

Notary

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
SUCV2010-01238-E

Notice sent

05.03.10

S.G.

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T.C.

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(md)

BOSTON POLICE DEPARTMENT,
Plaintiff

v.

DANIEL FITZGIBBON and MASSACHUSETTS CIVIL SERVICE
COMMISSION,
Defendants**MEMORANDUM AND ORDER ON THE PLAINTIFF'S
MOTION FOR A STAY OF THE COMMISSION'S DECISION**

Before the Court is the plaintiff Boston Police Department's (the "Department's") motion to stay pending its appeal of the order of the defendant Massachusetts Civil Service Commission (the "Commission") invalidating the Department's determination of the psychological unfitness of the defendant Daniel Fitzgibbon ("Fitzgibbon") for appointment as a Boston Police Officer. The Court **ALLOWS** the Department's motion for the following reasons:

1. The standard for issuing a stay under these circumstances is that the Department must show (a) the likelihood of success on the merits, (b) the likelihood of irreparable harm if the stay were to be denied, (c) the absence of harm to Fitzgibbon if the stay is allowed, and (d) the absence of harm to the public interest from granting the stay—alternatively, that "the public interest will be served by the stay." J. Smith & H. Zobel, Rules Practice § 62.3 (2007) (emphasis in original, quoting *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). See also *Nogiero v. Comm'r of Dep't of Transitional Assistance*, 72 Mass App. Ct. 496, 499 (2008) (citing the Smith & Zobel text where a TRO had issued staying agency's order).
2. The Plaintiff is likely to succeed on appeal because, although thoroughly articulated, the Commission's decision invalidating the Department's conclusion that Fitzgibbon was psychologically unfit was, in essence, a substitution of the Commission's own judgment for that of the Department. In this case—and in apparently a succession of recent cases—the Commission has invalidated determinations by the Department's Board-Certified psychiatrist that certain applicants are psychologically unfit for

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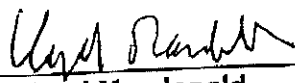
appointment. In doing so, Commission appears to have found persuasive the opposite conclusion by two other credentialed experts who appear from the record to have been routinely hired by attorneys for appealing applicants.

3. As to the scope of review of the Commission's decision, the Court is required to give the Commission, as an agency of the Commonwealth, wide deference within the subject matter of its statutory jurisdiction. However, the Commission itself, in exercising its review function pursuant to G.L. c. 31, § 43, is not free to substitute its judgment as to matters that relate to merit and policy considerations within the bounds of the reviewed agency's lawful discretionary authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004). "The issue for the commission is 'not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.'" *Id.* (quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983)).
4. No matter how finely the defendants parse the rationale of the Commission's decision, at its core, that decision appears to be simply a rejection of the professional judgment of the Department's designated expert in favor of the conclusions of Fitzgibbon's two experts. While on the merits the Court might well agree with Fitzgibbon's experts, that circumstance does not alter the fact that the Department's judgment on the issue appears to have fallen squarely within its lawful discretionary authority. Absent arbitrariness, bias or evidence of improper political influence—which are the core concerns of the Commission's appellate function—an agency's judgment on matters such as that before the Court must be respected. See *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997) and *Police Department of Boston v. Collins*, 48 Mass. App. Ct. 408, 411-413 (2000).
5. There is likely irreparable harm to the Department if the stay is not ordered in several respects. First, the Commission's order requires that Fitzgibbon be placed at the top of the eligibility list for appointment to the Department. Necessarily, that means that a person otherwise qualified and found psychologically "fit" by the Department will be passed over and the public will be denied that fit officer's services. Second, Fitzgibbon's appointment would set into motion accruing rights under the Department's collective bargaining agreement that would significantly burden the Department's subsequent efforts to remove Fitzgibbon from the Department if its judgment as to his unfitness was confirmed by subsequent events. Third, while the defendants argue that the Commission's order merely conditioned Fitzgibbon's being placed on top of the eligibility list upon his being found fit by another psychiatric expert chosen by the Department and that, thus, the Department's essential discretion was protected, that

order, itself, appears to impermissibly interfere with the managerial prerogatives that are lawfully due the Department.

6. There is no irreparable harm caused to Fitzgibbon by the stay. The Commission's order requires that upon his ultimate appointment he be credited with seniority retroactive to 2007. Thus, he will be made substantially whole if the Department's appeal is unsuccessful.
7. The stay affirmatively serves the public interest. There is no more sensitive issue than the psychological fitness of law enforcement officers. A police officer's badge endows powers of arrest, and an officer's gun simultaneously poses great assurance and grave risk to the public. Thus, no action should be unnecessarily taken by a reviewing court that permits one who has been determined to be psychologically unfit to be a police officer until all reasonable avenues of appeal have been exhausted. The appeal process as to that issue is underway. The stay ordered herein simply protects the *status quo* and the public's entitlement to law enforcement officers on the beat who are in fact psychologically fit for the job.

SO ORDERED.


D. Lloyd Macdonald
Justice of the Superior Court

April 29, 2010

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