not properly before this court.

obtaining Taser certification; (5) failure to thoroughly explain his driving record, credit history and small claims matters; and (6) failure to give reasons for his departure from the Great Barrington Police Department.

Incomplete Application

After careful review of the administrative record, there was substantial evidence to conclude that the plaintiff's application was incomplete. The plaintiff does not contest that he failed to answer the question concerning whether an employer had treated him unfairly. Additionally, the Commission found that his application was incomplete because he did not fully disclose his residence history or incidents of discipline while in the military, discussed *infra*. This court will not disturb the Commission's finding that the missing portions of the plaintiff's application were not mere unintentional human errors. Furthermore, the Commission expressed justifiable concern over the plaintiff's failure to answer the question "have employers always treated you fairly." Accordingly, there was substantial evidence for the Commission to find that the plaintiff did not submit a complete application, which was a legitimate factor in the City's determination to bypass him.⁸

⁸ The plaintiff also argues that there was no established procedure for determining what constituted an "incomplete" application and that other applicants missed questions but it was not held against them. The court will not disturb the Commission's determination because the degree of incompleteness was based on the failure to provide complete residence information, military discipline history, and

Failure to Disclose Military Discipline

Similarly, the plaintiff does not contest that he had two incidents on his military record. Although he characterizes the discipline as “arguable blemishes” and frames omitting these instances in his application as a misunderstanding concerning whether the incidents were even “disciplinary,” there is substantial evidence to conclude that these incidents happened and were not disclosed in his application. Accordingly, there was substantial evidence to conclude that the plaintiff did not fully disclose his disciplinary record while in the military, which the Commission found was a legitimate factor in affirming the City’s bypass.

Residence Information

Each applicant was required to provide a list of his residences for the previous ten years. The plaintiff indicated that he had been a resident of Pittsfield since January 2008.⁹ However, it was discovered that when the plaintiff registered to take the police examination, he certified that his residence was in Tyringham, Massachusetts and that he had lived there from April 30, 2010 to April 30, 2011.¹⁰

failure to answer the question about being treated fairly by employers; all of which are factual determinations supported by the record.

⁹ In order to gain Pittsfield residential preference for the 2011 police examination, the plaintiff needed to reside in Pittsfield from at least April 30, 2010 to April 30, 2011.

¹⁰ The plaintiff requested that HRD change his residence to Taconic Street in Pittsfield on September 1, 2011.

Moreover, when the plaintiff applied for a position with the West Stockbridge Police Department, he indicated that he had lived in Tyringham for the previous twenty-four years.¹¹

The record firmly supports the conclusion that the plaintiff made inconsistent statements concerning his residence information.¹² The plaintiff urges the court to consider that these inconsistencies were due to him providing a mailing address in place of his residential address so that he could reliably receive mail because he moved frequently. The record reflects that when the plaintiff registered for the police examination, he indicated to HRD that he resided in Pittsfield. However, when the plaintiff applied to West Stockbridge Police Department, he stated that he lived in Tyringham during the same time period that he indicated to HRD that he lived in Pittsfield. The Commission's conclusion that the plaintiff failed to provide an accurate residence history is supported by substantial evidence, and therefore this court will not overturn the Commission's determination merely because the plaintiff

¹¹ The plaintiff also identified a rented home in Plymouth that he lived in while he attended the police academy, an address listed only as "Galopago St.," an address listed as "Edward Ave", his family's home in Tyringham, a residence in Mexico, a residence in Lee and his time stationed at Camp Lejeune in North Carolina. The residences listed had few, if any, corresponding references. Granger spoke to the plaintiff's references in connection to his Taconic Street address, and the references provided positive reviews of the plaintiff.

¹² There is also substantial evidence in the record to support the Commission's finding that the plaintiff failed to provide thorough residency information and references.

offers a differing view of the Commission's findings.

Taser Training

The plaintiff stated in his application that he received Taser training and certification in Peabody, Massachusetts. It is uncontested that in order to lawfully take the Taser training, an officer has to be employed by a police department. Chief Haughey of the Holland Police Department sponsored the plaintiff for the training despite the fact that the plaintiff was not employed as a member of the Holland P.D.¹³ Further, the organization that administered the training stated that the plaintiff represented himself as a Holland police officer when he registered for the course.

The Commission found that it was "hard to believe" the plaintiff did not know that he was ineligible to participate in Taser certification when he was not employed as a police officer. Despite Haughey's sponsorship, the Commission made a credibility determination based on the evidence presented and the plaintiff's testimony. Moreover, the Commission emphasized that, in registering for the Taser certification, the plaintiff represented that he was employed by the Holland Police Department even though he was not. Accordingly, the Commission made a credibility determination, which this court will not disturb, based on substantial

¹³ Haughey testified that at the time he sponsored the plaintiff for the training, he was relatively new to the position of chief and did not know only employed and sworn police officers were allowed to take the course.

evidence in the record.

Driving Record and Credit History

The administrative record further indicates that the plaintiff acknowledged that he had a poor driving record, including accidents, citations and a registration revocation. The plaintiff failed to give thorough explanations for many of the citations. The plaintiff also indicated that he had a number of loans for which he was listed as delinquent, with two accounts listed as "in collection." He did not provide sufficient descriptions concerning his credit and loan history. Additionally, the plaintiff disclosed that he had one Small Claims Court judgment against him, but he failed to disclose a second case. The Commission found that the plaintiff's driving and credit histories indicated that he was not a responsible and productive individual.

Further, the Commission determined that the plaintiff's failure to provide thorough explanations for his driving record and credit history were legitimate factors in the City's decision to bypass him. There is substantial evidence in the record to support the Commission's conclusion.

The Commission's decision to affirm the City's bypass of the plaintiff based on his incomplete application, failure to disclose his history of military discipline, failure to provide a complete and accurate residence history, unlawfully obtaining Taser training and failure to adequately explain his driving record and credit history, were

all conclusions that were supported by substantial evidence.¹⁴

Non-Disclosure Agreement with Great Barrington Police Department

The plaintiff indicated in his application that he was employed by three police departments in Massachusetts, and he participated in forty hours of unpaid training time with the Great Barrington Police Department. To explain his departure from the Greater Barrington Police Department, the plaintiff reported that the Sergeant told him that things “were not working out,” and he was not offered permanent employment. The plaintiff’s application indicated that he did not receive a written reprimand or a reason why the Great Barrington Police Department did not appoint him as a full-time officer.

The City received a negative reference concerning the plaintiff from the Great Barrington Police Department. On June 3, 2012, the plaintiff called Sergeant Maddalena and met with him concerning the negative reference. On June 6, 2012, the plaintiff sent a letter to Maddalena stating, “[i]rrespective of my obligation to such [negative] review by Great Barrington P.D. my intent of contacting Sgt. Maddalena and sending this letter is to disclose my current status and relate any

¹⁴ The plaintiff also maintains that the Commission’s affirmance was arbitrary and capricious because there were application deficiencies in the individuals who were ultimately chosen to fill the positions. The Commission analyzed one of the successful applicants and sufficiently differentiated that individual from the plaintiff and explained why that individual was hired. Based on the administrative record, the plaintiff has failed to show that the City’s decision to hire any candidate other than him was either arbitrary or capricious.

information to ensure that my application and additional information submitted is complete and to the best of my knowledge.”¹⁵ On September 17, 2012, the plaintiff entered into a non-disclosure agreement (“NDA”) with the Great Barrington Police Department, which purportedly precluded the parties from discussing the plaintiff’s time with the Great Barrington Police Department and expunged the negative review in his personnel file. Between the time the City was aware of the negative reference and when the plaintiff entered into the NDA, the administrative record reveals that the City did not collect the plaintiff’s personnel file from the Great Barrington Police Department. However, after the NDA went into effect, Granger attempted to collect the plaintiff’s personnel record, but the Great Barrington Police Department refused to discuss the plaintiff’s personnel file pursuant to the NDA. When asked about the contents of his personnel record, the plaintiff presented the NDA and refused to disclose any information relating the his time at the Great Barrington P.D.

The Commission concluded that the plaintiff tried to hinder the City’s background investigation by obtaining the NDA with Great Barrington Police Department. The plaintiff maintains that his decision to secure an NDA with the Great Barrington Police Department was done long after the negative information was disclosed, and the City had had an opportunity to collect his personnel file.


¹⁵ Maddalena acknowledged that he saw the letter but the letter was not included in the plaintiff’s background investigation file.

Further, the plaintiff argues that nothing in his Great Barrington Police Department (sc) personnel file can be held against him because he lawfully exercised his rights under G.L. c. 149, § 52C.

Even assuming that the Commission erred by improperly using the plaintiff's legitimate exercise of his rights under G.L. c. 149, § 52C against him, this was only one of several factors the Commission considered in affirming the City's decision. Because the Commission's decision to affirm the City's bypass of the plaintiff was supported by substantial evidence on other legitimate grounds, this court need not address whether the Commission erred in holding the plaintiff's actions against him concerning the NDA with the Great Barrington Police Department.

ORDER

For the foregoing reasons, the plaintiff's motion for a Judgment on the Pleadings is **DENIED**. The Commission's decision affirming the City's bypass of the plaintiff is **AFFIRMED**, and the plaintiff's appeal is **DISMISSED**.


Peter M. Lauriat
Justice of the Superior Court

Dated: June 23, 2015