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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

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SUPERIOR COURT
CIVIL ACTION
NO. 14-1743

OFFICE OF THE ATTORNEY GENERAL
ADMINISTRATIVE LAW DIVISION

BOSTON POLICE DEPARTMENT

vs.

ASHLEY SENA & another¹

**MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S MOTION TO STAY**

INTRODUCTION

The plaintiff Boston Police Department ("the Department") commenced this action seeking judicial review, pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44, of a decision issued by the Massachusetts Civil Service Commission ("the Commission") ordering that the Department reinstate defendant Ashley Sena ("Sena") as a candidate for employment as a Boston Police officer after she was bypassed for the position. The matter is currently before the court on the Department's Motion to Stay Enforcement of the Civil Service Commission's Decision Granting Defendant, Ashley Sena, Relief pursuant to Mass. R. Civ. P. 65 and G. L. c. 30A, § 14(3). For the following reasons, the Department's motion is ALLOWED.

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BACKGROUND

On April 30, 2011, Sena took and passed a civil service examination for police officer. As a result of her passing score, Sena's name was placed on an eligible list, established by the Massachusetts Human Resources Division ("HRD") on November 1, 2011, for the position of

¹ Massachusetts Civil Service Commission

Boston Police officer.

In or around June 2013, HRD issued a certification to the Department to select fifty-five permanent police officers. Sena's name appeared on the certification list as a potential candidate. After completing a background investigation, the Department issued Sena a conditional offer of employment subject to medical, physical, and psychological examinations.

On September 8, 2013, Sena underwent a medical examination, including a vision examination. HRD's Physician's Guide of Initial-Hire Medical Standards requires that new police officers have at least 20/100 uncorrected vision on both eyes. The vision examination revealed that Sena's vision did not meet this minimum standard.

By letter dated October 7, 2013, the Department informed Sena that: "Based on our findings during your eye exam you do not meet the current vision guidelines set by the Commonwealth of Massachusetts for entry level police officers." The letter suggested that Sena "obtain a formal independent eye exam that shows your uncorrected/corrected vision and submit the results within 7 days of receipt of this notice." Attached to the letter was a Medical Verification document that confirmed that Sena had failed the medical examination. It also stated, in pertinent part that: "If an examinee fails an initial medical examination, he or she is eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination."

On February 12, 2014, the Department sent Sena another letter informing her that it had decided to bypass her for employment as a police officer, and that it was rescinding her conditional offer of employment based on her "uncorrected vision worse than 20/100 in either eye." On February 20, 2014, Sena appealed the Department's decision to bypass her to the Commission in accordance to G. L. c. 31, § 2(b).

A pre-hearing conference was held on March 18, 2014. At the conference, the hearing examiner informed both parties that for the purposes of Sena's appeal, the sixteen-week reevaluation period would commence on February 12, 2014, the date Sena received her bypass notification letter, as opposed to September 8, 2013, the date of the vision examination, or October 7, 2013, the date Sena was notified that she failed the vision examination.

A status conference was held on April 1, 2014. At the conference, the Commission alleges that the Department agreed to allow Sena until June 4, 2014 to undergo a vision reexamination. The Department denies that it made such an agreement.

On April 3, 2014, the Commission forwarded to the parties via email a draft Assented to Order of Relief. The draft order stated, in relevant part:

G.L. c. 31, § 61A allows candidates sixteen (16) weeks from the date of the failure of the initial examination to undergo a reexamination. Ms. Sena intends to have lasik surgery to correct her vision and then seek a reexamination.

For the purposes of this decision, the reexamination period will run until June 4, 2014, sixteen (16) weeks from the date Ms. Sena received her bypass letter, notifying her that she failed the vision examination.

Upon reexamination, should Ms. Sena meet HRD's medical requirements related to her vision, the conditional offer of employment shall be reinstated and, assuming Ms. Sena meets all other requirements of employment, she shall be appointed and enrolled in the next police academy.

In response, the Department requested that the draft order be amended. In an email dated April 4, 2014, the Department explained for the first time that Sena had also failed the psychological portion of the application process.² The Department then requested that the order be amended to "reflect this fact, and to give Ms. Sena an additional consideration with the requirement that she complete all aspects of the application process successfully."

Another status conference was held on April 15, 2014 to discuss the Department's

² Sena's first psychological evaluation, dated September 18, 2013, resulted in a recommendation that she undergo a second evaluation. After a second evaluation, it was recommended that Sena be bypassed.

proposed amendment. The Department explained that Sena had not been previously informed that she failed the psychological portion of her application because it was not the reason for her bypass. It requested that Sena be required to complete all aspects of the application process if she met the HRD Guidelines relative to her vision.

On May 1, 2014, without a full evidentiary hearing, the Commission issued an Order of Relief. The Commission explained that it was troubled by the fact that the Department failed to timely disclose that Sena had failed the psychological portion of the application. HRD's Personnel Administration Rules require the Department to specify all potential reasons for bypassing a candidate.³ The Commission found that although the Department did not bypass Sena because of the failed psychological examination, it was effectively using the failure to prevent Sena's appointment even if she passed the vision reexamination. Further, the Commission was troubled by the psychological examination report itself. The Commission explained that the report failed to identify a psychological condition that prevented Sena from serving as a police officer, and instead, relied on the Department's background investigation as the basis for finding Sena "unreliable" and "unqualified" to be a Boston Police officer.⁴

³ Personnel Administration Rule 08.04 states, in relevant part:

Upon determining that any candidate on a certification is to be bypassed . . . an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person Such statement shall indicate all . . . negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission.

⁴ The referenced report appears to be the report generated after Sena's second psychological evaluation. The report, dated November 27, 2013, states:

Ms. Sena has been unreliable in her work behavior, (termination from a job), her financial behavior (declaring bankruptcy), and her behavior in the community (failing to stop for the police

For those reasons, the Commission ordered that Sena's name be placed at the top of the next certification for the position of Boston Police officer, and for her name to remain there until she was either appointed or bypassed. It further provided that in the event that Sena was offered a conditional offer of employment, "the Department may require Ms. Sena to undergo a psychological evaluation. However, said evaluation shall be completed by mental health professionals other than those who" previously evaluated her.

The Department appealed the Commission's decision to the Superior Court, arguing that the Order of Relief is (1) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law; (2) in excess of the statutory authority or jurisdiction of the agency; (3) erroneous as a matter of law; (4) unwarranted by the facts found by the Commission on the record; and (5) unsupported by substantial evidence. The Department moved to stay enforcement of the Order of Relief, and to enjoin HRD from placing Sena's name at the top of the next certification for the position of Boston Police officer.

DISCUSSION

I. Standard of Review

A motion to stay an agency's order pending judicial review is treated similarly to a motion for a preliminary injunction. To succeed on a motion for a preliminary injunction, a plaintiff must demonstrate, "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of

and using abusive language). She is clearly bright and verbal, and has good social skills, but she is erratic and given to "blowing off" things that do not interest her (test questions), or which she does not see in her interest (credit card debt, details about her father's life). Because truthfulness and reliability are the bedrock requirements for a police officer, and since the job cannot be modified to require less of either, Ms. Sena should be considered unqualified for the police job at this time.

The report considered Sena's background, her first psychological evaluation, the fact that she "performed poorly on the psychological tests administered by the" Department, and an hour-long interview.

success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.” Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001), quoting Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). Where a plaintiff is seeking to enjoin governmental action, a court must “also consider whether the grant of an injunction would adversely affect the public interest.” Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004).

II. Likelihood of Success on the Merits

Pursuant to G. L. c. 30A, § 14(7), a court may affirm, reverse, remand, or modify an agency decision if “the substantial rights of any party may have been prejudiced” because the agency decision was based on an error of law, on an unlawful procedure, was arbitrary and capricious, was unwarranted by facts found by the agency, or was unsupported by substantial evidence. G. L. c. 30A, § 14(7). Under the substantial evidence test, the court determines “whether, within the record developed before the administrative agency, there is such evidence as a reasonable mind might accept as adequate to support the agency’s conclusion.” Seagram Distillers Co. v. Alcoholic Beverages Control Comm’n, 401 Mass. 713, 721 (1988). If there is substantial evidence, the court must affirm the agency’s decision “even though [it] might have reached a different result if placed in the position of the agency.” Id. In reviewing the agency’s decision, the court must 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, § 14(7). The court may not substitute its judgment for that of the agency, and “must apply all rational presumptions in favor of the validity of the administrative action . . .” Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 855 (1977).

Pursuant to G. L. c. 31, § 2(b), the role of the Commission is to determine “whether, on

the basis of the evidence before it, the appointing authority [here, the Department] 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). In the context of the Commission’s review, an action has reasonable justification when it is “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.” Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006), quoting Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex, 262 Mass. 477, 482 (1928). “In making that analysis, the commission must 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.” Cambridge, 43 Mass. App. Ct. at 304. “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.

Here, the Department bypassed Sena for employment as a Boston Police officer because she failed the vision examination. Thus, in evaluating Sena’s appeal, the task of the Commission was to determine whether the Department’s decision to bypass Sena because she failed the vision examination had reasonable justification. See id.

General Laws c. 31, § 61A states, in relevant part, that if a candidate for the position of police officer “fails to pass an initial medical or physical fitness examination, he [or she] shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination. If he [or she] fails to pass the reexamination, his [or her] appointment shall be rescinded.” This is consistent with HRD’s and the Department’s policies concerning medical

reexaminations.

Sena failed the vision examination on September 8, 2013, and was informed of that failure by way of a letter dated October 7, 2013. Consistent with G. L. c. 31, § 61A, the Department informed Sena that she had sixteen weeks from the date she failed the vision examination to undergo a reexamination. The Department did not bypass Sena until the sixteen-week reexamination period had passed. However, in reaching its decision granting Sena relief, the Commission determined that Sena had until June 4, 2014, sixteen weeks from the date she received her bypass notification letter, to undergo a vision reexamination, which was well in excess of sixteen weeks from the date of the failed vision examination.

Although the court is mindful of the deference afforded the Commission, the plain language of G. L. c. 31, § 61A is unambiguous and clear. See Boston Police Superior Officers Fed'n v. Labor Relations Comm'n, 410 Mass. 890, 892 (1991) (noting that considerable deference is generally accorded agency decision, unless the agency commits an error of law). An individual who fails a medical examination may “undergo a reexamination within 16 weeks *of the date of the failure of the initial examination.*” G. L. c. 31, § 61A (emphasis added). That being so, the Commission’s decision to allow Sena sixteen weeks from the date she received the bypass notification letter likely constituted an error of law. See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264 n.17 (2001) (explaining that when “[t]here is no ambiguity in the [statutory] language . . . and where the language of a statute is plain there is no room for speculation as to its meaning or its implication . . . [t]he Legislature must be presumed to have meant what the words plainly say”).

Moreover, the Commission did not explicitly find that the Department’s decision to bypass Sena because of her failed vision examination was unreasonable or unjustified. See

Cambridge, 43 Mass. App. Ct. at 303-304; Beverly v. Civil Serv. Comm'n, 78 Mass. App. Ct. 182, 187 (2010) (“The [C]ommission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions.”) In fact, neither the Order of Relief nor the Assented to Order of Relief offer an explanation for the Commission’s decision to begin the reexamination period from the date of the receipt of the bypass notification letter as opposed to the date of the initial vision examination.⁵ The Commission also made no findings of fact with respect to the Department’s reason for bypassing Sena. Without any explanation for its decision, it appears that the Commission essentially substituted its judgment for that of the Department, which it cannot do.⁶ See Cambridge, 43 Mass. App. Ct. at 303-304. Wherefore, based on the record currently before it, the court concludes that the Department has shown a likelihood of success on the merits of its claim.

III. Irreparable Harm and the Public Interest

Police officers are held to “high standards,” and as such, the Department is given “substantial deference” and “significant latitude” in screening candidates for the position of police officer. See Beverly, 78 Mass. App. Ct. at 188; Cambridge, 43 Mass. App. Ct. at 304-305 (“[i]n the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion”). Here, the Commission’s Order of Relief requires that the

⁵ The Commission argues that the Department agreed to begin the sixteen-week reexamination period from the date Sena received the bypass notification letter. There is no evidence in the record before the court to establish that this is the case. The Department states that it did not make such an agreement. Further, neither the Order of Relief nor the Assented to Order of Relief state that the Department made such an agreement. The Order of Relief states that the parties were “informed” that “for the purposes of this decision, the reexamination period would run until June 4, 2014, sixteen (16) weeks from the date Ms. Sena received her bypass letter” This does not indicate that the Department agreed to allow Sena extra time to complete the vision reexamination.

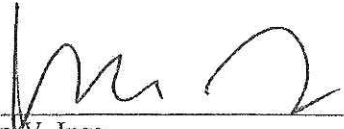
⁶ The Department also argues that the Commission erred by making findings and issuing an order without conducting an evidentiary hearing. While the court need not reach the merits of this argument, it notes that it is troubling that the Commission made findings with respect to the substance and results of Sena’s psychological evaluation without conducting an evidentiary hearing.

Department place Sena's name at the top of the next certification for the position of Boston Police officer. The Department alleges that it will be irreparably harmed if it is forced to consider Sena for employment over more qualified candidates.

Given the discretion afforded to the Department and the importance of appointing the most qualified police officers, the court finds that placing Sena at the top of the next certification for Boston Police officer will irreparably harm the Department by requiring it to consider Sena for employment over more qualified candidates. See Cambridge, 43 Mass. App. Ct. at 303-305. Further, in light of the Department's likelihood of success on the merits, the court finds that the risk of harm to the Department outweighs any risk of harm to Sena. It is of note that this is not a case that implicates the "fundamental purposes of the civil service system;" there is no allegation that Sena's bypass was based on "political considerations, favoritism, . . . [or] bias in governmental employment decisions." See id. at 304. Lastly, the court finds that the public interest is served by allowing the Department to select the most qualified candidates to serve as police officers.

CONCLUSION AND ORDER

For the foregoing reasons, the plaintiff's Motion for Stay is **ALLOWED**.



Garry V. Inge
Justice of the Superior Court

DATED: August 6, 2014

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