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SUPERIOR COURT
CIVIL ACTION
No. 08-4038-D

TIMOTHY MACMILLAN,
Plaintiff,

(LAT) vs.

THE MASSACHUSETTS CIVIL SERVICE COMMISSION, DIVISION OF HUMAN
RESOURCES and THE TOWN OF PLYMOUTH,
Defendants.

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

The plaintiff, Timothy MacMillan ("MacMillan"), moves for Judgment on the Pleadings, in accordance with Mass R. Civ. P. 12(c) and Superior Court Standing Order 1-96(4), challenging a decision of an administrative agency under G.L. c. 30A. MacMillan asks the Court to overturn the decision of the defendant, the Massachusetts Civil Service Commission ("the MCSC"), affirming the actions of the co-defendants, the Division of Human Resources ("the HRD") and the Town of Plymouth ("the Town"), in bypassing him for a promotion to Police Sergeant with the Plymouth Police Department. After review of the Administrative Record, and for the following reasons, the plaintiff's Motion for Judgment on the Pleadings is **DENIED**, the Town's Motion for Judgment on the Pleadings is **ALLOWED**, and the decision of the MCSC is ordered **AFFIRMED**.

BACKGROUND

Pursuant to G.L. c. 30A § 14(5), which state that “the review shall be confined to the record,” the Administrative Record reveals the following:

MacMillan was appointed as a full time Police Officer for the Plymouth Police Department in June of 1998 and continues to hold the position of Patrolman. In June of 2004 MacMillan was one of three candidates interviewed for the position of Police Sergeant by Police Chief Pomeroy and the Town Manager. The Town appointed the candidate who was first on the certification list of candidates. In January of 2005 the Town appointed the next name on the list, by then the first person, to another Sergeant position. No interviews were held for this appointment. The plaintiff testified that following this promotion, Chief Pomeroy told him he was “up next on the list.”¹

In the spring of 2005 there was an additional vacancy for Police Sergeant. MacMillan was first on the certification list, scoring 86 on the Civil Service Examination. Martin Mason (“Mason”) and another candidate were tied for second, both with a score of 85. Chief Pomeroy established an interview panel for the purposes of interviewing the candidates for the promotion. The panel consisted of himself and three other Police Chiefs from contiguous towns. Each candidate was interviewed for approximately 30 minutes on June 2, 2005. The panel consisted of Chief Pomeroy, Chief John Ford of the Bourne Police Department, Chief Arthur Parker of the Carver Police Department, and Chief David Cusolito of the Falmouth Police Department. This was the first time Chief Pomeroy had employed an interview panel for promotional appointments

¹ Administrative Record page 120.

at the Plymouth Police Department. The plaintiff testified that he was not notified prior to his interview that he was to be interviewed by a panel.

The panel was given copies of the candidates' resumes, Utilization of Sick Leave Reports, Activity Records for 2003/2004, Arresting/Booking Officer Reports, Citation Issuing Officer Reports and awards and commendations received by the candidates. MacMillan's arrest and citation records are very similar to those of the prior two candidates previously selected for Sergeant position.² The Town did not rely on the same criteria or interview process here that it did for the selection of the prior two candidates for the promotion to Sergeant. The statistics, such as citations, arrests and bookings, relied on for the bypass of MacMillan were not considered significant in prior selections.

Both MacMillan and Mason were in the Plymouth Police Honor Guard. They both had similar use of sick leave. MacMillan was the only military veteran being considered for the promotion. Mason received ten letters of appreciation and two commendations whereas MacMillan had received one letter of commendation from the Town's Fire Chief. Mason worked a day shift whereas MacMillan worked a midnight shift, exposing him to less police activity.³ They were each given 3 to 5 minutes in the interview to provide an overview of their background. Each was asked the same questions or series of questions by the interview panel. At the end of the interview, the candidates were each given the opportunity to tell the panel anything else they thought might help the promotion selection.

On November 9, 2008, at the Administrative Appeal, Chief Pomeroy testified that the panel formed a consensus that during his interview, Mason "was direct, forthright and answered

² Administrative Records pages 79-82.

³ Administrative Record page 82.

the questions exactly how he should have.”⁴ He gave specific answers and examples and exhibited a supervisory personality.⁵ The panel thought that MacMillan performed very poorly during his interview.⁶ The panel members felt that he appeared evasive, unsure, weak, and lacking in command presence.⁷ The answers to the interview questions were judged on impression and consensus. There were no clear right or wrong answers.

Chief Pomeroy testified that the panel unanimously recommended Mason be promoted to the position of Police Sergeant. The decision was based on several factors including Mason’s law enforcement experience in the Sheriff’s Department as a supervisor, his teaching experience, his superior education, his many letters of appreciation and commendation, superior interview performance and personal characteristics such as leadership skills, decision-making abilities, and self-confidence.⁸ Although both candidates possessed all of the necessary qualifications that were established as prerequisites for taking the promotional civil service examination, Mason was found to be the better candidate. On June 9, 2005, the Town notified the HRD in writing that it had selected Mason for the position of Police Sergeant and bypassed MacMillan. The reasons for the decision were included.⁹ On June 30, 2005 the HRD sent a letter to the Town approving Mason’s promotional appointment.

DISCUSSION

I. Standard of Review

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the

⁴ Administrative Record page 45.

⁵ Administrative Record pages 45-7; 53.

⁶ Administrative Record page 44.

⁷ Administrative Record page 45.

⁸ Administrative Record page 53.

⁹ Administrative Record Exhibit 2.

action taken by the appointing authority.”¹⁰ “Any person... aggrieved by a final decision of an agency in an adjudicatory proceeding... shall be entitled to... judicial review.”¹¹ The Court must uphold an administrative agency decision unless it finds that the decision was in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, based on an error of law, made upon unlawful procedure, unsupported by substantial evidence, unwarranted by facts found by the court or record as submitted, or arbitrary or capricious, and abuse of discretion, or otherwise not in accordance with the law.¹² In reviewing an agency decision the Court must “give due weight to the agency’s experience, technical competence, and specialized knowledge, and discretionary authority conferred upon it by statute.”¹³ The appellant seeking review of an administrative decision bears the burden of demonstrating the decision’s invalidity.¹⁴

II. The Town’s Decision for Bypassing MacMillan is Supported by Substantial Evidence

In selecting a candidate for the Police Sergeant position, the Town chose to consider other factors besides the civil service examination scores since the candidates were only separated by one point. MacMillan received a score of 86 and Mason received a score of 85. The Town opted to conduct interviews for the selection process. “Authority for such interviews is implicit in G.L. c. 31, § 25, fifth par...”¹⁵ An interview panel was created and it consisted of four local Police Chiefs, including Chief Pomeroy. MacMillan argued that the interview process was not fair because an interview panel was not used in the last two promotions for Police Sergeant. This argument is irrelevant since both MacMillan and Mason went before the same panel under

¹⁰ City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304 (1997).

¹¹ G.L. c. 30A, § 14(7).

¹² G.L. c. 30A, § 14(7).

¹³ Iodice v. Architectural Access Board, 424 Mass. 370, 375-6 (1997), citing G.L. c. 30A, § 14(7).

¹⁴ Brackett v. Civil Service Commission, 447 Mass. 233, 242 (2006).

¹⁵ Flynn & others v. Civil Service Commission & others, 15 Mass.App.Ct. 206, 208 (1983).

the same circumstances. The process for selecting the candidate changes frequently depending on the town manager but the criteria for selection remains the same.¹⁶ Each town manager has a different process they use for selection.¹⁷ Neither candidate was notified that there would be an interview panel or that their arrests and citation reports were going to be used.¹⁸ Each panel member was provided with background information for the candidates. Each candidate was asked the same set of questions, or series of questions, created beforehand. They were each given thirty minutes for the interview. Chief Pomeroy testified that the interview answers of each candidate were compared and contrasted by the panel. After reviewing those answers along with each candidate's personnel records, the panel unanimously selected Officer Mason for the position. The panel felt that MacMillan performed very poorly in the interview whereas Mason was "direct, forthright, upbeat, positive, and exhibited a strong command presence..."¹⁹

The interview panel gave weight to other factors such as supervisory experience, education, letters of recommendation and commendation, and productivity as a police officer. The panel felt that Mason was the better choice for the position as he exceeded MacMillan in the above named factors as well as his interview. As part of his appeal, MacMillan argues that not enough weight was given to his military background. It is within the discretion of the Appointing Authority to determine how much weight should be given to such a factor, not that of the Commission.²⁰ The Appointing Authority is "invested with broad discretion" in the task of "selecting public employees of skill and integrity."²¹ It is not within the authority of the Commission "to substitute its judgment about a valid exercise of discretion based on merit or

¹⁶ Administrative Record page 93.

¹⁷ Administrative Record page 93.

¹⁸ Administrative Record page 95.

¹⁹ Administrative Record page 45.

²⁰ Majority Appeal Decision page 24.

²¹ Majority Appeal Decision page 22 citing City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304-5 (1997).

policy considerations by an appointing authority.”²² The Town Manager accepted the recommendation of the interview panel and submitted a list of reasons to the HRD for bypassing MacMillan. The HRD accepted these reasons for the bypass and appointed Mason to the position of Police Sergeant.

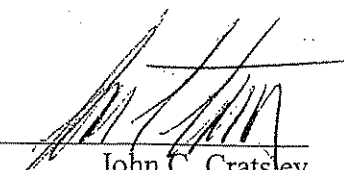
MacMillan claims that the defendants’ decision to allow the bypass is based upon an error of law, is unsupported by substantial evidence, is arbitrary and capricious and thus an abuse of discretion and is made upon unlawful procedure. MacMillan claims that the role of the MCSC is to determine “whether the Appointing Authority has sustained its burden or proving that there was reasonable justification for the action taken by the appointing authority.”²³ I find, for the foregoing reasons, that the MCSC did sustain its burden. As mentioned above, the appointing authority is given great discretion when making their decision. After a full review of the Administrative Record, I find no abuse of discretion or error of law in the MCSC’s decision nor was it arbitrary or capricious. The decision of the MCSC to uphold the bypass was supported by substantial evidence as shown by the Administrative Record.

²² Majority Appeal Decision page 24 citing City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 305 (1997).

²³ City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 305 (1997).

ORDER

For the foregoing reasons, it is hereby ORDERED that the August 7, 2008 decision of the defendant, the MCSC, affirming the actions of the co-defendants, the HRD and the Town, in bypassing MacMillan for a promotion to Police Sergeant in the Plymouth Police Department, is AFFIRMED, that the plaintiff's Motion for Judgment on the Pleadings is DENIED, and that the defendant Plymouth's Motion for Judgment on the Pleadings is ALLOWED.



John C. Cratsley
Justice of the Superior Court

Date: July 21, 2009