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BOSTON POLICE DEPARTMENT

vs.

GARY LEE and MASSACHUSETTS CIVIL SERVICE COMMISSION

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

The Boston Police Department (BPD) moves for judgment on the pleadings pursuant to G. L. c. 30A, § 14, requesting reversal of a decision by the Massachusetts Civil Service Commission (Commission) to grant certain relief to defendant Gary Lee. The Commission Decision ordered BPD to revive Lee's eligibility to be a BPD officer, to reinstate his name at the top of the next certification list for police officers, that the BPD not use the same reasons for bypass, and that if and when Mr. Lee is appointed, his civil service starting date shall be retroactive to those employed from the original certification list. Another judge of this court (Giles, J.) allowed BPD's motion to stay the relief ordered by the Commission during the pendency of this appeal. Docket, at Paper 14. Following hearing September 21, 2010, and for the reasons discussed here, BPD's Motion for Judgment on the Pleadings is ALLOWED.

Legal Standards

Pursuant to G.L. c. 30A, section 14(7), the court may reverse, remand, or modify an agency decision if that decision is based on an error of law or an unlawful procedure, is arbitrary and capricious, or if there is a lack of substantial evidence to support the decision. The party appealing the administrative decision bears the burden of proving that it is invalid for any of these reasons. Merisme v. Bd. of App. of Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989). The agency is the sole judge of the credibility and weight of the evidence presented at the administrative proceeding, and the court will not re-weigh that evidence. Greater Media, Inc. v. Dep't of Pub. Utilities, 415 Mass. 409, 417 (1993). The court may not substitute its fact-finding judgment for that of the agency. When reviewing any agency decision, the court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). "However, 'to the extent that an agency determination involves a question of law, it is subject to de novo judicial review.'" Merisme, 27 Mass.App.Ct. at 473 (citation omitted).

Defendant Commission, in turn, was responsible in this case for determining "whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving [by a preponderance] 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 in the context of the Commission's review of an authority's decision, 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. at 304 (citation omitted). It is the Commission's responsibility "to guard against political considerations, favoritism and bias in government employment decisions." Id. "It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id.

General Laws c. 31, the Massachusetts Civil Service Law, governs the selection and hiring of BPD's employees. Section 6 mandates that an appointing authority making new appointments obtain from the Massachusetts Human Resources Division (HRD) a certification list of eligible candidates. The appointing authority must hire from the beginning of the list, starting with those individuals with the highest scores. Id. Individuals from the certification list are offered a position, which is contingent upon satisfying medical and physical fitness requirements described in HRD's regulations. G. L. c. 31, § 61A.

HRD regulations establish procedures for bypass of an individual for a position, and a department has the discretion to do so provided it has a legitimate reason. The Police Commissioner has discretion to evaluate whether and what sort of investigation the Department needs to conduct into a candidate's background. St. 1962, c. 322 section 1.

#### Record Facts

On November 27, 2006, Lee's name appeared on certification list 260616 for Boston police officers. Lee had submitted his Student Officer Application to the Department in July, 2006. Pursuant to BPD's standard procedures, a background investigation began. An investigator presented his findings to a group of Department officials (referred to as the "Roundtable") who are responsible for reviewing the findings and determining whether or not to move the candidate forward. The Roundtable includes command level officials from the Internal Affairs, Legal Advisor, Human Resources and Recruit Investigation divisions of the Department. When an applicant successfully completes this background investigation portion of the process, s/he moves on to the medical and psychological screenings.

Mr. Lee failed the background investigation for the following reasons: Criminal docket sheets reflected that Lee was arrested by BPD for assault and battery in January, 1995. The complaining witness alleged Lee struck her after an argument, and had also given her a black eye earlier that same week. The BMC record reflects Lee was arraigned, waived his right to jury trial, and was found guilty of one count of assault and battery. On January 18, 1995, the same complaining witness applied for and obtained a Chapter 209A restraining order against Lee for a period of one year. On March 15, 1995, while on probation for the assault and battery charge, Lee was arraigned in another BMC criminal session for violating the January 18, 1995 restraining order. That matter was placed on file and continued; no findings were issued. In addition, BPD considered that Lee had been bypassed by the Boston Fire Department.

The BPD application sought information directly from applicants about any criminal history. Lee reported the 209A Order, stating that the victim alleged he "tried to run her off the

road.” This version conflicted with the affidavit originally filed by the complaining witness, which referred to punches in the face, legs, stomach and arm; a threat to kill; a hit in the eye; and a push downstairs. Lee also reported the case had been dismissed and the order removed; contrary to the court record reflecting the one year order. In response to a question on the application about convictions for a felony or a misdemeanor, or a CWO, Lee answered “No,” again contrary to the court record before the Department for conviction on the assault and battery, and the CWO for the Chapter 209A violation.

These materials, as well as Lee’s military record, good references, and employment history, were placed before the Department Roundtable. The Department has a practice of taking domestic violence seriously, and making every effort to prevent perpetrators from being appointed. The Roundtable was concerned about the year-long restraining order and the assault and battery conviction. The Roundtable was also concerned that Boston Fire Department had by-passed Lee for the criminal history, as well as for what BFD characterized as a bad driving record. On November 27, 2006, the Department requested HRD bypass Lee for employment, and on January 31, 2007, HRD accepted the Department’s reasons and by-passed Lee. Lee appealed that decision to the Commission, which held a full hearing on January 16, 2008. The Commission heard live testimony from a Department representative, Lee, and five other witnesses who strongly supported his application.

#### The Commission’s Decision

The Commission issued a 3-2 Decision dated April 9, 2009, ruling the Department did not have reasonable justification for bypassing Lee. In partial support of its Decision, the Commission relied on a September 17, 2007 ruling by the BMC to grant Lee’s motion for new trial on the January, 1995 assault and battery charge. Lee argued before the court in 2007 that he had not pleaded guilty to the charge voluntarily in 1995, but instead had done so out of fear of being deported.

The Commission concluded BPD “failed to obtain sufficient reliable evidence to rebut Lee’s substantial denial [of the abuse charges] and otherwise clean, if not exemplary record.” The Commission based this conclusion on the fact that the Department did not contact Lee for further comment on his record, nor did BPD contact the complaining witness, the arresting officers, the booking officer, the judge, the clerk, the victim witness advocate or the probation officer involved in the underlying cases.

The Commission also relied on its view of evidence taken at its own hearing that the criminal record events “occurring over a brief period, with the same woman would after a long period, tend to blend together and the technical distinctions or dispositions would not be as clear to a layperson.” The Commission found in favor of Lee’s version of the underlying events, offered in his live testimony at its 2008 administrative hearing, over the complaining witness’s version of events reflected in the 1995 court records. The Commission ruled that the woman’s sworn statement did not seem “natural” based, for example on the use of the word “struck” in her affidavit: “It sounds contrived and formal. This accusation sounds too general, under the circumstances. A true victim would likely be spontaneous, vocal, and specific; for instance claiming that she was punched in the face or kicked in the leg, and try to display the alleged

injury.” The Commission further found that the victim’s version is “also inconsistent with a real sense of fear due to receiving that much prior abuse,” and that “the girlfriend’s version of events was motivated by jealousy and ill will toward Lee.”<sup>1</sup> The Commission concluded BPD lacked reasonable justification to bypass Lee, both because BPD was wrong as a matter of fact about the criminal record, and because BPD’s background investigation was flawed.

#### Discussion

BPD argues the Commission’s Decision is based upon errors of law, unsupported by substantial evidence, in excess of the Commission’s statutory authority, and arbitrary and capricious. BPD’s essential claim is that the Commission inappropriately substituted its own judgment for that of BPD, by ruling that BPD’s investigative process was inadequate, looking behind the court docket records, and assessing the bona fides of those records for itself. Based on the record before me I rule BPD is correct with respect to errors of law.

#### The Facts of the Criminal Record

First, the assault and battery record BPD had before it in 1995 was quite clearly a conviction for a misdemeanor. An appointing authority is certainly entitled to rely on the official criminal record information before it at the time of the background investigation. The fact that Lee was able to procure a new trial on the assault and battery charge in September, 2007 -- ten months after BPD had made its bypass decision -- is irrelevant to that decision as a matter of law, and thus its consideration by the Commission was error. The results of the new criminal trial might -- or might not -- cause BPD to view Lee differently as a candidate, beginning sometime after 2007. As the record does not reflect Lee re-applied, any findings or rulings about his fitness for duty based on these subsequent events in 2007 is pure, inadmissible speculation. It is the province of neither the Commission nor the court to consider this newly-offered material in the first instance; but rather solely the prerogative of the appointing authority. The Commission was limited to considering whether there was reasonable justification “in the circumstances found by the Commission to have existed when the appointing authority made its decision.” Watertown v. Arria, 16 Mass. App.Ct. 331, 334 (1983).

Second, the Commission erred in its treatment of the criminal court records. Two different BMC sessions considered the assault and battery and Chapter 209A violation charges; two different courts ruled Lee responsible (by virtue of the conviction and the Chapter 209A order itself), in the face of those respective charges. It was for the appointing authority to balance the circumstances and weight of those charges and dispositions as recorded -- including their age and specificity-- against the rest of Lee’s otherwise good record. City of Cambridge, 43 Mass.App.Ct. at 305. It was then for the Commission to determine whether that balance as struck by BPD was supported by substantial evidence.

Under the guise of reviewing the Department’s factual decision making, the Commission purported to find as a matter of fact that the criminal conviction and Chapter 209A order and CWOV were not themselves justified. In this it exceeded its statutory authority and

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<sup>1</sup> The Commission’s dissenting opinion commented that these inferences drawn by the majority reflect a “glaring and outdated misconception about domestic violence and its victims.”

respect to the bona fides of the court judgments, because those findings are not within the Commission's experience, technical competence or specialized knowledge, and they are inconsistent with governing law. Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-242 (2006)(review of conclusions of law de novo); G.L. c. 30A, section 14(7). The Commission is simply wrong to argue here, as it does, that at the time BPD made its decision, the abuse charges were "disputed convictions." They were not, either as a matter of fact or of law.

#### The Department's Investigative Policies and Procedures

Closer to the line is the Commission's apparent finding and ruling that BPD was not reasonably justified in bypassing Lee, because its background investigation was "cursory." The Commission faulted BPD for failing "to obtain sufficient reliable evidence to rebut Lee's substantial denial [of the charges]." The rule is that an appointing authority's action is justified when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law." City of Cambridge, 43 Mass. App.Ct. at 304. The Commission found BPD's reasons inadequate.

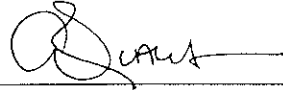
There is nothing inadequate as a matter of law about a departmental policy or practice against hiring perpetrators of domestic violence, and it is clear the Commission is not allowed to substitute its own judgment in this respect. City of Cambridge at 304; School Committee of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965). Nor can there be anything inadequate about relying on official court records to ascertain prior involvement in this, or any other, charge of interest to a Police Commissioner. The only question is whether the investigative process in place at BPD in 2006 was inadequate for not further probing the court records, to such an extent that it rendered the Department's decision about Lee not reasonably justified.

I find no legal authority for that proposition. To the contrary, the law is that appointing authorities have wide discretion in this area. City of Cambridge, 43 Mass. App. Ct. at 304. The Commission argues BPD was required to investigate the court records by questioning Lee about his written responses, contacting witnesses and court personnel involved in the prior proceedings, and reviewing the procedural aspects of those proceedings. First, this is an unreasonable and unrealistic view of BMC proceedings. Court personnel would likely not take or retain separate notes of these proceedings, and could never be expected to hold independent memories of them, given the virtually hundreds of cases they process weekly. Judges and other decision makers would likely not be available for comment outside the official record, even in the unlikely event there were any possibility of refreshing their recollections. Second, the issue is not whether the Commission – or the court – can imagine or would prefer a different investigative process. Rather, the standard is whether the appointing authority had reasonable justification for the process it chose to use in the circumstances which existed before it at the time. Based on the record before me, I rule BPD was justified as a matter of law in exercising its discretion by relying on the materials it did to bypass Lee.

Conclusion

For the reasons stated, Plaintiff's Motion for Judgment on the Pleadings is ALLOWED, and the Commssion's Order is vacated.

DATED: October 28, 2010



Christine M. Roach

Noted sent  
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