

(WES)

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1883CV00336

TOWN OF ABINGTON

REC'D CIV. SERVICE COMM
JUL 22 2019 PM 12:13

v.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS and (2) DEFENDANTS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

The Town of Abington (the "Town") has appealed, pursuant to G.L. c. 30A, § 14, from a decision of the Massachusetts Civil Service Commission (the "Commission") granting the appeal of co-defendant Joao Paulo Leite Pereira de Araujo ("Araujo") of the Town's decision to bypass and remove him from consideration for appointment to the position of full-time police officer with the Abington Police Department ("APD") and to ask the state's Human Resources Division ("HRD") to remove his name from the eligible list of candidates pursuant to Personnel Administration Rules .09 ("PAR .09").

The Town has now moved for a Judgment on the Pleadings in its favor, claiming the Commission's decision was not supported by substantial evidence, was arbitrary and capricious, and was an abuse of discretion. The Commission and Araujo have filed Cross Motions for Judgment on the Pleadings and a dismissal of the Town's complaint. For the following reasons,

¹ Joao Paulo Leite Pereira de Araujo

the Town's motion is **GRANTED** as to the Town's decision to bypass Araujo for the position of full-time police officer and **DENIED** as to the HRD's removal of Araujo from the eligible list pursuant to PAR .09. The Commission's and Araujo's motions are **GRANTED** as to Araujo's reinstatement to the eligible list and **DENIED** as to the Town's decision to bypass Araujo for the position of full-time police officer.

BACKGROUND

The following facts are taken from the administrative record. Araujo was born in Brazil and came to the United States in 2001 after high school on a six-month "B2 visa." He remained in the United States, becoming a temporary resident in 2005, a permanent resident (green card) in 2007, and a United States citizen in 2009 when he was naturalized. In 2004, Araujo was married. Araujo now lives in Abington with his wife and two daughters. He graduated first in his class at the Norfolk County Sheriff's Department ("NCS D") corrections academy and began working at the NCS D in corrections in 2011.

On December 6, 2013, Araujo applied for the position of Special Police Officer ("SPO") at the APD. As part of this process he filled out an application that is the same one used for full-time police officer candidates at the APD. Additionally, Araujo was required to submit to a psychological evaluation as a SPO candidate which resulted in a psychological report. The Town appointed Araujo to a SPO position, which he held from 2014 until his termination in 2016, which came about immediately following the APD's decision to bypass him for the position of full-time police officer. He then applied for the APD full-time police officer position on or about January 2, 2016. There were ultimately twelve candidates for three full-time positions, with Araujo ranked as the eighth candidate. On his application Araujo disclosed, among other things, that he: was a naturalized citizen, had been summoned to appear in criminal

court for an alleged breaking and entering (“B&E”), had received two traffic citations (a plate violation and a speeding ticket), had used marijuana twice as a teenager, and that he came to the U.S. in 2001 before obtaining residency in 2005.

APD Deputy Chief Christopher Cutter (“Cutter”) conducted most of the background investigation into Araujo for the full-time position. Cutter found that from 2001-2004 Araujo worked in the U.S., earning roughly \$90,000 over three years in “under the table” cash that he did not pay federal income tax on. Additionally, Cutter was concerned over discrepancies with previous responses Araujo had given on his applications for the SPO position in 2014, a position with the Plymouth County Sheriff’s Department in 2010, a license to carry (“LTC”) in 2010, and a renewal of his LTC in 2014. Specifically, Araujo had given varying responses regarding an alleged B&E accusation, his marijuana use, and his driving record on various applications. Also, Cutter reviewed a six-month extension of Araujo’s probationary period at the NCSD. Additionally, Cutter reviewed a verbal altercation with a member of the Plymouth Sheriff’s Department of Corrections in 2015, where Araujo and the other officer were frustrated with each other after Plymouth held up Araujo’s prisoner transport late in the evening.

Cutter brought these concerns to the APD Chief David Majenski (“Majenski”) who, in addition to making the final decision on Araujo’s potential full-time employment, would sit in on and observe the final interview between Cutter and Araujo on February 10, 2016. On February 9-10, 2016, prior to this interview, Cutter and Majenski advised Araujo to resign from his SPO position, stated “we are sorry things didn’t work out for the better,” and advised him to not go forward with the full-time police officer position to avoid a permanent record of the interview. Despite this, Araujo chose to go forward with the interview. During the interview, Araujo stated he felt “like he was being discriminated against” and “I know I can’t continue.” After that Cutter

said there was “no point in going forward” and the interview concluded. In his February 11, 2016 request for PAR .09 removal, Majenski stated Araujo was aggressive and that he thought he might jump over the table at Cutter. However, the Commission’s review of the video found Araujo remained composed throughout.

The record reveals that several of the Town’s concerns were not grounded in fact. Araujo has no criminal record as the alleged B&E never occurred and Araujo never appeared in court for it, only answering questions with a detective. Araujo explained that he misremembered going to court and reported this incident on his applications in the interest of full disclosure. Despite this, Cutter failed to investigate Araujo’s explanation, instead choosing to focus only on Araujo’s initial misremembrance. Also, Araujo’s probationary period at NCSD was a common occurrence to allow for further evaluation, as a letter from the NCSD explained. The letter also stated that Araujo was considered an exemplary officer following completion of his probation. With regards to the verbal altercation with the Plymouth County corrections officer, Araujo’s superiors were impressed with his professionalism and how he handled himself following the incident, soon reinstating him to the Sheriff’s Response Team (“SRT”). Additionally, it remains unclear whether Araujo’s license was actually ever suspended. However, it is clear that Araujo was working in the U.S. for three years without legal authorization to do so and that he did not file tax returns on his total income of \$90,000.

Ultimately, the Town bypassed Araujo for a position as a full-time police officer on February 11, 2016 based on over two dozen allegations discussed *infra*. That same day Majenski fired him from his at-will position as a SPO, citing the now complete background investigation. The HRD later removed him from the eligible list at the APD’s request. Araujo appealed the Town’s decision and the Commission heard his appeal on May 20, 2016.

The Commission's Decision

After the hearing on May 20, 2016 the Commission concluded that Majenski's list of over two dozen allegations justifying Araujo's bypass and removal from the eligible list were mostly unsupported by the record, taken out of context, or simply untrue. The allegations are as follows: (1) failure to disclose 2002 license suspension; (2) failure to disclose additional moving violations from 2002-2007; (3) failure to disclose driving without a license in 2002; (4) 2002 B&E; (5) failure to initially disclose B&E on 2014 LTC application; (6) failure to supply APD with high school diploma; (7) failure to provide official high school transcript; (8) failure to report discipline for 2015 verbal altercation with another prison guard; (9) failure to disclose pending termination from Norfolk Sheriff's Department unless probation extension was agreed to; (10) self-reported problems with interpersonal communication skills in 2012; (11) failure to disclose criminal activity on NCSD application; (12) failure to disclose past drug activity during 2015 psychological test sponsored by APD; (13) failure to provide details regarding drug use; (14) issues with anger and interpersonal communication skills; (15) failure to report potential termination from NCSD during APD's psychological evaluation; (16) untruthfulness on NCSD application regarding 2002 B&E; (17) failure to list proper name on application; (18) providing false information about initial reason to come to U.S.; (19) illegally remaining in U.S. from 2001-2005; (20) failure to pay federal or state taxes on around \$90,000 in earned income from 2001-2005; (21) signing fraudulent federal tax return in 2004; (22) accepting \$2,200 from the federal government in 2004 that he knowingly did not deserve; (23) failure to take responsibility for past criminal actions; (24) anger when questioned about past criminal activity and attempts to blame on discrimination; (25) failure to complete background investigation because of failure to submit documents pertaining to high school diploma and tax forms; (26) ending the final

interview by stating he had nothing more to say; and (27) showing signs of anger presently and recently while working.

The Commission granted Araujo's appeal on the ground that the Town failed to establish reasonable justification for bypass and removal of Araujo's name from the eligible list. The Commission found that the Town erroneously relied on the following grounds: (1) non-payment of taxes; (2) use of illegal drugs; (3) anger and job problems; (4) lack of interpersonal skills; (5) probationary period at prison guard job (6) illegal presence in the U.S. before green card; (7) criminal record; (8) use of different names; (9) driving record; (10) failure to provide high school transcript.² Further discussion of the Commission's decision is included *infra*.

DISCUSSION

An agency's decision is lawful unless it is not supported by substantial evidence, is arbitrary or capricious, or is an abuse of discretion. G. L. c. 30A, § 14 (7) (e), (g). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989). In reviewing the agency's decision, the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. G. L. c. 30A, § 14 (7); *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). The reviewing court may not substitute its judgment for that of the agency. *Murphy v. Contributory Ret. Appeal Bd.*, 463 Mass. 333, 344 (2012). Furthermore, "[a] court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the

² The Commission's Majority Analysis and Conclusion accepts all of the concerns cited by Commissioner Ittleman in her Minority Analysis and Conclusion with the exception of Araujo's alleged non-payment of taxes being sufficient to justify his bypass.

matter been before it de novo.” *Fisch v. Board of Registration in Med.*, 437 Mass. 128, 138 (2002), quoting *School Comm. of Wellesley v. Labor Relations Comm’n*, 376 Mass. 112, 120 (1978).

In reviewing the Commission’s decision, the court must consider “the entire record, or such portion of the record as may be cited by the parties.” G. L. c. 30A, § 14 (7). “A court reviewing a decision made by the commission is bound to accept the findings of fact of the commission’s hearing officer, if supported by substantial evidence.” *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010), quoting *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (internal quotation omitted). Moreover, “[i]n light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. . . .” *Beverly*, 78 Mass. App. Ct. at 188.

The Town claims that the Commission’s decision to grant Araujo’s appeal was not supported by substantial evidence, was arbitrary and capricious, and was an abuse of discretion. Specifically, the Town argues that six of the Commission’s findings are not supported by substantial evidence and are arbitrary and capricious. The challenged findings pertain to the following issues: (1) Araujo’s failure to file tax returns from 2001-2003 and his filing of a false joint tax return in 2004; (2) Araujo’s alleged criminal record; (3) Araujo’s driving record; (4) Araujo’s probationary period at his prior job; (5) Araujo’s alleged lack of interpersonal skills; and (6) the psychological evaluation conducted on Araujo, including his anger and job problems and nondisclosure of drug activity.

Tax Returns

After careful review of the administrative record, there was not substantial evidence to conclude that the APD’s reliance on Araujo’s nonexistent or false tax returns was unreasonable.

After learning of Araujo's arrival in the U.S., Cutter conducted a reasonably thorough review of Araujo's 2004 income tax filing as well as the employment history Araujo provided on the 2016 application. Cutter found that despite working throughout the three-year period of 2001-2003, earning around \$90,000 total, Araujo did not report his earnings or pay taxes on them.

Additionally, Cutter found that Araujo underreported his earnings for the year on his joint tax filing in 2004. As police are held to a higher standard, these findings provided a reasonable justification to bypass Araujo on the basis of his past untruthfulness. See *Beverly*, 78 Mass. App. Ct. at 188. The Commission, which acknowledged the deference given to police departments for these appointments, did not have substantial evidence to conclude that the APD was unreasonable and unjustified in bypassing Araujo on this basis. Thus, the Commission's decision regarding Araujo's bypass due to his nonpayment of taxes and false filing was not supported by substantial evidence.

However, this factor alone was not sufficient to remove Araujo's name from the eligible list pursuant to PAR .09, which authorizes such removal if the candidate's appointment would be "detrimental to the public interest." Outside of these tax issues in his first few years in the U.S. Araujo has not failed to pay taxes since 2005. Furthermore, as will be shown below, the Commission's decision regarding the Town's remaining reasons for bypassing Araujo and removing him from the eligible list was supported by substantial evidence, was not arbitrary and capricious, and was not an abuse of discretion. The record shows that following his early tax issues Araujo has been a good citizen. Additionally, there is no reason why Araujo cannot now go back and repay his debt to the government, firmly putting this issue behind him. As the Town's sole reasonable justification for Araujo's removal from the eligible list rests on his tax

issues from fifteen years in the past, it does not appear that Araujo's potential future appointment to a similar position would be detrimental to the public interest.

Criminal Record

The APD also cited an alleged B&E incident Araujo referred to on various applications as a reasonable justification for bypass based on the varying nature of his responses. Araujo disclosed this alleged B&E on his applications for the full-time position with the APD as well as on his initial LTC and subsequent renewal. However, he did not disclose this incident on his first renewal of his LTC (subsequently amended) or his application to the SPO position with the APD. The record makes it clear that that Araujo was neither involved in the alleged B&E nor was he ever arrested or charged in connection with it.³ Rather, any inconsistencies in Araujo's applications on this matter stemmed from mere misremembrance and a desire to be as forthcoming as possible on his applications. Cutter failed to adequately investigate this incident by calling Araujo's prior employer. Also, multiple documents demonstrate that Araujo lacks any criminal record. Thus, the Commission's decision regarding Araujo's criminal record was supported by substantial evidence.

Driving Record

The APD also referred to Araujo's driving record both in its decision to bypass him and its request to remove him from the eligible list. Specifically, the APD brought up multiple moving violations as well as an allegedly suspended license Araujo failed to disclose. However, the record demonstrates that Araujo listed the two moving violations he was responsible for, a plate violation and a speeding ticket, on his application for the full-time position with the APD. Also, it is not clear that Araujo's license was ever suspended in the first place. The only portion

³ The record reveals that the most Araujo was involved in this incident was answering some questions with a detective at a police station after being mistakenly identified as a suspect while working.

of Araujo's driving record relevant to this issue is a single entry stating "suspension payment default indefinite." The parties dispute the meaning of this entry as well as whether Araujo ever had actual knowledge of it during the brief period it was applicable. Thus, the Commission's decision regarding Araujo's driving record was supported by substantial evidence.

Probationary Period

The Commission found that the APD's reliance on Araujo's purported termination from the NCSD unless he agreed to an extension of his probationary period while working for the NCSD was unreasonable. In doing so, the Commission noted that the NCSD's Office has since described Araujo as an exemplary employee and stated that such extensions of probationary periods were typically done as a result of an agreement with the union. As a letter from the NCSD's Office stated that such probationary periods were common and that Araujo was otherwise an exemplary employee, the record supports both of the Commission's reasons. Thus, the Commission's decision regarding Araujo's probationary period was supported by substantial evidence.

Lack of Interpersonal Skills

The APD claimed that it was justified in bypassing Araujo and removing him from the eligible list in part because he supposedly lacked any interpersonal skills. In doing so the APD relied on an incident between Araujo and a member of the Plymouth County Sheriff's Office, Araujo's own admitted lack of interpersonal skills, and Araujo's behavior during the final interview with Cutter. However, the Commission concluded that the APD had mischaracterized Araujo's interpersonal skills, a conclusion that the record supports. The singular incident with the Plymouth County Sheriff's Office involved a brief verbal altercation resulting in Araujo's removal from Transportation and temporary suspension from the SRT. In the aftermath of this

incident, Araujo's superiors were impressed with how he handled himself following a temporary reassignment. Additionally, Araujo's admission of a lack of interpersonal skills was in reference to his early work as a prison guard in 2012 and was something he made a point of working on. Finally, review of the video of the interview led Commissioner Cynthia A. Ittleman to state that Araujo displayed no aggression, contrary to Cutter and Majenski's claims. Thus, the Commission's decision regarding Araujo's lack of interpersonal skills was supported by substantial evidence.

Psychological Evaluation

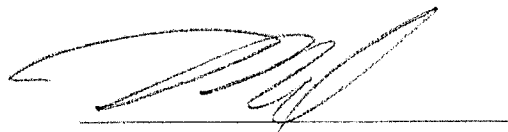
First and foremost, it is unclear whether the APD was permitted to consider Araujo's psychological report during his candidacy for a fulltime police officer position as the evaluation was conducted for his prior SPO position and no conditional offer of employment for a full-time position had been extended to him. Furthermore, even when considering the psychological report, it did not establish that Araujo possessed anger and job problems that would result in his failure of the psychological exam. Rather, the report stated that it is best to look to one's employment history to predict future behavior, a history that in Araujo's case contains only one verbal altercation discussed *supra*. Nor is it clear exactly what questions the psychologist asked Araujo, specifically regarding his alleged use of illegal drugs.⁴ Thus, the Commission's decision regarding Araujo's psychological evaluation was supported by substantial evidence.

ORDER

In conclusion, the Town prevails on its motion for judgment on the pleadings, but only for its bypass of Araujo based on its reasonable justification that Araujo was untruthful with

⁴ Additionally, with regard to Araujo's drug use, the record indicates only two instances of "experimentation" with marijuana as a teenager. Araujo freely admits this and other candidates for the full-time position were chosen despite their own marijuana use.

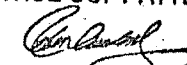
regard to his failure to file taxes from 2001-2003 and his underreporting of his income in 2004. The Commission lacked substantial evidence to find that this was not a reasonable justification, and the Town is permitted to rely on such a justification when dealing with the high standard police officers are held to. However, the Town's remaining justifications were not reasonable, as they were either unsupported by the record, taken out of context, or simply untrue. The Commission's decision that Araujo is to be reinstated to the eligible list is affirmed, because the Commission had substantial evidence to find that the Town failed to prove that it would be detrimental to the public interest for Araujo to remain on the eligible list. For the foregoing reasons, the Town's Motion for a Judgment on the Pleadings is **GRANTED** as to the Town's bypass of Araujo for the position of full-time police officer with the APD and **DENIED** as to the HRD's removal of Araujo from the eligible list pursuant to PAR .09. The Commission's and Araujo's Cross Motions for Judgment on the Pleadings are **GRANTED** as to Araujo's reinstatement to the eligible list and **DENIED** as to the Town's bypass of Araujo for the position of full-time police officer with the APD.



Mark A. Hallal
Associate Justice of the Superior Court

Dated: July 15, 2019

A TRUE COPY ATTEST


Clerk of Courts

cc: DE
RQ
JG

7.18.19