

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 2284CV02483**

MICHAEL KIELY

vs.

**MASSACHUSETTS CIVIL SERVICE COMMISSION
and CITY OF SOMERVILLE**

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

The plaintiff, Michael Kiely (“Kiely”), seeks review, pursuant to G.L. c. 30A, § 14 and G.L. c. 31, § 44, of a decision by the defendant, the Civil Service Commission (“Commission”), to affirm the defendant’s, the City of Somerville (“City”), decision to bypass him for promotion to Lieutenant in the Somerville Police Department (“SPD”). Before the court are the parties’ cross Motions for Judgment on the Pleadings. For the reasons discussed below, Kiely’s Motion for Judgment on the Pleadings is **DENIED**, the City’s Motion for Judgment on the Pleadings is **ALLOWED**, and the Commission’s decision is **AFFIRMED**.

BACKGROUND

I. Procedure for Appointment in Somerville for its Police Department

Somerville’s City Charter, Title 4, Section 2, provides, in relevant part: “The mayor may appoint, subject to confirmation by the city council ...” officers and members of the police department. The City Council is comprised of eleven members, seven members represent individual wards and four members serve at large. The President of the City Council assigns individual city councilors to various committees. One committee, the Confirmation of

Appointments and Personnel Matters Committee (“Committee”), is comprised of five city councilors who evaluate the candidates that the mayor has conditionally appointed to the SPD.

Since 2018, the Committee, under the director of its Chairman, J.T. Scott (“Scott”), has provided a more thorough review of the mayor’s recommended promotions. More specifically, the Committee reviews documentation, including Internal Affairs files, rather than voting based simply on the representations of the SPD and the recommendation of the mayor.

II. Kiely

Kiely joined the SPD in 1995. Since his appointment, the SPD has disciplined him twice. First, in 2003, the SPD suspended him for an incident stemming from the discharge of his weapon. On January 18, 2003, Kiely was working a detail as a uniformed police officer at the East Cambridge Savings Bank. During his shift, an officer, who was on duty at the time, came to visit him. Even though this officer had been disciplined in the past for not being within his sector while on duty, this officer was again not in his sector. During their conversation, a radio call came through about a carjacking and police chase. Ultimately, the fleeing vehicle approached the area of the bank and Kiely discharged his firearm. In the days following the incident, the SPD asked Kiely to write a report of the incident. Kiely did not write a report until three days later and, in that report, he did not mention that the other officer had been at the bank with him. The SPD charged Kiely with falsifying records, being untruthful, and not filing a timely report after discharging his service weapon. The Chief of the SPD, noting the serious nature of the violations, suspended Kiely for five days, which was all he was statutorily allowed to do. He then referred the matter to the Mayor, who increased the suspension to fifteen days. Kiely appealed to the Commission, which denied his appeal, stating, in part, that Kiely had

sought to conceal that the other officer was at the bank and his failure to note the other officer's presence constituted untruthfulness.¹

Next, in 2005, the SPD suspended Kiely for five days for using a school computer at an elementary school in Somerville to view pornography while working overtime. Kiely failed to close the pornographic images such that they were left visible on the computer. Kiely did not appeal this suspension.

Kiely was appointed to Sergeant in 2014. On September 16, 2017, Kiely took the promotional examination to become a lieutenant. On December 21, 2017, the state's Human Resource Division established an eligible list of candidates for promotion. On March 15, 2019, the City created a list for promotion to the position of lieutenant. Six individuals indicated that they were willing to accept promotion to the position of lieutenant, including Kiely. Kiely was tied for second on the City's list. The Chief of the SPD, two deputy chiefs, and the Director of Personnel for the City interviewed the candidates. This interview panel recommended Kiely and two other candidates for promotion, covering the top three candidates on the City's list. The Mayor agreed with the panel's recommendations and all three candidates received a conditional offer of promotion from the Mayor. On June 20, 2019, the Mayor informed Kiely, by letter, that he was being promoted to lieutenant subject to confirmation by the City Council.

On September 23, 2019, the Committee met to consider various pending promotions at the SPD, including Kiely's promotion. The Committee was concerned about Kiely's untruthfulness in his reporting on the 2003 firearm discharge incident. The Committee was also concerned about the 2005 pornography incident. When asked by the Committee about this

¹ After this, the Middlesex District Attorney's Office issued a Brady Letter, which is intended to inform defendants of a prior finding of untruthfulness by a potential Commonwealth witness, on Kiely.

incident, Kiely claimed the computer was not utilized by students, even though the password was “STUDENT.” The Chief of the SPD told the Committee that the interview panel did not consider these two incidents because of their age. The Committee, however, believed that the untruthfulness in the 2003 reporting and viewing of pornography at a school were serious enough that it was difficult to disregard them, even with the time that had passed.

The Commission was further concerned about Kiely’s filing of an internal complaint, in 2016, against a lieutenant in the SPD (“Lieutenant M”) and his subsequent retraction of some of those allegations. In that complaint, Kiely alleged, in part, that Lieutenant M had victimized him “for well over a year by several physical and verbal attacks against myself, my family and my girlfriend as well as her children.” Lieutenant M was suspended for five days and appealed to the Commission, which overturned the suspension. In its decision overturning the suspension, the Commission noted that Kiely did not testify at the hearing and had “casually retracted any allegation related to physical attacks or any attacks against his girlfriend or her children by” Lieutenant M. The Committee stated that Kiely’s retraction of these allegations bore on his veracity.

After the Committee discussed Kiely’s candidacy for promotion, Scott asked the Chief of the SPD whether there has been any finding that Kiely had lied in relation to the internal complaint he had filed against Lieutenant M. Scott filed a formal complaint against Kiely at the request of the Chief, which triggered an investigation. The investigator did not find any evidence of untruthfulness and Kiely was exonerated.

In September 2019, the Committee unanimously voted against promoting Kiely. On September 26, 2019, the full City Council voted to not appoint Kiely for promotion to lieutenant. The City Council approved the other two candidates for promotion.

On December 9, 2019, Kiely filed a bypass appeal with the Commission. The Commission stated that the evidence showed that the Committee was “primarily concerned by what they considered a pattern of untruthfulness by [Kiely], including Kiely’s prior discipline for untruthfulness in 2003, upheld by the Commission, and the ensuing Brady Letter; the 2005 discipline in which the [] Committee concluded that Kiely misrepresented the access that grade school students had to the computer he used to view pornography; and [Kiely’s] apparent misrepresentations about Lieutenant M’s actions, which he later retracted.” Decision at p. 27. The Commission addressed Kiely’s argument that his prior discipline was too stale and that there was not a sufficient nexus between his prior misconduct and his present suitability for promotion. The Commission stated:

When, as here, an incumbent police officer engages in untruthfulness regarding a material issue (i.e. – omitting information on a police report to protect another police officer), an Appointing Authority is justified in relying on that prior untruthfulness to bypass them for promotion, even if that untruthfulness occurred many years ago.

...

Further the [Committee] was concerned that [Kiely’s] untruthfulness was not limited to filing the false police report. Specifically, they were troubled that [Kiely] continued to insist that elementary school students were not able to access a school computer from which he viewed pornography (while working overtime) and failed to close out the sites he had been visiting. The fact that the login password to the computer was “STUDENT” undercuts [Kiely’s] argument and supports the [Committee’s] legitimate concern about whether [Kiely] had a tendency to fudge the truth to portray himself in a more favorable light.

These two incidents alone provided the [Committee] with reasonable justification for bypassing [Kiely] for promotion. For that reason, it is not necessary to address whether [Kiely] made false allegations against a police officer when he apparently stated that he and a family member had been subject to physical harassment by that officer, an allegation [Kiely] subsequently recanted.

Decision at pgs. 27-28. Finally, the Commission addressed Kiely’s allegations that Scott had a personal bias against him. The Commission noted that it was the Chief of the SPD who had

advised Scott to file a complaint so as to trigger an investigation. The Commission found that Scott was not personally biased against Kiely. Instead, Scott “exhibited concern, as a representative of the City, with what he believed was the [SPD’s] failure to fully investigat[e] Kiely’s] statements.”

On October 6, 2022, the Commission concluded that the Committee had reasonable justification to not confirm Kiely’s conditional offer of promotion and denied Kiely’s bypass appeal. On November 1, 2022, Kiely appealed the Commission’s decision to this court.

DISCUSSION

When a candidate for appointment appeals from a bypass, the Commission 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 v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006), citing G.L. c. 31, § 2 (b). “Reasonable justification in this context means done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.* (quotations and citation omitted). In determining whether the City has shown a reasonable justification for a bypass, the Commission’s primary concern is to ensure that the City’s action comports with “basic merit principles.” *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001). See *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304 (1997) (fundamental purposes of civil service system is to guard against political considerations, favoritism, and bias in governmental employment decisions).

Pursuant to G.L. c. 31, § 44, the court reviews the Commission’s decision to determine whether it conforms to the standards set forth in G.L. c. 30A, § 14 (7). See *Massachusetts Ass’n*

of Minority Law Enforcement Officers, 434 Mass. at 263. The court may set aside or modify the Commission's decision if "the substantial rights of any party may have been prejudiced" by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law. G.L. c. 30A, § 14 (7). As the one appealing the Commission's decision here, Kiely bears the heavy burden of establishing that the decision is invalid. *Brackett*, 447 Mass. at 242; *Massachusetts Ass'n of Minority Law Enforcement Officers*, 434 Mass. at 263-264. The court gives "due weight to the experience, technical competence, and specialized knowledge" of the Commission in deciding these matters. G.L. c. 30A, § 14 (7). The court's review "is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Brackett*, 447 Mass. at 242.

As an initial matter, the court notes that Kiely is currently retired on an accidental disability benefit and, at the hearing, his counsel stated that he will not be coming back to the SPD. In this respect, the court questioned whether this case is moot as the relief the Commission would grant Kiely if the court vacated the Commission's decision is placement at the top of the next promotion list, which does nothing for Kiely if he is retired. See *Mayor of Revere v. Civil Serv. Comm'n*, 31 Mass. App. Ct. 315, 319-320 (1991) (noting that Commission recognized that it could not order appointment of bypassed candidate, so it "merely ordered" bypassed candidate's name to be placed at top of forthcoming eligibility list for bypassed position). Counsel for Kiely responded that Kiely was seeking the increase in income that he would have made as a lieutenant both prior to his retirement and on retirement. But that would essentially require the Commission to order the SPD to appoint Kiely to lieutenant, which the court does not believe the Commission has the power to do. See *Timmins v. Civil Serv. Comm'rs*, 276 Mass. 142, 145 (1931) ("[T]he commission does not make appointments.... The appointing power has

a right of selection.”). Regardless, the parties did not brief this issue, and because the court determines that Kiely’s appeal fails on the merits, it will not address the issue of whether Plaintiff’s claim is now moot.

I. Staleness of Misconduct

Kiely’s primary contention is that the Commission erred in relying on misconduct that was over fifteen years old as justification for not confirming him. More specifically, Kiely argues that there was not a sufficient nexus between his prior misconduct and his current ability to perform the duties of lieutenant. The court disagrees. It was reasonable for both the City and the Commission to rely on conduct that pertained to Kiely’s untruthfulness, particularly considering their concerns with Kiely’s pattern of untruthfulness. *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 & n.12 (2010), quoting *Cambridge*, 43 Mass. App. Ct. at 305 (“In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates, and ‘[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.’”). The Commission properly decided that there was reasonable justification for the City’s bypass based on this misconduct.

II. City Charter

Kiely next contends that the Mayor is the Appointing Authority under G.L. c. 31, and the City Council cannot, as it did here, “subvert” his authority under Chapter 31 to appoint officers and members of the police department.

General Laws c. 31, § 1 defines “appointing authority” as “any person, board or commission with power to appoint or employ personnel in civil service positions.” Here, the Mayor is the appointing authority because the City Charter gave him that power, albeit subject to

confirmation by the City Council. There is nothing in Chapter 31 precluding the City from conditioning the Mayor's appointment power on City Council approval. See *Town Council of Agawam v. Town Manager of Agawam*, 20 Mass. App. Ct. 100, 103 (1985) ("By Legislature's delegation to municipalities through G.L. c. 43B of greater power in managing their affairs, municipalities could, within certain broad limitations, choose for themselves the forms of local government they found best suited to their own needs, including as part of that choice the manner of creating and filling local offices."). Thus, under G.L. c. 31, in Somerville, the Mayor, subject to City Council confirmation, is the "appointing authority."

III. Bias

Finally, Kiely contends that Scott was biased against him as evidenced by Scott's actions with respect to Kiely's retraction of the allegations against Lieutenant M, including Scott's filing of a formal complaint against Kiely. Kiely raised this argument before the Commission and the Commission found that Scott was not personally biased against Kiely. The Commission stated that Scott "exhibited concern, as a representative of the City, with what he believed was the [SPD's] failure to fully investigat[e Kiely's] statements." The court's review "is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Brackett*, 447 Mass. at 242. See *Beverly*, 78 Mass. App. Ct. at 188 (court is bound to accept findings of fact of Commission if they are supported by substantial evidence). There was substantial evidence in the record supporting the Commission's determination, including the reasonable inference that Kiely either lied when he filed the complaint against Lieutenant M or lied when he retracted those allegations. Thus, the court will not disturb the Commission's findings of fact with respect to the alleged bias of Scott.²

² Kiely also contends that the Committee did not afford him a "fair and impartial review" because it more thoroughly reviewed his candidacy compared to previous candidates. Essentially, Kiely takes issue with

Kiely has not met his heavy burden of establishing that the Commission's decision is invalid and the court therefore **AFFIRMS** the decision.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Motion for Judgment on the Pleadings is **DENIED**, the City's Motion for Judgment on the Pleadings is **ALLOWED**, and the Commission's decision is **AFFIRMED**.

/s/Rosemary Connolly

Rosemary Connolly
Associate Justice of the Superior Court

DATED: April 5, 2024

the Committee's attempt to be more diligent in its review of the mayor's recommended promotions. Kiely has not explained, however, how this contention, if true, affects the court's review of the decision of the Commission that the City Council had reasonable justification to not promote him. Regardless, Kiely has cited no authority for the proposition that an appointing authority cannot change its procedure for reviewing candidates over the years.