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JOEL HENDERSON vs. CIVIL SERVICE COMMISSION & another.¹

1 City of Lynn

15-P-1265

APPEALS COURT OF MASSACHUSETTS

2016 Mass. App. Unpub. LEXIS 695

July 12, 2016, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009)*, ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, *MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4 (2008).*

JUDGES: Cypher, Grainger & Kinder, JJ.⁸

8 The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The appellant Joel Henderson appeals from a Superior Court judgment on the pleadings in favor of the defendants, the Civil Service Commission (commission) and the city of Lynn (city). The court affirmed the decision of the commission that the city had reasonable justification to bypass Henderson for a position with the city fire department. Henderson argues that the city's interview questions regarding his criminal history violated G.

L. c. 151B, § 4(9), as appearing in St. 1974, c. 531, and mandates reversal of the bypass. We affirm.

Background. The facts are essentially undisputed. In 2010, Henderson passed the civil service exam for a firefighter position. In 2012, he was listed as a prospective hire; he subsequently passed a drug test and advanced to an interview.²

2 In 2011, Henderson failed a drug test when his body hair was sampled instead of hair from his head, per the normal procedure; he was bald.

As part of the hiring process, the city obtained Henderson's Criminal Offender Record Information (CORI) report. The CORI report indicated that Henderson was charged with four counts relating to marijuana in 1998. Three charges were continued without a finding; he was convicted of the fourth charge and placed on probation for possession of marijuana, a misdemeanor. The CORI report also reflected other charges which did not lead to convictions.

During his interview, city officials asked Henderson a set of standard questions as well as other questions specific to his application. In response to one of the standard questions Henderson admitted that he used marijuana in 2011. The interviewers noted that Henderson "appeared slightly evasive to questions regarding past indiscretions," and that he "appear[ed] to blame others for situations."

On November 13, 2012, the city notified Henderson that he had been bypassed. The notice enumerated the reasons for the decision: (1) multiple charges for marijuana possession and admitted use of marijuana in 2011

after taking the firefighter exam, (2) concerns over his employment history, including a dismissal from a Boston EMS job in 2008 due to deficient clinical skills,³ and (3) "display[ing] a consistent pattern of evasiveness when confronted with negative aspects of [his] background[, and]. . . not tak[ing] responsibility for past drug use." Of the firefighters hired, fifteen were ranked lower than Henderson on the certification list. Several applicants who were hired at the time Henderson was bypassed had charges that had been dismissed, continued without a finding, or had no disposition. However, none of those charges were drug-related.

3 He was also terminated by Universal Testing, a concrete company, when he failed to show up to work after his truck broke down.

Henderson filed a timely appeal with the commission. A hearing was held on February 25, 2013, with a magistrate of the Division of Administrative Law Appeals (DALA), who recommended that the commission affirm Henderson's bypass. After careful consideration, the commission voted to affirm the decision of the DALA magistrate, concluding that two reasons articulated by the city, Henderson's employment history and his admission of recent marijuana usage, provided reasonable justification for the bypass.

Discussion. "Pursuant to *G. L. c. 31, § 44*, we review the commission's decision to determine if it violates any of the standards set forth in *G. L. c. 30A, § 14(7)*, and cases construing those standards." *Brackett v. Civil Serv. Commn.*, 447 Mass. 233, 242 (2006)(quotation omitted). "We generally accord considerable deference to the commission's disposition of a charge . . . [unless] the commission commits an error of law." *Boston Police Superior Officers Fedn. v. Labor Relations Commn.*, 410 Mass. 890, 892 (1991).

"[T]he commission's role . . . is . . . reviewing the legitimacy and reasonableness of the appointing authority's actions[; it] owes substantial deference to the appointing authority's exercise of judgment in determining whether there was reasonable justification shown" for the bypass. *Beverly v. Civil Serv. Commn.*, 78 Mass. App. Ct. 182, 187-188 (2010)(quotation omitted). A bypass decision is reasonably justified when it is made with "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Brackett, supra*, at 241 quoting from *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928).

The commission determined that sufficient evidence supported the city's reasonable justifications for bypassing Henderson. The commission noted that the city did

not rely solely on the stale marijuana possession charges or the 1998 conviction⁴ in deciding the bypass, but also placed weight on Henderson's admission of recent drug use combined with his employment history and demeanor when confronted with the negative aspects of his background.

4 The commission determined the conviction was too stale to be given great weight in evaluating Henderson's candidacy.

Henderson argues that drug history information was obtained during his interview in violation of *G. L. c. 151B, § 4(9)*,⁵ which prohibits employers from "request[ing] any information . . . or otherwise discriminat[ing] against any person by reason of his or her failure to furnish such information through a written application or oral inquiry . . . [of] an arrest, detention, or disposition regarding any violation of law in which no conviction resulted."

5 Henderson does not contend that the action of obtaining his CORI report was prohibited. Such use is permitted and not discriminatory. See *Bynes v. School Comm. of Boston*, 411 Mass. 264, 269 (1991) (adopting interpretation of *G. L. c. 151B, § 4(9)* which "upheld a hearing commissioner's determination that the use of an individual's arrest record, not directly obtained from that individual, in making employment decisions does not violate § 4(9)").

The commission reasoned that because the CORI report was lawfully obtained, the city was within its rights to inquire about the charges listed on the report. However, even assuming that there was improper questioning, we see no prejudice to Henderson; improper questioning does not automatically equate to discrimination.⁶

6 We note the conflict within our law regarding the criminal history information an employer may obtain directly from an applicant. In contravention to *G. L. c. 151B, § 4(9)*, *G. L. c. 31, § 20*, was amended by St. 1985, c. 560, eleven years after § 4(9) to require that all applications include the question: "Have you been convicted of a criminal offense other than drunkenness, simple assault, speeding, traffic violation, affray, or disturbance of the peace? . . . If Yes, please indicate the date, court, offense charged and the penalty imposed." When statutes contain conflicting provisions, "the earlier statute must give way to the later one." *Boston Hous. Auth. v. Labor Relations Commn.*, 398 Mass. 715, 718 (1986).

The bypass letter noted two appropriate reasons for Henderson's bypass: recent drug use and employment history. There are manifestly legitimate public safety reasons to bypass an applicant for a position such as firefighter or police officer if the applicant has recently used drugs.⁷ See *Boston v. Deputy Dir. of the Div. of Empl. & Training*, 59 Mass. App. Ct. 225, 228-229 (2003) (city police department had an interest in "forbid[ding] its officers from using illicit drugs"). And, as stated, the letter referenced Henderson's previous job termination for failure to conform to standards in an analogous public safety position; work history is also and indisputably a proper consideration in evaluating applications. See *Beverly v. Civil Serv. Commn.*, 78 Mass. App. Ct. at 189 (employee termination from previous position provided reasonable justification for bypass). Finally, the city was within its rights to utilize the information on the CORI report when weighing Henderson's candidacy. *Bynes v. School Comm. of Boston*, 411 Mass. 264, 269 (1991).

7 Henderson appropriately conceded in oral argument that recent drug use reasonably justifies bypassing a candidate.

A bypass "may be reasonably justified on the merits, even where the appointing authority uses flawed procedures for selecting candidates. . . . In such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with the fundamental purpose of the civil service system, . . . to ensure decision-making in accordance with basic merit principles." *Sherman v. Randolph*, 472 Mass. 802, 813 (2015) (quotation omitted) (finding a decision was reasonably justified "where the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process are not so severe that it is impossible to evaluate the merits from the record"). The judge did not err in affirming the commission's determination that the city provided reasonable justification in bypassing Henderson.

Judgment affirmed.

By the Court (Cypher, Grainger & Kinder, JJ.⁸),

8 The panelists are listed in order of seniority.

Entered: July 12, 2016.