

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION 14-0395

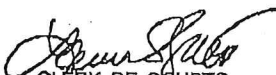
DENNIS OLISKY

vs.

TOWN OF EAST LONGMEADOW & another¹

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN 25 2016


CLERK OF COURTS

MEMORANDUM OF DECISION ON
DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS

The matter before the Court arises from a decision by the Massachusetts Civil Service Commission ("Commission") affirming a decision by the defendant, the Town of East Longmeadow (the "Town"), to bypass the plaintiff, Dennis Olisky ("Olisky"), as a candidate for an open position as a patrol officer with the Town. Olisky petitions the Court to vacate the Commission's decision, arguing that the decision was not based on substantial evidence, was predicated upon substantial and prejudicial errors of fact, and was an arbitrary and capricious abuse of discretion. G. L. c. 30A, § 14 (7). This case is now before the Court on the Town's motion for judgment on the pleadings. For the reasons stated below, the Town's motion is ALLOWED.

BACKGROUND

On April 20, 2011, Olisky, then a skilled worker in the Town's Department of Public Works (the "DPW"), took the applicable Civil Service Examination, aspiring to

¹ Massachusetts Civil Service Commission

secure appointment as a police officer with the Town. He received a score of ninety, the highest score among applicants for the position willing to accept appointment.

On June 1, 2011, the East Longmeadow lost electrical power when a tornado ravaged western Massachusetts. The following day, Olisky was assigned to drive a truck normally driven by Olisky's coworker, referred to as "Mr. A" in the administrative record. Upon Mr. A's request, Olisky drove to Mr. A's home around 2 p.m. on June 2, 2011, to deliver a cellular telephone that Mr. A had left in the truck. When Olisky arrived, he witnessed Mr. A lift a small portable generator out of the truck. The DPW used the generator for outdoor projects and to provide power to the Town's water tank in the event of a power outage. Mr. A told Olisky that he needed the generator to power his refrigerator because his house had lost power. Olisky returned the truck to the DPW without the generator.

Later that afternoon, the DPW Foreman, Roy Esposito ("Esposito"), reported to the DPW General Manager, John Collins ("Collins"), that the portable generator was missing. When Esposito contacted Olisky to inquire about the whereabouts of the generator, Olisky responded, "I don't know. You should call [Mr. A]." Esposito's subsequent call to Mr. A was forwarded to a voicemail messaging system. Esposito left a message imploring Mr. A to contact him if he was aware of the location of the generator. Esposito later called Olisky again, informing him that he could not reach Mr. A, and asking that Olisky try to reach Mr. A. Olisky did not inform Esposito that he witnessed Mr. A take the generator out of the truck. On the night of June 2, 2011, Esposito found the

missing generator in the Town's water building. The generator had not been at that location during Esposito's prior searches of the building.

The following morning, June 3, 2011, Mr. A asked Olisky not to tell anyone that he took the generator. On June 6, 2011, Collins questioned all of his employees about their knowledge regarding the period of time the generator was missing. No one came forward with any details. Collins then asked the police to investigate the incident. On June 8, 2011, Mr. A came forward and admitted to taking the generator on June 2, 2011. Olisky was subsequently asked to write a statement detailing his actions on that day.

At a disciplinary hearing at the Board of Public Works (the "BPW") on June 23, 2011, both Olinsky and Mr. A appeared and apologized for their actions. The BPW unanimously voted to terminate the employment of both Mr. A and Olisky, but delayed their termination letters until the following week so that the two men would have an opportunity to tender their resignations from the DPW instead of being terminated. On June 24, 2011, Olisky tendered his resignation to the Town.

On June 27, 2011, the Town requested a certification from the state's Human Resources Division (the "HRD") to fill two police officer position vacancies with the East Longmeadow Police Department. Olisky's name appeared on a list of prospective hires along with seventeen others, ranking higher than any other candidate who was willing to accept appointment.

On July 1, 2011, Olisky, through a union representative, attempted to withdraw his resignation, but BPW declined to accept the withdrawal. In a letter to Olisky dated July 7, 2011, the BPW wrote: "While the Town maintains that you effectively resigned

from employment last month, please be advised of the Town's alternative position that it has just cause to dismiss you from employment. Therefore, this letter serves to notify you of your termination from employment effective immediately" The letter also detailed the grounds for termination and restated Olisky's behavior with respect to the missing generator.

On September 19, 2012, the HRD provided the Town with the names of more individuals to add to the list of prospective employees. Even following the addition of other names, Olisky remained the highest ranked candidate on the certification among those who indicated a willingness to accept appointment.

On November 11, 2012, Olisky was interviewed for the police position by Sergeant Patrick Manley ("Manley") and two other sergeants. Manley recognized Olisky as a former employee of the DPW, as Manley had assisted the investigation of the missing generator in 2011. Manley spoke with his supervisor, Chief Douglas Mellis ("Chief Mellis"), about what he knew of the incident, which prompted Chief Mellis to request further information from the DPW.

The DPW's superintendent provided documentation of the generator incident to Chief Mellis, who subsequently informed the Town Board of Selectmen (the "BOS"), the Town's appointing authority, that Olisky's name should be stricken from the list of candidates to be interviewed by the BOS for a police officer position because Olisky was being bypassed for the position. On November 26, 2012, the day before Olisky was scheduled to interview for the position before the BOS, Chief Mellis called Olisky into

the Town's police station and informed him that the interview was cancelled and that he was no longer being considered for the job.

On December 12, 2012, the BOS filed a statement of reasons for the bypass with the HRD. On the same day, the Town informed Olisky by letter that he had been bypassed for the police officer position. The letter stated that the reason for the bypass was the generator incident, which, according to the Town, is behavior "contrary to the conduct and integrity expected of all officers of the Town of East Longmeadow Police Department."

On January 9, 2013, Olisky filed an appeal of the Town's bypass decision with the Commission, which held hearings on the matter on May 8 and June 12, 2013. On April 17, 2014, the Commission issued a decision upholding the Town's decision to bypass Olisky. On April 29, 2014, Olisky filed a motion for reconsideration with the Commission. On May 19, 2014, Olisky filed the present appeal to this Court pursuant to G. L. c. 30A. On May 29, 2014, the Commission denied Olisky's motion for reconsideration.

DISCUSSION

1. Standing Order 1-96 Violation

As a preliminary matter, the Town argues that because Olisky failed to submit his own motion for judgment on the pleadings before the deadline imposed by Superior Court Standing Order 1-96, there is no reason to reach the merits of Olisky's claim, as this Court has discretion to dismiss Olisky's appeal. Olisky counters that his prosecution of this matter was delayed by the significant time it took to procure a written transcript of

the hearing before the Commission. Superior Court Standing Order 1-96 provides that a plaintiff challenging an agency decision must serve a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) "within thirty (30) days of the service of the record" Standing Order 1-96, § 4. The Commission filed its certified administrative record on this matter with the Court on December 17, 2014. Olisky timely filed his petition for judicial review under G. L. c. 30A, § 14, but he has not filed his own motion for judgment on the pleadings.

The Court may grant an extension of time to file motions "for good cause shown." *Id.*, § 2. Further, "[a] defendant's response [to a motion for judgment on the pleadings] shall be deemed to include a cross-motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c)" *Id.*, § 4. Accordingly, Olisky's written opposition to the Town's motion for judgment on the pleadings may be deemed to include a cross motion for judgment on the pleadings. Recognizing the importance of Standing Order 1-96, and acknowledging that Olisky did indeed fail to file within the timeframe prescribed therein, the Court will nevertheless address the substantive merits of the Town's motion.

2. Substantial Evidence

A judgment on the pleadings is appropriate only if there are no material facts in dispute on the face of the pleadings. *Clarke v. Metropolitan Dist. Comm'n*, 11 Mass. App. Ct. 955, 955 (1981). If the non-moving party puts a material fact into question, by pleading by denial or by affirmative defenses, judgment on the pleadings is inappropriate. *Tanner v. Board of Appeals of Belmont*, 27 Mass. App. Ct. 1181, 1182 (1989). Olisky asserts that the administrative record does not support the Town's decision to bypass him

or the Commission's judgment affirming that decision, but does not assert that evidence outside of the record contravenes material facts in the record. The Court therefore must accept all facts pleaded by the nonmoving party as true, *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002), and accepts all contravening assertions in the moving party's pleadings as false. See *Minaya v. Massachusetts Credit Union Ins. Corp.*, 392 Mass. 904, 905 (1984). Regardless of the presence of controverted issues, a factual dispute that is immaterial to the controversy does not preclude judgment. *Wing Memorial Hosp. v. Department of Pub. Health*, 10 Mass. App. Ct. 593, 596 n.3 (1980).

Judicial review of an administrative decision under G.L. c. 30A is confined to the administrative record.² G.L. c. 30A §§ 14 (4), (5). The appealing party carries the burden of demonstrating that the administrative decision is invalid. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). A court may set aside or modify an administrative decision only if it is based on errors of law, unsupported by substantial evidence, or arbitrary and capricious. G. L. c. 30A, § 14 (7).

In reviewing the Commission's action under G.L. c. 30A § 14 (7), even if Court disagrees with the result of administrative decision, the Court is not empowered to substitute its own judgment for that of the Commission. *Mass. Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 262-263 (2001). Instead, under G.L. c. 30A § 14 (7), 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." *Id.*, quoting *Iodice v. Architectural Access Bd.* 424 Mass.

² The record in this case includes both the certified administrative record submitted by the Commission and the transcript of the hearing before the Commission, requested by Olisky under Standing Order 1-96, § 2.

370, 375-376 (1997). As part of its review, the Court must determine “whether there is substantial evidence in the record before the Commission to support the Commission’s decisions” *Mayor of Revere v. Civil Service Comm’n*, 31 Mass. App. Ct. 315, 322 (1991). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion.’” *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981), quoting *Boston Edison Co. v. Selectmen of Concord*, 355 Mass. 79, 92 (1968). See G. L. c. 30A, § 1 (6).

However, “under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts” found by the agency. *Retirement Bd. of Brookline v. Contributory Ret. Appeal Bd.*, 33 Mass. App. Ct. 478, 480 (1992).

In an appeal before the Civil Service Commission, the appointing authority bears the burden of proving, by a preponderance of the evidence, that there was “reasonable justification” for its actions. *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 303 (1997). “‘Justified,’ in the context of review, 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.’” *Id.* at 304, quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928). The Commission is only authorized to reverse an agency decision if it finds that the agency decision was not based upon a preponderance of the evidence in the record. G. L. c. 31, § 2 (b). The Commission is not authorized “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority,”

Cambridge, 43 Mass. App. Ct. at 304, and owes substantial deference to the appointing authority's exercise of judgment. *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188 (2010).

Upon a careful review of the certified record, the Court is constrained to find the Commission's decision to affirm the town's bypass of Olisky was based upon substantial evidence. The record indicates that the decision considered and rejected Olisky's argument that, upon questioning by his supervisor, Esposito, he told the truth about who had the generator on June 2, 2011, and that he did not lie or cover up Mr. A's wrongful conduct. The Commission found by a preponderance of the evidence that Mr. A told Olisky not to tell anyone that Mr. A took the generator and that Olisky obliged. On this basis, the Commission believed that the Town was justified in bypassing Olisky based upon his conduct. It further found no evidence of improper motive or bias, which Olisky alleges affected the Town's decision.

Olisky's position is that his statement to Esposito, "I don't know, ask [Mr. A]", was a truthful statement that he did not know where the generator was and did not constitute an attempt to cover up the whereabouts of the generator. Olisky cites the hearing testimony of the superintendent of public works as well as Sergeant Manley, who both stated that they were unsure if Olisky lied, given the fact that the generator was returned shortly after it was taken and that he referred Esposito to Mr. A upon first inquiry. Although, the Court may find merit in Olisky's position, the evidence did not require the Commission to find that Olisky had been truthful.

There is, in fact, ample evidence in the administrative record to support the Town's, and ultimately, the Commission's determination that when Olisky told Esposito "I don't know [where the generator is], ask [Mr. A]," he was misleading or omitting certain critical facts. Supportive of this interpretation of Olisky's conduct is the evidence in the record that Mr. A asked Olisky not to tell anyone that he took the generator and, when asked by Collins if he knew anything about the circumstances of the generator disappearing, Olisky did not provide that information. The record indicates that only after Mr. A admitted that he took the generator on June 8, 2011, Olisky, in a written statement, volunteered information he knew on June 2, 2011.

Further, the presence of the mitigating evidence cited by Olisky, alone, is insufficient to permit the Court to find the Commission's decision erroneous. *Cambridge*, 43 Mass. App. Ct. at 303 ("A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support."). Olisky makes several arguments to support his claim that the Commission's decision based on substantial evidence. For instance, Olisky claims that other employees questioned on June 6, 2011 "may have known it was Mr. A who borrowed the generator," but were not disciplined. He opines that this disparate treatment, combined with what he contends is a distorted interpretation of his statement to his supervisor about the whereabouts of the generator, are grounds for reversal of the Commission's decision. However, the fact that other employees "may" have also known where the generator was, a claim Olisky fails to support with any evidence, does not negate the evidence about his own misconduct, which was the sole focus of the Commission.

Olisky also contends that the defects in the Town's letter to the HRD detailing the reasons for his bypass warrant the complete vacation of the Town's bypass decision. Indeed, the letter from the BOS to the HRD containing the justifications for his bypass erroneously stated that the generator was missing for "several days" and was "obviously needed during [the tornado] emergency," even though the record is clear that the generator was returned on the day it was stolen and was not used in the days following the power outage. However, this error bears no connection to Olisky's conduct, the basis for the decision. As the Commission observed in its final decision, although the "generator was not actually needed during this emergency situation, that does not justify [Olisky's'] conduct, nor was that his call to make."

Additionally, Olisky argues that evidence elicited at the hearing revealed that other DPW employees, including Olisky's superiors, borrowed equipment, including generators, regularly. He asserts that the Commission's failure to consider this information was prejudicial error. However, Olisky's failure to reveal information about the generator's whereabouts--not his complicity in allowing Mr. A to take the generator for his personal use--justifies the Commission's decision. The BOS determined that Olisky's conduct in the generator incident reflected poorly on his integrity, leading the BOS to believe that he had not met the standards expected of East Longmeadow police officers. Because the Commission's decision has a rational explanation, it must therefore stand.

3. Due Process

Relatedly, Olisky claims that the Commission's failure to reverse the Town's decision was clear error because the BOS did not file the reasons for the bypass with HRD until December 12, 2012, and that the Town's bypass of him on November 27, 2012, was therefore premature and void. See G. L. c. 31, § 27. The law provides that the "appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator." *Id.* In order for a bypass to become effective, the appointing authority must submit a written statement of reasons for the bypass to the HRD and it must accept or approve those reasons. *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 682 n.3 (2012). The Town's decision to bypass Olisky was therefore not effective until December 12, 2012, when the HRD received the BOS's list of reasons for bypassing Olisky.

Olisky claims that due process entitled him to receive the reasons for his bypass before his scheduled interview with the BOS for the police officer position on November 27, 2012. He argues that because he was not notified of the reasons for his bypass until December 12, 2012, he did not have an opportunity to address those reasons at the interview. This, he argues, renders the Town's and Commission's decisions violative of his due process rights and, as such, void as a matter of law. Section 27, however, does not require that a bypassed candidate be given the opportunity to address those reasons in an interview with the appointing authority.³

On November 26, 2012, the day before his BOS interview, the BOS chose to bypass Olisky. Olisky was informed that he would no longer be interviewed and was no

longer being considered for the job on the same day. He finally received the reasons he was bypassed on or about December 12, 2012. He appealed the bypass to the Commission on January 9, 2013. Nothing in § 27 or other law requires an appointing authority to afford a bypassed individual the opportunity to explain the circumstances surrounding the reasons for the bypass at a job interview. The Town was not required to wait until the HRD received and approved the bypass before it uninvited Olisky to the November 27, 2012, job interview.

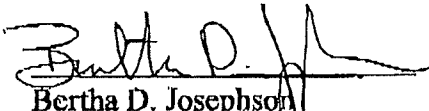
In connection with his due process argument, Olisky asserts that his bypass was doubly flawed because Chief Mellis asked the BOS to withdraw Olisky's name from consideration for the police officer position, which the BOS promptly did. Olisky reasons that because Chief Mellis is not the appointing authority, the BOS's compliance with his request, without more, violates the proper procedure for bypassing the highest-ranking candidate on a given list.

This argument fails because nothing in § 27 prohibits the appointing authority from implementing the bypass recommendation of Chief Mellis. The statute merely requires the appointing authority ultimately to file a statement of reasons for the bypass with the HRD once it has made its final decision on a candidate. The HRD was entitled to adopt Chief Mellis's recommendation without further inquiry and without affording Olisky an opportunity to challenge Chief Mellis's recommendation at a hearing or an interview. Olisky's statutorily-mandated opportunity to challenge the bypass was preserved via his appeal of the Town's decision to the Commission and, subsequently, to this Court under c. 30A.

Due to the substantial evidence in support of the Commission's decision to affirm the town's decision to bypass Olisky, the Court affirms the Commission's decision, see *Mayor of Revere*, 31 Mass. App. Ct. at 322, and determines that the Town did, in fact, have a reasonable justification for bypassing Olisky sufficiently supported by credible evidence. See *Cambridge*, 43 Mass. App. Ct. at 304. Affirming the Commission's decision is also appropriate where Olisky's due process rights were properly preserved throughout the appeal process, and the Commission remained well within the bounds of its discretion in reviewing the Town's decision.

CONCLUSION

For the foregoing reasons, the Town's Motion for Judgment on the Pleadings is ALLOWED.


Bertha D. Josephson
Justice of the Superior Court

Dated: 1-25-16