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COMMONWEALTH OF MASS
BOSTON POLICE DEPARTMENT
SUPERIOR COURT
CIVIL ACTION
NO. 13-00437-E
RECEIVED
2013 FEB 27 P 1:00
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

vs.

RENEE PALMER and another¹

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

This is an action for judicial review whereby the plaintiff, the Boston Police Department (the "Department"), pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44, appeals from a decision issued by the Civil Service Commission (the "Commission"), granting the appeal of the defendant, Renee Palmer ("Palmer"), who was bypassed for employment as a Boston Police Officer on December 13, 2010, based on the Department's concerns regarding Palmer's recent employment history. The plaintiff now moves for Judgment on the Pleadings. For the following reasons, the plaintiff's Motion for Judgment on the Pleadings is ALLOWED.

BACKGROUND

The pleadings and record establish the following facts.

On or about June 2010, Palmer's name appeared on Certification #207159 for the position of Boston Police Officer. On September 15, 2010, Palmer signed and submitted her completed Student Officer Application to the Department for consideration. After receipt of the Student Officer Application, and as part of the employment application process, the Boston Police Recruit Investigation Unit assigned Detective Bernadette Stinson ("Det. Stinson") to

¹ Massachusetts Civil Service Commission

conduct a background investigation. The Department's background investigation includes a review of the applicant's criminal history, driving record, employment history, and financial history, as well as information from both personal and professional references. The investigation revealed that Palmer previously received six written warnings for tardiness and failure to comply with various company policies, and that Palmer had been placed on a ninety day probationary period with her then current employer as the result of a verbal altercation with a non-English speaking customer. The Department bypassed Palmer because of issues related to her recent employment history.

PROCEDURAL HISTORY

On August 24, 2011, the Civil Service Commission held a full hearing. Palmer testified that the facts gleaned from the investigation into previous employers were accurate, but offered testimony in mitigation or explanation of the Department's specific concerns. On or about December 30, 2011, the Commission issued its decision ordering Palmer to be placed at the top of the eligibility list for the Boston Police Officer position. On or about February 2, 2012, the Department filed a Complaint for Judicial Review. On or about July 26, 2012, the Department filed the present Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P. 12 (c).

DISCUSSION

I. Standard of Review

A party aggrieved by a final decision of the Commission may seek judicial review of that decision in the Superior Court pursuant to G. L. c. 31, § 44. The provisions of the Administrative Procedures Act, G. L. c. 30A, govern review of the Commission's decision. Review of conclusions of law is de novo. Raytheon Co. v. Director of Div. of Employment Sec., 364 Mass.

593, 595 (1974). The Commission's factual determinations must be supported by substantial evidence. G. L. c. 30A, § 14 (7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1; see also Lycurgus v. Director of the Div. of Employment Sec., 391 Mass. 623, 627-628 (1984). The duty of the Commission is to apply the facts to determine whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision." School Comm. of Brockton v. Civil Serv. Comm'n., 43 Mass. App. Ct. 486, 489 (1997), quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). The Commission, however, does not have the authority to "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Cambridge v. Civil Serv. Comm'n., 43 Mass. App. Ct. 300, 304 (1997).

Judicial review is limited to the administrative record. G. L. c. 30A, § 14 (5). Where the Commission's decision is based on substantial evidence, the Court will not substitute its views as to the facts. Cherubino v. Board of Registration of Chiropractors, 403 Mass. 350, 354 (1988). A party challenging the Commission's ruling bears the burden of demonstrating its invalidity. Faith Assembly of God v. State Bldg. Code Comm'n., 11 Mass. App. Ct. 333, 334 (1981).

The standard of review for the Commission when reviewing an appointing authority's decision under G. L. c. 31 § 2 (b) is "whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge, 43 Mass. App. Ct. at 303. In the context of review "justified" 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.

II. Evidence Supporting the Department’s Determination

The Commission’s decision placing Palmer on the top of the eligibility list for the Boston Police Officer position is erroneous as a matter of law and constitutes an abuse of its statutory authority. The role of the Commission when reviewing a decision made by an appointing authority is to “focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions, including, of course, promotions, and to protect efficient public employees from political control It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion . . . by an appointing authority.” *Cambridge*, 43 Mass. App. Ct. at 304. The Commission’s role is to ensure that political favoritism or bias does not taint the appointing authority’s employment decisions. *Id.* at 305. The Department’s decision to bypass Palmer does not meet any of the concerns of political favoritism or bias that the Commission was created to limit.

The Department must hire applicants who demonstrate good judgment, controlled behavior, and an ability to adhere to policies and procedures. Palmer’s recent employment record and admitted conduct at the Commission Hearing failed to establish that she possessed these traits. The Department is charged with ensuring the safety and protection of the members of the community. The Department therefore has the discretion to bypass potential employees with a history of poor judgment, especially when the circumstances involved behavior that amounted to harassment and contributed to the escalation of a volatile situation. The Department could

correctly conclude that behavior such as Palmer's demonstrates a significant risk that, if placed in a similar situation as a police officer, the applicant may act in a similar manner towards others.

It is permissible for the Department to review an applicant's employment history and make a determination based on the investigation as to whether the applicant should be denied. The Department need not investigate whether a former supervisor had the authority to make statements concerning the applicant or whether there may have been ulterior motives behind the assessment given by a supervisor. Proceedings governed by the State Administrative Procedure Act "need not observe the rules of evidence observed by courts, 'so long as the evidence admitted' is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." Wardell v. Director of Div. of Employment Sec., 392 Mass. 433, 437 n.5 (1986), quoting from G. L. c. 30A, § 11 (2). To require otherwise would place the unreasonable burden of examining the authority of every former supervisor along with each supervisors' motivation for making their statements regarding the applicant. The time and cost expended in such an exercise would be prohibitive.

The Department sustained its burden of showing that there was reasonable justification for the action taken. Between May 2008 and May 2009, Palmer received six written disciplinary warnings while working as an assistant manager for Runway Fashions. Upon investigation of the warnings, Det. Stinson contacted Palmer's former supervisor to discuss Palmer's performance. Det. Stinson learned from her conversation with Palmer's former supervisor that the supervisor felt Palmer needed improvement in handling stressful situations and that she was not satisfied with Palmer's performance as an employee. Then, in the latter part of 2009, while working as a Loss Prevention Specialist at CVS, Palmer was placed on ninety day probation stemming from a

verbal altercation she had with a customer she had been monitoring for theft. Palmer admitted in her written explanation of the verbal altercation that the situation could have been avoided, that she did not use her best judgment and ultimately was harassing the customer.

Palmer admits to most of the written warnings and the probationary period, but claims the written warnings were generally misunderstandings and the product of one particular supervisor with whom she did not have a close relationship and whose assessment was motivated, in part, by declining retail sales. However, even putting the written warnings aside, Palmer's own testimony regarding the altercation she had with a customer while working at CVS validates the Department's determination. She admitted that her behavior with the customer amounted to "harassment" and that she did not exercise good judgment. Palmer, when confronted by an aggressive shopper, failed to de-escalate the situation by removing herself. She instead engaged in the verbal altercation and caused the customer to write a letter stating that at the time, she was in fear for her life. Palmer's testimony lends support to the Department's decision to bypass her based on her recent employment history.

III. The Civil Service Decision is in Excess of the Commission's Statutory Authority

The Commissioner exceeded the Commission's statutory authority in overturning the Department's decision to bypass Palmer. "Where an appeal from an action by the appointing authority is brought before it, the commission does not have the authority 'to substitute its judgment about a valid exercise of discretion based on merit and policy considerations by an appointing authority. . . . In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion.'" Burlington v. McCarthy, 60 Mass. App. Ct. 914, 914 (2004), quoting Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300,

304-305 (1997). “It is not for the Commission to assume the role of super-appointing agency, and to revise those employment determinations with which the Commission may disagree.”

Burlington, 60 Mass. App. Ct. at 915.

The Commission exposes its error when it concedes the relevance of both the extremely negative assessments given by Palmer’s former supervisor and Palmer’s own admission of poor judgment concerning the 90-day probation, but criticizes the Boston Police Department appointing authority with having given those incidents undue weight in light of the positive assessments given by co-workers and different former supervisors. This represents an impermissible substitution by the Commission of its own judgment for that of the appointing authority. In this case, the Department, within its discretion, decided not to take the risk inherent in hiring someone who has, in its view, shown poor judgment in former employment settings. “Prior misconduct has frequently been a ground for not hiring or retaining a police officer.”

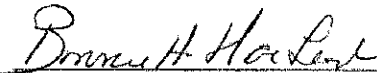
Cambridge, 43 Mass. App. Ct. at 305.

The Department presented sufficient evidence that Palmer did not possess the qualities expected and required of a Boston Police Officer. A police officer is responsible for protecting the public, fostering positive community interactions, and maintaining order, safety, and security. The Department properly concluded that placing a badge, firearm and authority in the hands of an applicant who, in the recent past², had exercised poor professional judgment and failed to follow policies and procedures might well place the safety and security of the public and fellow officers at risk. The Department has demonstrated reasonable justification for its bypass decision.

² The Department indicated that this recent history would not necessarily operate as a permanent bar to this applicant’s employment.

ORDER

For the foregoing reasons, the plaintiff's Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P. 12 (c) is **ALLOWED**. Judgment shall enter reversing the decision of the Commission.



Bonnie H. MacLeod
Justice of the Superior Court

Date: January 22, 2013