

Robert
SUFFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION NO. 2008-4775-G

BOSTON POLICE DEPARTMENT

vs.

SHAWN ROBERTS and MASSACHUSETTS CIVIL SERVICE COMMISSION

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Boston Police Department (BPD) moves for judgment on the pleadings pursuant to G. L. c. 30A, § 14, requesting reversal of a decision by the Massachusetts Civil Service Commission (Commission) to grant certain relief to defendant Shawn Roberts (Roberts). The Commission Decision ordered BPD to place Roberts at the top of the next certification list for police officers, and to submit Roberts to psychological testing by a different qualified independent screener. Roberts has cross-moved for judgment on the pleadings, arguing the matter is moot¹ or, alternatively, that the court affirm the Commission's judgment. Following hearing October 6, 2009, and my review of the entirety of the administrative record, BPD's Motion for Judgment on the Pleadings is DENIED, and Robert's Motion for Judgment on the Pleadings is ALLOWED.

Legal Standards

Pursuant to G.L. c. 30A, section 14(7), the court may reverse, remand, or modify an agency decision if that decision is based on an error of law or an unlawful procedure, is arbitrary and capricious, or if there is a lack of substantial evidence to support the decision. The party appealing the administrative decision bears the burden of proving that the decision is invalid for any of these reasons. Merisme v. Bd. Of App. Of Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989). The agency is the sole judge of the credibility and weight of the evidence presented at the administrative proceeding, and the court will not re-weigh that evidence. Greater Media, Inc., v. Dep't of Pub. Utilities, 415 Mass. 409, 417 (1993). When reviewing any 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." G.L. c. 30A, section 14(7). It is not for the court to substitute its judgment on questions of fact and discretion. School Committee of Brockton v. Civil Service

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¹ The issues presented by BPD have not been rendered moot by Roberts' subsequent employment as a Boston Police officer. A live issue remains as to whether the Commission abused its discretion or acted outside of the scope of its authority. Even in the absence of a live controversy, it is within the court's discretion to review a case that has been fully briefed and argued where the issues are capable of repetition, yet evading review. Commonwealth v. McCulloch, 450 Mass. 483, 487 (2008).

Comm'n, 43 Mass. App. Ct. 489-90 (1997).

Defendant Commission, in turn, was responsible in this case for determining “whether, on the basis of the evidence before it, the appointing authority [BPD] has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). Reasonable justification in the context of the Commission’s review of an authority’s decision, 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 (citation omitted), based on a preponderance of the evidence. Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315 (1991). It is the Commission’s responsibility to “guard against political considerations, favoritism and bias in governmental employment decisions.” Id. As such, the Commission may intervene in an appointing authority’s personnel decision where “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy [govern]. . . . It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id.

General Laws c. 31, the Massachusetts Civil Service Law, governs the selection and hiring of BPD’s employees. Section 6 mandates that an appointing authority making new appointments obtain from the Massachusetts Human Resources Division (HRD) a “certification list” of eligible candidates. The appointing authority must hire from the beginning of the list, starting with those individuals with the highest scores. Id. Individuals from the certification list are offered a position, which is contingent upon satisfying medical and physical fitness requirements described in HRD’s regulations. G. L. c. 31, § 61A.²

HRD regulations establish two categories of psychiatric conditions which may result in the bypass of an individual for a position. The existence of a “Category A” condition “would preclude an individual from performing the essential functions of a municipal police officer;” however, a “Category B” condition “based on its severity or degree may or may not preclude an individual from performing the essential functions of a municipal police officer.” Category A conditions include “disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, and disorders of personality.” Category B conditions include “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A.”³

The BPD Psychological Screening Plan, which incorporates the HRD regulations, creates a three-phase screening process focused on identifying candidates’ Category A or

² G. L. c. 151 B, § 4(16) prohibits conditional offers of employment, except that “an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job.”

³ History means “an individual’s history, current status, prognosis, and ability to respond to the stressors of the job” and “any other psychiatric condition that results in an individual not being able to perform as a police officer.”

Category B conditions. Phase I involves administration of the MMPI-2 and the PAI. Phase II entails a thirty minute clinical interview and mental status examination by a BPD psychiatrist. If the BPD psychiatrist has any questions at the end of Phase II, the candidate is sent to an independent psychiatrist for a second opinion. Phase III involves an in-depth clinical interview conducted by the independent psychiatrist.

Procedural Background

On June 20, 2006, Roberts' name appeared on certification list 260616 for Boston police officers.⁴ On July 5, 2006, BPD offered Roberts a position, contingent on his passing a medical examination that included the three-phase psychological screening.

BPD's Evaluation of Roberts

To complete Phase I, on August 11, 2006, Roberts took two psychological personality tests approved by BPD, the Minnesota Multiphasic Personality Inventory ("MMPI-2") and the Personality Assessment Inventory (PAI). In Phase II, Roberts met with Dr. Marcia Scott (Scott) of BPD. Scott determined Roberts was not psychologically fit to be a Boston police officer based on her evaluation of the two personality tests and an interview with Roberts. Roberts then proceeded to Phase III, which entailed an evaluation by independent licensed psychologist, Dr. Julia Reade (Reade). Reade interviewed Roberts, reviewed his test results, considered Scott's opinion, and also concluded Roberts was psychologically unfit to be a police officer. On November 22, 2006, BPD officially bypassed Roberts for appointment based on Scott and Reade's psychological evaluations.

The Commission's Decision

The Commission held a full hearing on June 23, 2008 and July 8, 2008. The Commission heard evidence from Roberts, his experts Dr. James Beck (Beck) and Dr. Mark Schaefer (Schaefer), and Reade. Twenty-three exhibits were admitted.

Beck disputed Reade's opinions on a number of bases, and concluded Roberts was qualified and fit to become a police officer. Schaeffer opined that Roberts' test results showed he was a "pretty healthy . . . public safety applicant," and that his psychological condition was "solidly in the normal range."

After the hearing, the Commission issued a forty-page decision, concluding BPD lacked reasonable justification for bypassing Roberts, and that its witness (Reade) had failed to establish a "credible case" for her conclusions. The Commission found the evidence showed Roberts had never been diagnosed with a Category A or Category B psychiatric disorder, nor did he have a history of any Category B substance abuse problems. The Commission determined BPD failed to justify Roberts presented any

⁴ Roberts' name had previously appeared on a certification list in 2005, and he had been given a conditional offer of employment that year. BPD bypassed Roberts in 2005 based on the evaluation of independent psychiatrist Reade.

Category B psychiatric condition. It ruled "BPD's bypass of Mr. Roberts for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to his employment status through no fault of his own," and was instead based on the biased decision-making of BPD's experts. The Commission credited the opinions of Roberts' experts in evaluating the evidence on which Scott and Reade relied to reach their recommendations.

In particular, the Commission concluded that the mental status exam review in this case "reflect[ed] a certain pre-disposed animosity toward Mr. Roberts," and "an unacceptable lack of objectivity."⁵ It also stated that Scott's review of Roberts' Phase I testing was "selective and wholly unreliable." Finally, the Commission determined that Scott's decision to send Roberts to Reade, the same psychiatrist who had conducted Roberts' unsuccessful 2005 Phase III interview, displayed a pre-disposition to disqualify Roberts.

The Commission similarly found Reade "failed to establish a credible case for her conclusion that Mr. Roberts suffers from 'extreme anxiety, with attendant distortion of his thinking and behavior,'" because Reade did not rely on any "convincing situational example" of Roberts exhibiting such behavior. Instead, the Commission found Reade's conclusions were based on several unsupported and speculative factual assumptions, and on a flawed interpretation of MMPI-2 and PAI test results.⁶ Moreover, the Commission noted Reade "appeared to take unwarranted personal offense" to Roberts' responses to questions regarding his experience with depression, and that she referred to him as a "one trick pony."

After concluding BPD was not justified in bypassing Roberts, the Commission did not go quite so far as to make a decision on Roberts' fitness as a police officer.⁷ Instead, the Commission granted Roberts alternative relief. It ordered BPD to place Roberts at the top of the next eligibility list for appointment as a police officer; ordered Roberts be allowed to submit to psychiatric testing by qualified screeners other than Scott

⁵ The Commission found bias present in Scott's Mental Status Exam, where she describes Roberts as a "depressed appearing" man and states that Roberts "curtly" told her that he was still a cadet. The Commission also found suspect Scott's focus on an isolated attendance entry, where Roberts took a sick day for a migraine, to justify the "untruthfulness" of Robert's statement that he had not had a migraine "since he was 15."

⁶ With respect to factual assertions, the Commission noted Reade testified Roberts' cadet supervisor stated he should be "more assertive," but no such reference could be found in Roberts' BPD record. Similarly, the Commission found Reade had formed an opinion of Roberts that he clings close to home based on a statement (unsupported by the record evidence) that Roberts lacked interest in working for the NYPD because it was "too far away." The Commission found Reade chose not to credit Roberts' positive work references, after presuming that the clientele at two bars where Roberts bartended were "an extension of Mr. Robert's community" and the "kind of people he grew up with." Finally, the Commission found Reade's negative conclusions about Roberts' lifestyle choices were unsupported by the evidence.

⁷ The Commission did suggest: "The facts of this case leave little doubt that Mr. Roberts is a solidly normal candidate for the position of Boston Police Officer and the Commission is skeptical that any fair and objective psychiatric medical evaluation reasonably could come to the opposite conclusion."

or Reade; and ordered that, if Roberts were ultimately given a position, BPD was to adjust his record for seniority purposes retroactively to the earliest employment date from certification list 260616.

Discussion

BPD argues the Commission's decision is based upon errors of law, unsupported by substantial evidence, in excess of the Commission's statutory authority, and arbitrary and capricious. BPD's essential claims are two: (1) that the Commission abused its discretion by substituting its judgment for that of the appointing authority; and (2) that the Commission exceeded the scope of its own authority by the relief it granted Roberts. After review of the record, the court determines the Commission did not abuse its discretion, and the ordered relief was within the scope of its authority.

I. Abuse of Discretion

BPD claims the Commission abused its discretion by substituting its independent judgment for that of BPD's experts, rather than merely evaluating the basis for the BPD's decision to bypass Roberts.

The Commission concluded BPD lacked reasonable justification to bypass Roberts based on psychological screening conducted by Scott and Reade. It is undisputed on this record that neither Scott nor Reade opined Roberts suffered from a Category A or B psychiatric disorder, or that he had a history of substance abuse. The Commission found the evidence upon which Reade based her conclusion that Roberts exhibited a Category B psychiatric condition to be unreliable. The Commission also found both Scott's and Reade's evaluations to have been driven by a personal bias against Roberts.

I find and rule that the record before the Commission at hearing supports its determination that Scott was unfairly predisposed to find Roberts psychologically unfit as a Boston police officer. Scott's notes of the mental status exam could be read to suggest Scott harbored a personal animosity towards Roberts. A reasonable fact finder could find that Scott's selective and unsubstantiated evaluation of Roberts' psychiatric test results, as well as his employment record, demonstrates biased decision making. Credibility determinations, including inferences and conclusions of bias, are the exclusive province of the administrative hearing officer. Greater Media, 415 Mass. at 417; Retirement Bd of Brookline v. CRAB, 33 Mass. App. Ct. 478, 480 (1992).

Similarly, the record supports the Commission's conclusion that Reade's evaluation of Roberts was not based on sufficient evidence, and that it was infused with bias. The record reasonably supports a finding that Reade's concluding Roberts suffered from a Category B psychiatric condition of extreme anxiety, with attendant distortion of his thinking and behavior, was based on speculation, unsupported factual assumptions, and a flawed interpretation of Roberts' MMPI-2 and PAI test results. The record also reasonably supports the finding that Reade took "unwarranted personal offense" to Roberts' response to her questions, and labeled Roberts a "one trick pony."

Stripped of these inappropriate foundations, BPD's expert opinions failed to establish reasonable justification for the bypass. Under these circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased decision-making of its experts, rather than a fair application of the psychological standards set forth in G. L. c. 31, § 61A and its accompanying regulations. The Commission as fact finder was well within its discretion to credit Roberts' experts' opinions in this regard. Commonwealth v. Hinds, 450 Mass. 1, 12, note 7 (definitive jury charge on assessment of expert opinion testimony). The court is aware of no authority to the contrary.

In so doing, the Commission did not substitute its judgment for that of BPD, because it made no determination of its own as to Roberts' psychological fitness as a police officer. Boston Police Dept. v. Cawley, Suffolk Civil No. 06-5331-C; contrast, Boston Police Dept. v. Munroe, 2002 WL 445086 at *6 (2002) (holding Commission failed properly to evaluate whether BPD had reasonable justification to bypass an applicant, but instead itself determined by a preponderance of the evidence that the applicant was psychologically fit to be a police officer). Moreover, the Commission's finding and the court's affirmance does not mean, as BPD argues, that subjective interviews by professional clinicians who assess affect and demeanor do not carry important weight in the process of psychological screening; they of course do, as they must. The problem on this record is that the clinicians' interview conclusions are not supported by substantial, reliable, psychiatric evidence.

II. Scope of Authority

BPD also argues the Commission exceeded its scope of authority under G. L. c. 31, § 44, by ordering BPD to give Roberts an opportunity for testing by a qualified independent screener. BPD maintains the Commission's order illegitimately interferes with BPD's ability to control its own psychological screening process.

There can be no doubt that the Police Commissioner, and not the Commission, has the authority to appoint police, and to determine whether to conduct a more in-depth review into a particular applicant's background. And the court fully appreciates what is at stake when reviewing police department hiring. Munroe, at * 8. But BPD's argument is misplaced here. In this case, the Commission awarded relief tailored to the specific circumstances of what it determined, in its adjudicatory capacity, to be a wrongfully bypassed applicant. This limited award properly avoids substituting the Commission's own judgment for that of the appointing authority. City of Cambridge, 43 Mass. App. Ct. at 304.

BPD's Motion for Judgment on the Pleadings is **DENIED**, Roberts' Motion for Judgment on the Pleadings is **ALLOWED**, and the case is **DISMISSED WITH PREJUDICE**.

December 30, 2009



Christine M. Roach