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SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. SUCV 2017-0990-DTHE CITY OF SOMERVILLE,
Plaintiff,Notice sent
1/09/2018
S. P.
R. L. Q., JR.

vs.

HENRY LIMA and CIVIL SERVICE COMMISSION,
Defendants.

(sc)

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

The City of Somerville ("City") bypassed defendant, Henry Lima ("Mr. Lima") for the position of Fire Fighter in the City. The City has filed this appeal under G. L. c. 30A, § 14 from a final decision, dated March 2, 2017 ("Decision") of the Civil Service Commission ("Commission") allowing Mr. Lima's bypass appeal, directing the state's Human Resources Division ("HRD") to "place the name of Henry Lima at the top of the next Certification for the position of permanent reserve firefighter in the City of Somerville until he has been appointed or bypassed" and ordering the City to "ensure a de novo review of [Mr. Lima's] candidacy with no negative inferences drawn from the appointment process which was the subject of" the bypass appeal. Pursuant to Standing Order 1-96, the City has filed a Motion for Judgment on the Pleadings ("Motion"), which Mr. Lima opposed in writing. The Court held a hearing on the Motion on November 21, 2017, at which only the City appeared. After review of the administrative record, motion and memorandum and upon consideration of oral arguments, the Motion is **DENIED**.

BACKGROUND

The Civil Service Commission's Hearing Officer issued an extensive and careful, 23-page decision, which the full Commission adopted. The findings are supported by substantial evidence and taken as fact by this Court on appeal, although they need not be repeated here. The key issue concerns the City's consideration of the nephew (Candidate A) of the City's Assistant Personnel Director, William Roche. Candidate A's father, brother, 2 cousins and another uncle are also employed by the City.

In summary, the HRD issued two certifications for appointment to the firefighter position. The first, dated July 7, 2015, did not include Candidate A. However, at the City's request, HRD sent the City seven additional names on July 10, 2015, including Candidate A, who ranked below Mr. Lima on the list.

On November 10, 2015, Mr. Roche disclosed the following, pursuant to G.L. c. 268A, § 23(b)(3):

My nephew [Candidate A] is an applicant for firefighter in the City of Somerville. The City of Somerville requested enough names from the Human Resources Division to put 15 candidates on the reserve list. He is approximately 45th in the list, tied with six other individuals.

As Personnel Director, I oversee the process for the selection of firefighters to recommend to the Mayor. More specifically, I review applications, background checks, CORI checks, driver's license records, and participate in the interview process. The interviewing panel, which consists of three members, makes a recommendation to the Mayor.

...

My nephew is on the civil service list provided by the Human Resources Division.

....

Although I participate in the interview process, I will not be participating in his interview, if it becomes necessary. If selected by the interview team, I will forward his name with other selected individuals for approval to the Mayor. The Mayor is the appointing authority. The Board of Aldermen confirms all candidates. The original list was provided by HRD and I have no role in that list. Anyone bypassed has appeal right to HRD.

Taking into account the facts that I have disclosed above, I feel that I can perform my official duties objectively and fairly.

After background investigations, interviews and recommendations of the various candidates, the City sent a bypass letter to Mr. Lima on February 2, 2016, which listed, as negative reasons, his “history of time and attendance issues, a poor credit history as well as a poor performance during [the] interview with the Panel including a willingness to operate outside the chain of command and disobey orders that you do not agree with.” Page 2 of the Bypass letter stated that Candidate A was being appointed, but the City later learned that it could not appoint 25 candidates from that list. When the City reduced the appointments to 15 candidates, Candidate A was not among them.

On April 19, 2016, HRD sent a second certification, from which the City could appoint 15 additional reserve firefighter candidates. Although that list could bring the total number of appointments to 30, the First Chief only told the Mayor that he could use 25 reserve firefighters – not 30. Candidate A was tied for last on that list, again ranking below Mr. Lima.

Lima requested, and received, a second interview. On June 9, 2016, the City sent him a non-selection letter, reiterating the negative reasons given in the February 2 letter, adding a paragraph regarding the May 25, 2016 re-interview and concluding: “Your second appearance before the panel failed to dispel the grave concerns that the panel had concerning your candidacy.” As before, Candidate A was selected over Mr. Lima, despite a lower ranking on the list. One of the stated reasons was Candidate A’s “strong work history,” even though, as will be seen, an unbiased evaluator could very easily have concluded the opposite. This time, Candidate A’s selection resulted in employment. Two other candidates who ranked below Mr. Lima had arguably serious blemishes on their background investigations, but also had family connections to city employees (in

one case, with a step-father who was a District Fire Chief and a mother who was a retired Fire Department employee), also were selected and appointed.

Among other facts (some of which are quoted below), the Hearing Officer found:

Mr. Roche, who was then serving as the City's Personnel Director, and whose nephew was a candidate for reserve firefighter, actively participated in various decisions regarding the appointment process that could be viewed as beneficial to his nephew.

First, . . . the initial July 7, 2015 Certification, which authorized the City to appoint ten (10) reserve firefighters, did not contain the name of Mr. Roche's nephew. Mr. Roche was involved in the decision-making process which resulted in the City, three days later, expanding the vacancies to be filled to 15 and requesting more names from HRD, which included the name of his nephew.

Second, after the name of Mr. Roche's nephew was not among those recommended to fill the 15 reserve firefighter slots, Mr. Roche and the Mayor had a discussion about going further down the Certification and appointing other "good candidates", which Mr. Roche acknowledges included his nephew.

Third, after being told by HRD that the City would not be in compliance with the statutory "2N + 1" formula if it appointed twenty-five individuals, Mr. Roche was involved in the decision-making process to appoint 15 and then request another Certification weeks later. That new Certification actually requested sufficient names to appoint another 15 reserve firefighters, bringing the reserve list to 30, something even Fire Chief Sullivan was unaware of.

Fourth, Mr. Roche actively participated in the decision to bypass other candidates, including Mr. Lima who were ranked above his nephew. Given that Mr. Roche's nephew was ranked in the last tie group on the Certification, any decision to bypass candidates ranked above his nephew had the potential to benefit his nephew, especially given the limited number of appointments that could be made under the "2N + 1" formula.

DISCUSSION

Under G. L. c. 30A, § 14(7), this Court has limited power to set aside or modify the Decision. It may do so if substantial rights may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and

capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). The appealing party bears the burden of demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986). The Supreme Judicial Court has noted that the appellant's "burden is heavy." Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). The court must consider the entire record, including whatever "fairly detracts" from the agency's finding, but the Court has no power to substitute its judgment for that of the agency if the record contains substantial evidence to support conflicting propositions; nor may it second guess the agency's judgment regarding credibility of witnesses and the weight to be given to particular evidence. See Doherty v. Retirement Commission of Medford, 425 Mass. 130, 135 (1997). When reviewing an 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).

As the hearing officer noted, it ensures that appointing authorities employ "[b]asic merit principles," which include, among other things "assuring fair treatment of all applicants and employees in all aspects of personnel." G.L. c. 31, §1. See Massachusetts Ass'n. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256 (2001). In bypass appeals, as in other contexts, the Commission is charged with implementing "the underlying purpose of the civil service system . . . to guard against political

considerations, favoritism and bias in governmental employment decisions.” Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited.

The Hearing Officer stated:

Once again, the Commission is faced with an appointment process that was potentially compromised because of the involvement of an individual whose relative as among the candidates under consideration.

Unfortunately, this is not new ground for the Commission.

He then cited four previous Commission precedents in which it took action because of the involvement of a relative in a selection process where another relative was a candidate.

These precedents, dating from 2009 to 2014, were available to the City as guidance in this case.

The City argues that Mr. Roche’s 268A disclosure distinguishes this case from those prior precedents. The Commission was entirely within its authority to disagree. For one thing, the disclosure occurred in November 2015, when Mr. Roche stated that his nephew was ranked 45th in a field expected to generate 15 appointments. The evidence of favoritism emerged, in significant part, through events that post-dated this disclosure. Those events that made bypass of candidates whom Mr. Roche did evaluate -- like Mr. Lima -- much more likely to result in appointment of Candidate A. Even more importantly, the question is not whether Mr. Roche violated c. 268A, but whether Mr. Lima received a selection process that was free from favoritism and bias. The Hearing Officer’s conclusion on this point, adopted by the Commission, is eloquent and convincing:

While I respect Mr. Roche’s sincere belief that his decision to recommend bypassing Mr. Lima was unrelated to his nephew’s candidacy, the stark contrast in how these two (2) candidates were reviewed creates, at minimum, the perception that there was not a level playing field.

For example, when Mr. Lima told the interview panel that his absences at the Sheriff's office were related to workplace conditions for which he had filed a workers compensation claim, Mr. Roche personally asked the City's Police Department to effectively re-open Mr. Lima's background investigation and pose a series of specific questions to the Sheriff's office about Mr. Lima's workers compensation claim. In contrast, when, as part of a follow-up background investigation, it was determined that Mr. Roche's nephew was no longer employed at Macy's there was no request to follow-up with Macy's regarding why this relatively short employment had come to an end. In fact, the City actually cited Candidate A's "strong work history" as a reason for selecting him over Mr. Lima. The record shows an understandably limited work history for Candidate A, who had only graduated from high school a few years earlier. Mr. Roche should not have played any role in reviewing the background investigation of his nephew or any other candidates, including those ranked above his nephew who were competing for the same position.

For the same reasons, Mr. Roche should also not have been involved in interviewing and ranking other candidates who were in direct competition for the same position being sought by his nephew.

More globally, I was troubled by what seemed to be an inclination to view the results of background investigations through a different lens, depending on whether the candidate was known to the City because of his relation to incumbent employees. For example, when Mr. Lima's current longtime employer stated that he was a good employee "when he showed up," the investigator drew a negative inference and asked for more detailed information. In contrast, when a recent former employer labeled a candidate ranked below Mr. Lima as "lazy and unreliable," the police lieutenant conducting the background investigation opted to write a "personal note" referencing the work ethic of the candidate's family members who were employed by the City. Put simply, this is the type of disparate treatment of candidates that the civil service system is meant to prevent.

The Commission's findings on favoritism, and the evidentiary support for them, are rational and supported by the evidence. They reflect the Commission's expertise and experience in identifying indicia of favoritism and dealing with favoritism in municipal appointments throughout the Commonwealth, and set a consistent, clear guide for cities and towns in following basic merit principles.

The City, on appeal, largely avoids the facts that the Commission found troubling. That approach leaves little room for the Court to do anything but affirm the Commission.

In any event, the Court has absolutely no hesitation in affirming the Commission's well-reasoned analysis of a pattern of favoritism in the selection process, to the advantage of applicants with connections to City employees.

The City does argue that it had sound reasons for bypassing Mr. Lima. That may be, but it is beside the point, because the City violated its duty to apply basic merit principles. The Hearing Officer did not ignore, or fail to address, those reasons, as the City contends. Rather, he explained:

... The lack of a level playing field here makes it difficult, at best, to determine whether the City would have viewed Mr. Lima's background and answers in a different lens if he, like other lower-ranked candidates, had strong familial connections to City employees. For example, would the interview panel have given more weight to the fact that Mr. Lima had filed a claim for workers compensation before drawing negative conclusions about his time and attendance if his father was a District Fire Chief for the City? Would they have given more weight to the fact that he was, at least for some period of time, out of work, when evaluating his credit history if his father was a building inspector for the City? Finally, would they have accepted what, at least to me, appeared to be his sincere statement that he has never disobeyed an order during his long career in public safety before concluding that they had "grave concerns" about his ability to follow the chain of command if his brother was a firefighter for the City?

As is evident from this passage, the Commission did not ignore the stated deficiencies in Mr. Lima's background, contrary to the City's argument (Mem. at 16). Rather, it noted that a fair process could have viewed those shortcomings as either unsupported or less serious than those of successful candidates A, B or C.

The Commission had ample authority to require the City to comply with its statutory responsibility to apply basic merit principles. See City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997) ("When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for

intervention by the commission.”). Unless and until the City complies with that duty, it has not impartially or lawfully adopted any reasons for bypassing Mr. Lima that would warrant review or deference by the Commission or the Court. “Mr. Lima deserves to be evaluated as part of a process that, at a minimum, has not been compromised by a perception that a different standard was applied to candidates whose relatives were longtime employees of the City.” Decision at 22. Accordingly, neither the hearing officer nor the Court has reached the question whether, given a fair process, Mr. Lima’s record would justify a bypass. That question will be answered only after the City first applies basic merit principles.

Finally, the City argues that, because “only 14 persons were hired to fill the 15 spots available from” the second certification, “no bypass of Mr. Lima was necessary to reach Candidate A” City Mem. at 17. If this is a stand-alone argument, it was waived by failure to present it to the Commission as such in the pretrial hearing memorandum or the proposed decision submitted by the City. See generally Boston Neighborhood Taxi Association v. Department of Public Utilities, 410 Mass. 686 (1991) (An argument that was not presented to the agency for decision has been waived). To the extent that the City claims that “[t]he Commission failed to recognize this important fact,” its claim is contradicted by the record.¹ As part of the argument that the City had

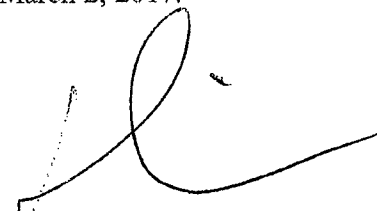
¹ The City cites AR 800, which corresponds to hearing exhibit 41. The Hearing Officer’s Finding #75 makes findings regarding Exhibit 41, including that “On September 13, 2016, the City’s Mayor signed a ‘Notice of Employment’” The Hearing Officer noted that ‘Candidate A was the last name listed on the Notice of Employment as he was in the last tie group from Certification No. 03715 (Exhibit 41).’ It is true that the finding refers to “the names of twenty-four (24) additional candidates,” when the list actually included 14 names. Given that Exhibit 41 was stipulated and contained no ambiguity as to the number of candidates, the Court treats the mistake in referring to the number of candidates as a clerical error having no legal significance on appeal.

no "improper motive for hiring Candidate A," the Hearing Officer reasonably rejected this argument. For one thing, the City itself argued (AR 88) that it "thought that it could only hire 14 candidates (2N + 1)" off the second list because only 29 candidates signed the certification. Given the City's thinking, it was, indeed, necessary to bypass Mr. Lima in order to appoint 14 candidates. Moreover, the City's original plan was to hire 25, not 30 reserve firefighters. Why it needed to appoint 14 firefighters of the second list (in addition to the 15 appointed off the first list) to fill 25 total vacancies is, to put it charitably, a mystery. Candidate A was the 14th candidate appointed off the second list – the 29th candidate appointed to fill a mere 25 vacancies – facts that the Hearing Officer specifically noted and was not required to view as coincidental or innocent, let alone exculpatory. These facts amply support the Hearing Officer's concerns of favoritism and, to the extent relevant, his findings regarding the City's intent.

CONCLUSION

For the above reasons:

1. The plaintiff's Motion for Judgment on the Pleadings is DENIED.
2. The defendants' Cross-Motion for Judgment on the Pleadings is GRANTED.
3. FINAL JUDGMENT SHALL ENTER AFFIRMING the Final Decision of the Civil Service Commission, dated March 2, 2017.



Douglas H. Wilkins
Justice of the Superior Court

Dated: January 5, 2018