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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1882CV00229

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APR 29 2019

MA Off. of Attorney General
Administrative Law Division

ALBERT MAN,
Plaintiff,

vs.

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CLERK OF THE COURTS
NORFOLK COUNTY
4/25/19

MASSACHUSETTS CIVIL SERVICE COMMISSION and CITY OF QUINCY,
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Albert Man, brought this action to seek judicial review of a decision issued by the Massachusetts Civil Service Commission (commission), see G. L. c. 31, § 44, and c. 30A, § 14, that dismissed his appeal of a determination made by the city of Quincy (city or Quincy) to bypass him for appointment with the City's fire department. The case is before the Court now on the plaintiff's and the City's cross motions for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c), in accordance with the Superior Court procedure for resolution of administrative appeals. See Superior Court Standing Order 1-96 (2017).¹

After hearing, and upon review of the administrative record, see G. L. c. 30A, § 14(4) and (5), the Court DENIES the plaintiff's motion and allows the City's cross motion. For the following reasons, the plaintiff has failed to meet his burden "of proving the invalidity of the commission's

¹In response to the plaintiff's motion, the commission, as a nominal party, states that it relies upon its decision and the administrative record filed with the Court, (paper no. 8.2 at 1). See *Reuter v. Methuen Pub. Sch.*, 87 Mass. App. Ct. 1121 (2015) (unpublished); *Desmond v. West Bridgewater*, 94 Mass. App. Ct. 1122 (2019) (unpublished).

decision,” *Mendonca v. Civil Serv. Comm’n*, 86 Mass. App. Ct. 757, 762 (2014), citing *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 242 (2006).

Discussion. The plaintiff frames his motion as a challenge the selection process used by the city when evaluating him for a position with the fire department. Specifically, the plaintiff finds fault with the evaluation of his candidacy “based entirely on a single interview conducted by officers of the Quincy Police Department, who had been assigned to conduct a background investigation of the plaintiff.” (Plf.’s Mot. at 21.) In particular, according to the plaintiff, the “department selection process . . . was flawed because it allowed [his] candidate summary report, which was drafted by the police officer assigned to be the candidate’s background investigator, to become the exclusive source of information for the final appointment or bypass determination of [him].” (*Id.* at 22.) This argument is unavailing.

As an initial matter, insomuch as the plaintiff challenges the validity of the commission’s decision based upon claimed flaws in the procedure, the challenge lacks persuasive force. To be sure, the commission concluded that the “selection process that resulted in the decision to bypass [the plaintiff] was seriously flawed,” albeit for reasons other than that which the plaintiff argues, and, indeed, the commission went so far as to recommend changes in the process going forward, (Admin. Record at 97).² But, the commission nonetheless observed, correctly, that procedural deficiencies, in and of themselves, “are not fatal to an otherwise lawfully grounded bypass . . .”.

²The Court agrees that the deficiencies catalogued by the commission, “from the form of the written application to the way that the ultimate decision is made by the Mayor of Quincy, as the Appointing Authority” (“without the Fire Chief, and, apparently, without formal input from the [Quincy Fire Department]”) are concerning, including for the reasons the commission states in its decision, (see Admin. Record at 98-104).

(*Id.*) Rather, as the commission noted, (see *id.* at 97-98), under settled principles of civil service law, even if an appointing authority has used flawed selection procedures, a candidate's bypass appeal should be denied where "the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process [we]re not so severe that it is impossible to evaluate the merits from the record." *Sherman v. Randolph*, 472 Mass. 802, 813 (2015). And, here, the commission concluded that, in the circumstances of the plaintiff's selection process, the flaws in fact were "not so severe." (Admin. Record at 104.) The Court agrees with this conclusion and finds that it has sufficient support in the record.

Specifically, the administrative record warrants the commission having concluded that the evidence it found likely resulted from procedural flaws either did not have material consequence to the City's bypass determination (i.e., the plaintiff's ostensible failure to have followed certain instructions on the application form; the curtailment of the application process, such that not all the plaintiff's so-called "Positives" apparently were considered; and the time constraints placed upon the plaintiff in submitting his application, but which constraints applied to all candidates equally), or, if it had prejudicial effect to the plaintiff's application (i.e. his "criminal history"), could be set aside and not considered in the evaluation of the bypass appeal. (See Admin. Record at 98-104). In short, as the commission concluded, that the flaws in the selection process, if any, did not afford a basis for disturbing the City's bypass determination.

The more substantive argument made by the plaintiff is that the evidence produced by the selection process failed to provide a legally sufficient foundation for the bypass determination, and, accordingly, that the commission erred, as a matter of law, in finding otherwise. This argument also is unpersuasive. The administrative record supports affirming that the commission

had, as required, “substantial evidence” upon which to ground its decision denying the plaintiff’s bypass appeal. See *Brackett v. Civil Serv. Comm’n*, *supra* at 241-242, and cases cited.

“Substantial evidence” in this context means “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Andrews v. Civil Serv. Comm’n*, 446 Mass. 611, 616 (2006); see G. L. c. 30A, § 1(6). In evaluating whether the record contains such a quantum of evidence, the court “defer[s] entirely to the commission on issues of credibility and the weight to be accorded to the evidence.” *Thompson v. Civil Serv. Comm’n*, 90 Mass. App. Ct. 462, 469 (2016). Under the substantial evidence test, a conclusion made by the commission fails judicial scrutiny only where “the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.” *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 692 (2012), quoting from L.L. Jaffe, *Judicial Control of Administrative Action* 598 (1965). This standard was met here.

The commission’s decision set out two bases for concluding that the City had “reasonable justification,” as required under G. L. c. 31, § 2(b), see *Brackett v. Civil Serv. Comm’n*, *supra* at 241, and cases cited, for its determination to bypass the plaintiff: his “lack of candor” in the application process, (see Admin. Record at 104-108), and his “history” of rejection by other public safety agencies for positions of employment, (see *id.* at 108-113). The commission concluded the former constituted an independent ground to affirm the City’s bypass determination, (*id.* 107-108), and the Court accordingly first addresses that basis.

As relevant thereto, the plaintiff contends that the administrative record does not contain substantial evidence to support the commission’s conclusion regarding his lack of candor. The Court disagrees. As the commission found, the evidence before it disclosed “three problematic

examples of [the plaintiff's] inattention to the application process (at best), and evasive behavior (at worst)" (*Id.* at 106.) The most serious omission the commission found was his "less than forthcoming approach to his current and past gambling habits." (*Id.*) Of particular significance, there was evidence, including statements made by the plaintiff, credited by the commission in the due exercise of its discretion, which permitted the reasonable inference that the plaintiff gambled more than he had disclosed in his application. (See *id.*) Moreover, the commission fairly noted that the plaintiff had acknowledged the fact that he had intentionally omitted information regarding his gambling history, so he would not appear to have a gambling problem. (*Id.*) The commission further found that this application process was not the first such process in which the plaintiff had not been forthcoming about his gambling-related activities and habits, a fact effectively conceded by the plaintiff during his testimony. (*Id.*)

Second, the commission, in essence, found questionable that the plaintiff (a) was unwilling, or unable, to provide the names of any neighbors as a reference, including the neighbors next to whom he had lived, relatively recently, for at least ten years, (*id.* at 106-107); (b) had answered "NO" to the application question that asked whether he knew any Quincy firefighters, despite that, during his interview, he had provided the names of four such firefighters whom he knew, (*id.* at 107); and (c) did not provide a credible explanation for why he had limited his answer as he had done to one of the questions in the "Criminal History" section of his application (*id.*). Third, the commission found "troubling [the plaintiff]'s sketchy knowledge about his finances," and noted especially his lack of diligence in providing the details required by the application concerning his financial obligations as homeowner, landlord, and mortgagee. (*Id.*) Those factual findings and inferences lied within the province of the commission, as a matter of administrative

law, see *Thompson v. Civil Serv. Comm'n*, *supra*, and a fair review of the record reveals that they all had evidentiary support sufficient to meet the substantial evidence standard, see *Police Dep't of Boston v. Kavaleski*, *supra*.

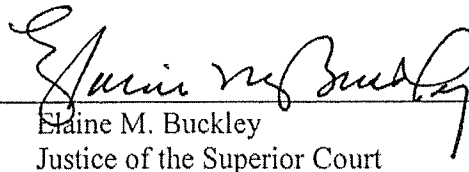
In reviewing a decision issued by the commission, a court must give “due weight to the experience, technical competence, and specialized knowledge of [the commission], as well as to the discretionary authority conferred upon it,” G. L. c. 30A, § 14 (7). *Brackett v. Civil Serv. Comm'n*, *supra* at 241-242. The reviewing court cannot substitute its judgment for that of the commission, *Thomas v. Civil Serv. Comm'n*, 48 Mass. App. Ct. 446, 451 (2000); *Commissioners of Civ. Serv. v. Municipal Court of Boston*, 369 Mass. 84, 89 (1975), and, under general principles of administrative law, does not decide whether, faced with the same set of facts, it would have arrived at the same conclusion, but whether a contrary conclusion was not merely a possible, but a necessary inference, see *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663, 690 (2010), quoting from *Commissioner of Revenue v. Houghton Mifflin Co.*, 423 Mass. 42, 43 (1996).

Here, in so considering the administrative record under that deferential standard, the Court cannot conclude the commission erred in ruling that the plaintiff’s omissions and errors, especially concerning gambling, provided a foundation for the position advanced by the City that he was “too susceptible to both evasiveness and inattention to be trusted with the job of a firefighter.” (*Id.* at 107.) As the commission stated in its decision, (*id.* at 104-105), the civil service laws reflect that heightened scrutiny of a candidate’s good character and integrity is appropriate in the selection of an individual entrusted with the public’s safety and welfare. See, e.g., *Commissioner of the Metro. Distr. Comm'n v. Director of Civil Serv.*, 348 Mass. 184, 193 (1964). (recognizing power and duty

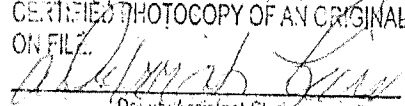
of appointing authority to protect public interest in having only public officers and employees of good character and integrity); *Saliba v. Worcester*, 92 Mass. App. Ct. 408, 414 (2017), quoting *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304-305 (1997) (in firefighter bypass appeal, observing that appointing authorities are invested with broad discretion in selecting public employees of skill and integrity). It was not invalid, on the record of this case, for the commission to affirm the city's determination to bypass the plaintiff for appointment with its fire department, given the evidence the commission reasonably found showed his lack of candor, trustworthiness, and reliability.³

ORDER

It therefore is **ORDERED** that Albert Man's Motion for Judgment on the Pleadings (paper no. 8.0) be, and hereby is, **DENIED**, and that the City of Quincy's Cross Motion for Judgment on the Pleadings (paper no. 8.1) be, and hereby is, **ALLOWED**.


Elaine M. Buckley
Justice of the Superior Court

DATED: *April 24, 2019*

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ON FILE.

Deputy Assistant Clerk

4/25/19

³Because the commission's decision is affirmed on this basis, the Court need not, and thus does not, reach the second basis articulated by the commission for its decision.