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COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

NOTICE

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2013-01169-G  
RECEIVED

KRISTIN MALLOCH,  
Plaintiff/Petitioner,

APR 12 2016

vs.

MA Off. of Attorney General  
Administrative Law Division

CIVIL SERVICE COMMISSION, TOWN OF HANOVER, et. al,  
Defendant/Respondents.

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

Pursuant to G. L. c. 30A, § 14, the plaintiff, Kristin Malloch ("Malloch"), appealed the unanimous (one commissioner not participating) February 21, 2013 decision of respondent Civil Service Commission (the "Commission"), upholding a decision of respondent Town of Hanover (the "Town") to bypass Malloch for a promotion to police sergeant. A Superior Court judge ruled that the Commission's procedures violated G.L. c. 31 and entered judgment on the pleadings in favor of Malloch. The Supreme Judicial Court ("SJC") vacated the Superior Court judge's order, finding that the Commission's review process was procedurally valid, and remanded the case to the Superior Court to review the Commission's decision on the merits. Malloch v. Town of Hanover, 472 Mass 783 (2015). The parties waived further submission of briefs and oral argument. For the below reasons, Malloch's motion is ALLOWED, and the matter is remanded to the Town for a new hearing on the decision of whether to promote Officer Richard or Malloch to the position of sergeant.

Notice Sent  
4-8-16

## **DISCUSSION**

### **A. The Legal Standard**

#### **1. Review in general under G.L. c. 30A, §14(7).**

Pursuant to G.L. c. 30A, § 14(7), this Court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."

Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 868 (1997).

Petitioner bears the burden of demonstrating the invalidity of the Commission's decision.

Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App.

Ct. 470, 474 (1989). In 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" by statute. G.L. c.

30A, § 14(7) (1997); see Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420

(1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713,

721 (1988). The reviewing court may not substitute its judgment for that of the agency.

Southern Worcester County Regional Vocational Sch. v. Labor Relations Comm'n, 386

Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages

Control Comm'n, 372 Mass. 152, 154 (1977).

#### **2. Review of Commission bypass decisions**

In reviewing bypass decisions:

General Laws, c. 31, § 2(b), requires the [C]ommission to determine, on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that

there was reasonable justification for the action taken by the appointing authority.

Brackett v. Civil Service Commission, 447 Mass. 233, 241 (2006) (quotations and additional citations omitted). 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.” Malloch, 472 Mass. at 800 (quotations and additional citations omitted).

**B. Application of the Legal Standards**

This Court affirms the Commission’s decision to the extent that it upheld the Town’s bypass of Malloch in favor of Officer Kane. The record reflects that Officer Kane was the most qualified candidate. Among other support for this conclusion, he performed well at his interview with the town manager and police chief, and all three members of the panel of superior police officers who interviewed Kane gave him a perfect score of 20 out of 20. However, the Court finds that the Town’s bypass of Malloch in favor of Officer Richards was “[u]nsupported by substantial evidence,” G.L. c. 30A, §14(7)(e), and “[u]nwarranted by facts found...on the record.” G.L. c. 30A, §14(7)(f). Therefore, the Commission could not properly have found that the Town met its burden of proving, by a preponderance of evidence, that the Town’s decision was “sufficiently supported by credible evidence, when weighed by an unprejudiced mind.” Malloch, 472 Mass. at 800.

As the SJC and the Commission both noted in their respective decisions, there are multiple factors in this case “supporting a concern that gender bias might have played a role in the bypass determination, which would be a violation of basic merit principles.” Malloch, 472 Mass. at 799-800. Factors cited by the SJC and the Commission include

that (1) the town employs only two female police officers; (2) no female has ever served as a superior officer in the Town; (3) the Town used all-male interview panels; (4) the police panel rated officer Malloch below her male colleagues for reasons partly related to “poise-presentation” and lack of “command presence;” (5) members of the review panels met jointly prior to their Commission testimony, and parts of their testimony about Malloch’s nervousness sounded rehearsed and exaggerated, in contrast to their comments about the nervousness of a male candidate who was promoted; and (6) in response to an interview question about reading, the police chief was dismissive about Malloch’s choice of a novel, while the town manager praised a male candidate’s “candor” for stating that he did not read books. *Id.* at 800, n. 16. The record below further reflects that (1) of the three candidates, Malloch received the highest score on the civil service exam; (2) Malloch had served in the Town’s police department for eight years, with nothing in the record to suggest any misconduct or even deficiencies in her performance; and (3) Malloch was highly praised (as were the male applicants) for her written submission. See A. 352-354.

Although the Commission expressed concerns about the possible role of gender bias in Malloch’s bypass, it upheld the Town’s decision, primarily for two reasons. First, the Commission gave substantial weight to the rankings of the three-member panel of superior officers. A. 362-363. Second, the Commission found that Malloch had given insufficiently specific and inadequate answers to some questions. A. 363. In the view of this Court, these findings are not sufficiently supported by the record to sustain the Town’s burden.

The rankings of the three-member panel are of limited relevance in this case, because the town manager testified that he gave “very little” weight to the panel, relying almost entirely on his own judgment in making bypass decision. A. 250. Nor did the town manager even look at the applicants’ personnel files. A. 255. And yet, the town manager asked each applicant only two questions. One question was about the applicants’ book reading habits. The town manager admits that this question had little or no relevance to the candidates’ qualifications for the job. A. 251. Moreover, somehow the town manager was more impressed by the “candor” of the male applicant (Officer Richards), who said he never reads books, than by the female applicant (Malloch), who was able to describe a novel she had read.<sup>1</sup>

The town manager’s second question asked about the difference between management and leadership. This was the town manager’s only question that had direct bearing on the issue of who would make the best police sergeant. See A. 251. And yet, when Malloch responded that the question was a good question that required thought, the town manager did not ask her to respond further. A 252-253. Admittedly, Malloch’s response did not show leadership. However, if the town manager’s recollection is accurate, he was left with no rational basis on which to assess Malloch’s qualifications for the job. Assuming for argument’s sake that one question on the difference between management and leadership provides a rational basis for a police promotion decision, which this Court questions, the record does not support the town manager’s selection of Officer Richard over Malloch based on what the record reflects of their responses.

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<sup>1</sup> Although Officer Richards was praised for his candor when admitting that he never read books, Malloch was criticized for her candor when admitting that there were go-to officers on her shifts other than herself. See A. 355, 358.

In sum, based on the above-noted factors raising gender-bias concerns, the fact that the town manager gave “very little” weight to the interview panel and yet asked the applicants only two questions, the content of the questions, the responses of Officer Richards and Malloch to the question on reading books, the town manager’s failure to obtain a response from Malloch to his “leadership/management” question, and the town manager’s failure to review Malloch’s personnel file or obtain additional information about her, the Commission’s ruling in favor of the Town on its bypass of Malloch must be reversed as not supported by sufficient evidence.

### **C. Remedy**

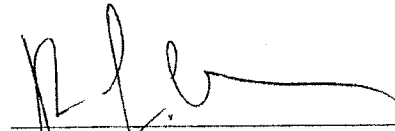
This Court has the authority to order the Town to appoint Malloch to the position of sergeant, particularly given the length of time that has passed since the Town’s decision. See Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination, 450 Mass. 327, 343-344 (2008); Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966). However, the job of a supervisory police officer has extraordinary responsibilities, including managing officers whose lives are sometimes at risk. This Court does not have a sufficient basis on the record – indeed, it has no basis – to decide whether Malloch was more qualified for the position of sergeant in 2012 than was Officer Richards. Remand to the Commission is another available remedy, but the Court fears that this would only lead to further delay. Therefore, the Court remands the matter to the Town, with instructions to reassess the qualifications of Officer Richards and Malloch under a process that is reasonably related to assessing their relative merits and devoid of gender bias.

**CONCLUSION AND ORDER**

Plaintiff's Motion for Judgment on the Pleadings (Docket # 9) is **ALLOWED**.

The case is remanded to the Town of Hanover for further proceedings consistent with this opinion and the opinion of the Supreme Judicial Court in Malloch v. Town of Hanover, 472 Mass. 783 (2015).

Dated: April 6, 2016

  
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Robert L. Ullmann  
Justice of the Superior Court