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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-876

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KRISTIN MALLOCH

2017 MAY 15 AM 11 59

vs.

COMMONWEALTH OF MASS.
CIVIL SERVICE COMMISSION

TOWN OF HANOVER & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After the town of Hanover (town) bypassed the plaintiff, Kristin Malloch, for promotion to the position of police sergeant in favor of two male candidates, Timothy Kane and Derek Richards, both of whom scored lower than she did on the promotional examination, Malloch appealed to the Civil Service Commission (commission). She alleged, inter alia, gender bias. Although the commission expressed significant concern about possible bias, it ultimately concluded that the bypasses were based on lawful, reasonable grounds. Malloch then brought an action under G. L. c. 30A, § 14, in Superior Court where she prevailed on a separate argument concerning the town's delegation of bypass authority, but that argument was rejected by the Supreme Judicial Court on direct appellate review. See

¹ Civil Service Commission and the chief human resources officer of the human resources division of the Commonwealth.

Malloch v. Hanover, 472 Mass. 783 (2015) (Malloch I). The case was remanded to the Superior Court for a review of the commission decision under § 14. Id. at 800-801.

At the request of the parties, there was no further briefing or oral argument on remand. A second Superior Court judge affirmed the portion of the commission decision that upheld the town's bypass of Malloch for candidate Kane, but found that the bypass in favor of candidate Richards was unsupported by substantial evidence and unwarranted by the facts as found. See G. L. c. 30A, § 14(7)(c) & (f). The second judge, as had the Supreme Judicial Court, see Malloch I, supra at 799-800, and the commission before him, noted multiple factors suggesting that gender bias may have played a role in the town's bypass determination. He subsequently concluded that the record was not sufficiently developed and, as a result, he could not determine whether Malloch was more qualified for the position of sergeant than Richards. To avoid further delay, he remanded the matter directly to the town "with instructions to reassess the qualifications of [Officers] Richards and Malloch under a process that is reasonably related to assessing their relative merits and devoid of gender bias." The town has appealed. For the reasons set forth infra, we reverse in part.

Background. In October, 2011, Malloch took a promotional examination for police sergeant and received a score of eighty-

six. As a result, her name was placed on a list of eligible candidates for police sergeant in the town's police department (department). In April, 2012, when the town needed to fill two vacancies for sergeant, she was ranked first on the list of certified eligible candidates. The other officers on the list - Kane, Karl Buzalski, and Richards -- were ranked second, third, and fourth, respectively. Buzalski later withdrew his candidacy. The three remaining candidates had relatively similar backgrounds. Kane had served in the department for twelve years, and Malloch and Richards had each served for eight; all three held degrees in criminal justice. Their writing samples, submitted as part of the promotion process, were also comparable.

The candidates were then interviewed by a three-member panel comprised of a police lieutenant from the town, a police lieutenant from another town, and a police captain from a third town. The panel asked each candidate the same ten questions, and each panel member scored the candidates on four criteria: "communication skills," "poise-presentation," "appearance," and "response to questions." The panel members each wrote assessments of the candidates, and the assessments were then summarized in a unified report that was delivered to the town's police chief, Walter Sweeney, Jr.

Next, the appointing authority, town manager Troy B. G. Clarkson, joined by Chief Sweeney, conducted his own set of interviews. In contrast to the panel, which had posed ten questions, Clarkson posed only two. He asked the candidates to name their favorite book -- a question admitted to be substantively irrelevant -- and to describe the difference between leadership and management. On or about October 1, 2012, Kane and Richards were selected for promotion, both bypassing Malloch. See G. L. c. 31, § 27 (procedure for bypassing highest scoring individual on certified list of eligible candidates).

Malloch timely appealed to the commission, see G. L. c. 31, § 2(b), alleging, among other things, that the decision to bypass her was the result of gender bias. Following a full hearing, the commission found significant reasons to be concerned that gender bias had infected the process. Only two women served in the department, neither as a superior officer; and the members of the panel, Clarkson, and the police chief were all men. The written materials, including the panelists' individual reports and the combined report given to Chief Sweeney, were replete with language reasonably suggestive of bias, including phrases such as "poise-presentation" and "command presence." Bias was also suggested by the manner in which Clarkson and Chief Sweeney reacted to the candidates'

answers about their favorite book.² Malloch identified Watership Down, by Richard Adams, and Richards stated that he does not read books for entertainment, but that he does read the department policy manual when he has spare time. The commission found that Chief Sweeney was dismissive of Malloch's answer; he recalled that she had read a "book about animals," or words to that effect. The reaction to Richards's answer, on the other hand, was positive. Clarkson praised Richards for his honesty, saying Richards did not "try to think of something we wanted to hear," and he apparently did not think Richards was being ingratiating by saying that he read the department policy manual in his spare time. In addition to these specifically cited factors, the record is replete with various other indicia that might suggest bias.³

Notwithstanding, the commission found that the town chose to bypass Malloch on reasonable, lawful grounds because of her relatively poor performance in the interviews. The panel members felt that Malloch was nervous and lacking in confidence.

² Clarkson admitted the question was irrelevant, claiming he wanted only to gauge how candidates handled an "out-of-the-box" question that was "perhaps out of their law enforcement comfort zone."

³ There are repeated references to a sergeant's subordinates as "the men," and references to junior officers as the "new guys." Additionally, one panel member, in his written assessment of candidates, prefaced a criticism of Malloch by characterizing her response to a question as "a nice statement," a phrase reasonably suggestive of a derisive attitude.

They also took issue with the substance of her responses to certain questions. For example, the candidates were asked how they would improve department efficiency, and Malloch simply said that she would "get more officers on the road," or words to that effect.⁴ In response to a hypothetical question about responding to an active shooter situation, Malloch gave a vague response -- "go in," essentially -- without meaningfully elaborating on tactical considerations. And, when Clarkson and Chief Sweeney asked about the difference between leadership and management, Malloch, despite seeming to reflect thoughtfully on the question, was essentially "stumped" and unable to offer a complete answer.

Kane and Richards had more successful interviews. Both officers exhibited confidence, and Kane, in particular, was seen as an outstanding candidate, capable of instilling confidence in others. Kane was also praised for his ability to draw on his experience and provide thoughtful answers to the questions. Richards had a more detailed response to the question about improving efficiency, suggesting a field training program. Both Kane and Richards gave thorough answers to the active shooter hypothetical, including tactical details. And, when asked by

⁴ In subsequent testimony, Malloch elaborated meaningfully on her response, essentially saying that officers frittered away too much time at the police station, not actively engaged in any kind of work.

Clarkson about the difference between leadership and management, both Kane and Richards gave thoughtful answers that convinced Clarkson that they understood the differences between the two and the importance of both.

The second judge's decision. As we have previously noted, the judge upheld the bypass in favor of Kane, but not the bypass in favor of Richards. The judge concluded that Clarkson, the appointing authority, had given "very little" weight to the panel's recommendation, had not reviewed Malloch's personnel file, and relied almost entirely on his own judgment in making the bypass decision. The only relevant question he posed was that concerning leadership and management, and the judge concluded that the answers to this question, alone, would not provide an adequate basis for a bypass decision. The judge then ordered the matter remanded to the town.

Standard of review. Pursuant to G. L. c. 31, § 2(b), the commission was required to determine, based on a preponderance of the evidence before it, whether there was reasonable justification for the appointing authority's action. Brackett v. Civil Service Commn., 447 Mass. 233, 241 (2006). "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.'" Ibid., quoting from Selectmen of Wakefield v. Judge

of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928).

In an appeal to the Superior Court, the reviewing judge is not to substitute his own judgment for that of the commission; rather, he must determine whether its decision was supported by substantial evidence. Ibid.

Discussion. The town argues that the judge improperly weighed the evidence of bias and improperly substituted his own findings for that of the commission.⁵ We address each contention in turn.

1. Bias. The town contends that the judge erred in his assessment of the factors indicative of bias. Although the judge, like the commission, expressed significant concerns about various factors indicative of bias, neither he nor the commission concluded, definitively, that bias actually infected the process or motivated the town's bypass of Malloch in favor of Richards. Notwithstanding the absence of such a finding, we address the points raised by the town as the specter of bias has loomed over the proceedings.

The town first challenges the relevance of the fact that the town employs only two female police officers, neither in a

⁵ The town also argues that the remand order violates civil service laws and the rights of Officer Richards, who was not a party to these proceedings. Because we agree that the commission decision should have been affirmed, we do not address this issue.

supervisory capacity.⁶ True, there are a variety of nondiscriminatory reasons why this may be the case, however other explanations do not render statistical evidence wholly irrelevant, especially in the context of many other factors suggestive of bias. Cf. Lipchitz v. Raytheon Co., 434 Mass. 493, 508-509 (2001) (statistical evidence may support inference of bias in discrimination claims under G. L. c. 151B).

Second, the town asserts that the judge selectively ignored evidence that favored it and, more specifically, the fact that Clarkson, the appointing authority, had appointed women to two high ranking positions in other departments within the town;⁷ and, that while serving as town manager in a different municipality, Clarkson had actually appointed the first female police sergeant. While these facts may indeed be relevant, the many other factors suggestive of bias provided ample support for the commission's finding, reaffirmed by the judge, that there was legitimate reason for concern.

2. Evidence supporting bypass decision. We now turn to the crux of this appeal, namely, whether there was substantial evidence in the record to support the town's bypass of Malloch in favor of Richards. See Brackett, 447 Mass. at 241. In

⁶ The town does not challenge the evidentiary support for these findings and, indeed, each and every one finds ample support in the record.

⁷ He appointed a finance director and an interim deputy fire chief.

ruling there was not, the judge relied on Clarkson's testimony that he gave "very little" weight to the interview panel, did not review Malloch's personnel file, and was left to make his decision based only on the candidates' answers to his question about the difference between leadership and management. The record does not support this assessment.

First, Clarkson testified that it was only prior to his interviews that he gave "little" weight to the panel's recommendation. On cross-examination, when Malloch's attorney repeated Clarkson's earlier testimony that "the views of the panel members weren't really of significance to you in making your final decision," Clarkson interrupted to disagree with that characterization, saying that he understood the original question as focused on the relevance of the panel recommendation "prior to the interview." Clarkson testified that, after the interviews, he took time to collect his thoughts, review the panel's recommendation, and make a thoughtful and reasoned decision.

Additionally, while it is true that Clarkson did not review Malloch's personnel file, neither did he review the other candidates' files.⁸ Chief Sweeney, however, did, and after the interviews, he discussed them with Clarkson and informed

⁸ Clarkson did, however, review the candidates' resumes and writing samples.

Clarkson that none of the candidates had records of discipline, all of them had commendations and, as a whole, their files were "extremely similar."

Lastly, while it is true that Clarkson only asked two questions, the record reflects that Chief Sweeney posed two of his own, both facially relevant. He asked the candidates to describe their leadership styles, and he asked them to describe a time when they led an investigation. Chief Sweeney described the content of the candidates' answers; he described his assessment of the answers, cogently explaining why he felt that Malloch's answers were, comparatively, lacking; and, after the interviews, he testified that he spoke with Clarkson and the two discussed their assessments.

Conclusion. Although there were legitimate reasons to be concerned that gender bias may have infected this process, the record contains substantial evidence to support the commission's conclusion that the town acted on reasonable, lawful grounds in choosing to bypass Malloch in favor of Richards. The commission decision should have been affirmed in its entirety. So much of the judgment that remanded the case to the town is reversed. The case is remanded for entry of a new judgment affirming the

commission decision in full.

So ordered.

By the Court (Vuono,
Carhart⁹ & Kinder, JJ.¹⁰),

Joseph F. Stanton

Clerk

Entered: May 15, 2017.

⁹ Justice Carhart participated in the deliberation of this case prior to his retirement.

¹⁰ The panelists are listed in order of seniority.