

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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SUPERIOR COURT
CIVIL ACTION
NO. 2013-01169-G2014 APR 30 P 4:13
KRISTIN MALLOCH
COMMONWEALTH OF MASS.
CIVIL SERVICE COMMISSION
vs.Notice sent
3/04/2014
F. J. Mc.
L. W. E.
F. & B.
K. P. F., JR.
B. F. B.TROY B.L. CLARKSON¹ & others²MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS

(sc)

INTRODUCTION

The plaintiff, Kristin Malloch, brings this action pursuant to G. L. c. 30A § 14 and G. L. c. 31, § 44 seeking judicial review of the Massachusetts Civil Service Commission's decision affirming the Town of Hanover's decision to bypass Malloch for a promotion within the Hanover Police Department. For the following reasons, the plaintiff's Motion for Judgment on the Pleadings is ALLOWED.

BACKGROUNDA. Police Sergeant Promotion Process

The plaintiff is a police officer in the Town of Hanover. On October 15, 2011, the Town conducted a civil service examination to establish a list of candidates eligible to be promoted to police sergeant. There were two police sergeant positions available. The plaintiff received a score of 86 on the exam and was the highest-ranking candidate. The next highest-ranking

¹ As Town Manager/Appointing Authority for the Town of Hanover

² Christopher Bowman, as Chairman of the Massachusetts Civil Service Commission, and Paul Dietl, as Chief Human Resources Officer of the Division of Human Resources, which in this decision is referred to as the Human Resources Division ("HRD"), which is what that defendant and the other parties call it in their briefs.

candidates, in order of their exam scores, were Officer Timothy Kane, Officer Karl Buzalsky, and Officer Derek Richards.

A panel consisting of police officers, including senior officers from neighboring towns, the Town Manager, and the Chief of Police reviewed the exam scores and interviewed the eligible candidates. The Town Manager, defendant Troy B.L. Clarkson, made the final decision based on his observations, review of the interviews, and Police Chief Walter Sweeny's recommendations. Although the plaintiff received the highest exam score, Clarkson decided to bypass her for the promotion, and instead promoted Officers Kane and Richards.

B. General Laws c. 31, § 27 – Bypass Promotions

Under G. L. c. 31, § 27, if an appointing authority,³ such as the Town, decides to promote a qualified candidate other than the candidate who scored highest on an eligibility exam (in this case the plaintiff), the appointing authority must prepare a statement of reasons for the bypass.

Specifically, G. L. c. 31, § 27 provides in relevant part,

If the appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest [here, the plaintiff], and the person whose name is highest is willing to accept such appointment, **the appointing authority shall immediately file with the administrator [here, the Human Resources Division] a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator.** The administrator shall make such statement available for public inspection at the office of the department. (Emphasis added).

³ General Law c. 31, § 1 defines "appointing authority" as "any person, board or commission with power to appoint or employ personnel in civil service positions." In this case, the Town of Hanover is an appointing authority because it has authority to appoint civil service personnel, such as police officers. Compare Lopez v. Massachusetts, 588 F. 3d 69, 74-75 (1st Cir. 2009) (applying Massachusetts law) (cities and towns function as "appointing authorities" under G. L. c. 31). Thus, in this decision, references to the appointing authority shall include the Town of Hanover, as well as defendant Clarkson, sued here, perhaps imprecisely, as "Town Manager/Appointing Authority."

C. General Laws c. 31 § 5(l) and the Human Resources Division's Attempt to Delegate Section 27 Functions

General Laws c. 31, § 5(l) states that the “administrator,” that is, the Human Resources Division,⁴ has the power to “delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth.” In 2009, in response to increasing budgetary concerns, HRD exercised its power under G. L. c. 31, § 5(l) and delegated to the appointing authorities, such as the Town, its functions under G. L. c. 31, § 27—namely its authority to “receive” the appointing authorities’ statements of reasons for a bypass.

D. Town's Statement of Bypass Reasons and the Plaintiff's Appeal

On September 27, 2012, Clarkson mailed to the plaintiff a statement of reasons explaining why the Town bypassed her for the promotion. The plaintiff appealed the bypass decision to the Civil Service Commission. The Commission held a hearing on December 12, 2012, and on February 27, 2013, issued a decision affirming the Town's bypass decision and dismissing the plaintiff's appeal.

The plaintiff now seeks judicial review of the Commission's decision pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14, arguing that the defendants violated G. L. c. 31, § 27. The plaintiff argues that G. L. c. 31, § 27 requires HRD to review and approve the Town's statement of reasons for a bypass, and in this case HRD failed to do so. The defendants, however, argue that HRD is not required to review or approve the Town's statement of reasons, because in September 2009 it delegated that function to the appointing authorities, and such delegation was permissible under G. L. c. 31, § 5(l).

⁴ General Laws c. 31, § 1 defines “administrator” as “the personnel administrator of the human resources division within the executive office for administration and finance.”

DISCUSSION

Under G. L. c. 31, § 44, a party aggrieved by a final order or decision of the Commission may seek judicial review in the Superior Court. Such judicial review shall be governed by G. L. c. 30A, § 14. See G. L. c. 31, § 44. Central to the plaintiff's position is that the Commission erred because its failure to require HRD to perform a substantive review of the Town's bypass reasons, as well as HRD's delegation to the Town of its obligations under G. L. c. 31, § 27, was inconsistent with the law of Massachusetts. See G. L. c. 30A, § 14(7)(c) ("the court may set aside or modify the decision...because the agency decision is...(c) based upon an error of law").

As the defendants note, administrators such as HRD have broad power to delegate to cities and towns the administrative functions of the civil service system. See Staveley v. City of Lowell, 71 Mass. App. Ct. 400, 406-407 (2008). The only apparent statutory limitation on this power to delegate is that such delegation must be "practicable." See G. L. c. 31, § 5(1) (administrator may delegate administrative functions "so far as practicable . . ."). In this case, the parties dispute whether it is "practicable" for HRD to delegate its Section 27 functions.

A. The Meaning of "Receive" in G. L. c. 31, § 27

Whether it is practicable for HRD to delegate its Section 27 functions depends on the meaning and purpose of Section 27, and in particular, the meaning of "receive" as used in Section 27. See G. L. c. 31, § 27 (bypass promotion "shall be effective only when such statement of reasons has been received by the administrator.") The plaintiff argues that "receive," as used in Section 27, does not merely require the administrator to act as a depository for the statement of reasons. Rather, the plaintiff argues that "receive" means the administrator must review and approve the statement of reasons. I agree with the plaintiff.

MacHenry v. Civil Service Comm'n, 40 Mass. App. Ct. 632 (1996), specifically addressed the meaning of “receive” as used in G. L. c. 31, § 27. The court held that “receive” as used in Section 27 does not render the administrator a mere “ministerial depository.” Id. at 635 (such interpretation is inconsistent with the civil service law’s goal of preventing bias and favoritism; various levels of review, including review by HRD, ensure that bypass decisions are based on “basic merit principles”). Rather, the court held that Section 27 requires the administrator to review, accept, and approve the appointing authority’s statement of reasons. Id. at 635-636 (Section 27 requires the administrator to review the statement of reasons and gives it authority to pass on the validity of those reasons).

Bielawski v. Personnel Administrator of the Div. of Personnel Admin., 422 Mass. 459 (1996) (rev’d on other grounds), further supports my conclusion that “receive” means review and approve. Although Bielawski did not directly address the meaning of “receive,”⁵ the decision was based on the assumption that Section 27 requires the administrator to conduct a substantive review of the bypass reasons and approve those reasons. See id. at 461, 466 (“procedural scheme requiring approval by the personnel administrator [that is, HRD] . . . satisf[ies] the requirements of due process.”).

At least one Superior Court opinion also adopted this meaning of “receive,” and in the course of its analysis equated “receive” with conducting a substantive review. Tierney v. Civil Service Comm’n, 1996 LEXIS 328, *8-9 (Mass. Super. Ct. 1996) (Garsh, J.). I, too, adopt this construction, because that is how the Supreme Judicial Court and the Massachusetts Appeals Court interpreted the word “receive” in Section 27, in Bielawski and MacHenry, respectively.

⁵ Such an analysis was unnecessary in Bielawski because in that case the administrator did in fact review the appointing authority’s bypass reasons. See 422 Mass. at 461.

B. The Delegation of Section 27 Functions is not Practicable

Because “receive” as used in Section 27 means review and approve, it is not practicable for HRD to delegate this function to appointing authorities such as the Town. See G. L. c. 31, § 5(I) (administrator may delegate administrative functions “so far as practicable.”). As noted, Section 27 requires the appointing authority (the Town) to file a statement of bypass reasons with the administrator (HRD) and states that the appointment shall be effective “only when such statement of reasons has been received by the administrator.” If HRD could delegate this function to the Town, it would mean that under Section 27, the Town files a statement of reasons *and* “receives” that statement of reasons. Where “receive” means review and approve, it is illogical for the statutory scheme to allow the Town to review and approve its own statement of reasons. See Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999) (statute should not be construed in a way that would lead to an absurd result or contravene the legislature’s clear intent). Further, as the MacHenry court reasoned, if Section 27 merely required the administrator to act as a depository, it would “render . . . superfluous the panoply of Section 27 requirements. If [HRD] were only to be a depository and to play no reviewing role, it is unclear what purpose would be served by requiring that the filing with [HRD] be immediate and available for public inspection, and that it be a precondition of the appointment’s becoming effective.” 40 Mass. App. Ct. at 635-636.

My conclusion that HRD must review and approve bypass reasons and that it is not practicable to delegate this function is consistent with the meaning and purpose of the civil service law. The purpose of the civil service system is to recruit, choose, and promote civil service employees based on merit principles, to prevent political consideration, bias, and favoritism, and to protect public employees from partisan political control. See Cambridge v.

Civil Service Comm'n, 43 Mass. App. Ct. 300, 304-305 (1997). The civil service law's procedural scheme furthers this purpose by requiring a system of review by various entities. See Bielawski, 422 Mass. at 466 (the procedural scheme requiring *approval* by the personnel administrator (HRD), allowing an appeal of the approved reasons to the Civil Service Commission, and then providing limited judicial review by the courts, satisfies the requirements of due process); MacHenry, 40 Mass. App. Ct. at 635 (as part of the procedural scheme which protects and furthers civil service merit principles, the personnel administrator must review an appointing authority's statement of reasons under Section 27).

If HRD could delegate Section 27 reviews to the Town and allow the Town to approve its own statement of reasons, it would destroy a procedural safeguard that the appellate courts have stated is useful to prevent bias, favoritism, and political consideration. See MacHenry, 40 Mass. App. Ct. at 635 (reducing personnel administrator's "role in the [Section 27] bypass process to that of ministerial depository, flies in the face of [its] responsibilit[y]" to evaluate civil service applicants "in accordance with basic merit principles" and "to administer, enforce, and comply with the civil service laws and rules."). In contrast, requiring HRD to review and approve the Town's statement of reasons is consistent with the civil service law's procedural scheme and purpose of protecting and furthering civil service merit principles. See id. at 635 (in the context of the civil service law as a whole, it is reasonable to interpret Section 27 as giving the administrator authority to review and not merely formally receive bypass reasons).

C. Conclusion

I do not suggest that the Town based its decision on anything other than merit; indeed, I applaud its decision to involve in the selection process senior police officials from neighboring towns, who presumably do not know the candidates for promotion. I also acknowledge the


defendants' argument that under G. L. c. 31, § 5(l) the administrator has broad delegation powers. (sc)

But the scope of those delegation powers must be viewed in the context of the civil service law as a whole, and any delegation must be consistent with its purposes. See Staveley, 71 Mass. App. Ct. at 407. Those purposes and principles entitled the plaintiff to a substantive review by HRD, and it is not "practicable" to delegate to the Town the authority to review and approve bypass reasons under G. L. c. 31, § 27.⁶

As a form of relief, the plaintiff asks for a declaration that Officer Kane's and Officer Richards' promotions must be vacated and that the defendants must promote the plaintiff to sergeant. As an alternative, the plaintiff asks me to remand the matter to the Civil Service Commission and HRD and instruct them to remand the entire promotional process back to the Town for compliance with G. L. c. 31, § 27. I conclude that the fairer course is to remand the matter, with the instructions provided below.

ORDER

For the foregoing reasons, the plaintiff's Motion for Judgment on the Pleadings is ALLOWED. This case is remanded to the Civil Service Commission and the Human Resources Division. In compliance with G. L. c. 31, § 17, the Town of Hanover is to file its statement of bypass reasons with the Human Resources Division, which is to decide whether to approve those reasons after a substantive review.



Paul D. Wilson
Justice of the Superior Court

February 28, 2014

⁶ The plaintiff also argues that the Commission's decision affirming the Town's bypass decision was not based on substantial evidence. Because I conclude that the defendants violated G. L. c. 31, § 27, it is unnecessary to address the merits of this claim.