

13

RECEIVED COMMONWEALTH OF MASSACHUSETTS

2014 OCT 10 PM 3 32
MIDDLESEX, ss.
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

SUPERIOR COURT
C.A. NO. 2014-614-A

CITY OF MALDEN,
Plaintiff,

vs.

CIVIL SERVICE COMMISSION,
Defendant.

RECEIVED

OCT 10 2014

OFFICE OF THE ATTORNEY GENERAL
ADMINISTRATIVE LAW DIVISION

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

The City of Malden ("City") brings this action, pursuant to G. L. c. 30A, §14, challenging the decision of the Civil Service Commission ("the Commission"), which rejected the City's reasons for bypassing Garlen Seong for appointment as a Malden firefighter. Pursuant to Superior Court Standing Order 1-96, the City filed a Motion for Judgment on the Pleadings ("Motion"), which the Commission has opposed. Following a hearing and a review of the record, the City's Motion is **DENIED**.

BACKGROUND

The Malden Fire Department ("MFD") responds to over 8,400 calls per year, seventy percent of which involve medical aid. Approximately 20% of the City's residents were Asian as of 2010. It is important for members of the fire department to be able to communicate with residents, especially during calls for medical aid. The MFD therefore decided that having a Cantonese-speaking responder in its Fire Alarm Division would enhance the department's ability to serve the City's residents.

On January 9, 2013, the MFD asked the Human Resources Division for a selective certification to appoint a full-time Cantonese-speaking firefighter. The MFD received a selective certification.

Garlen Seong was a 25-year-old resident of Malden when he applied to become a firefighter with the MFD. He speaks Cantonese. Among three Cantonese-speaking candidates, he had the highest examination.

In early 2013, members of the MFD interviewed Mr. Seong and other candidates. Commissioner Denehy and Chief Colangeli were on the interview panel. The panel asked candidates questions from a standard list of questions, but did not ask every candidate every question. Most of the panel members took notes during the interviews. Following his usual practice, Commissioner Denehy did not. Mr. Seong was hesitant and uneasy during his interview. Commissioner Denehy favors candidates who look at him during the interview and who are decisive and sure of themselves. Chief Colangeli favors candidates who are self-confident and have Type A personalities, because they are more likely to risk their lives to perform their duties.

When asked what he would do in his free time, Mr. Seong said that he was a diesel mechanic and would pursue further training. His driving record showed two speeding tickets, one in 2006 (which the Stoughton District Court dismissed) and one in 2007.

The panel preferred the answers of the other candidates over Mr. Seong. The interview process did not include an evaluation of how well the candidates spoke Cantonese. After interviewing and selecting candidates, the Malden Fire Department

destroys the panel's interview notes and the candidates' criminal histories and driving records. It has done so for decades, because it does not consider them relevant to anyone.

On March 13, 2013, the City sent Mr. Seong a bypass letter, giving "the following reasons:"

- 1) Your inability to answer the most basic questions was not acceptable to the entire panel.
- 2) You had a below average evaluation by the panel due to an overall poor performance.
- 3) A questionable driving record.

Malden bypassed Mr. Seong for a candidate whose initials are KHL. The selection letter cited the following reasons:

- 1) Your background check showed you to be a good citizen with excellent recommendations.
- 2) You had an excellent interview and the entire panel believes you will be an asset to the Department.
- 3) You are an Army Veteran.
- 4) You have a degree in Physical Fitness.
- 5) You are a Certified EMT.

Mr. Seong timely appealed by letter dated April 1, 2013.

Before the hearing on the bypass, the Commission ordered the City to provide a copy of the driving record of KHL, as well as the "rating sheets" from the interviews. The City did not comply with that order, issued on June 4, 2013, until the business day before the hearing, Friday, August 2, 2013. Its response was that it had no interview notes or documents reflecting the questions asked of the applicant chosen. It also objected in privacy grounds to producing the driving records of KHL. It had not previously informed the Commission of its objection or the absence of responsive documents. The hearing officer found that the MFD's "supposed inability to produce the successful applicant's driving record – to get another copy, if necessary – is, without

further explanation, not credible.” When the hearing officer tried to obtain a copy of the City’s original response, he received a response with evident inconsistencies, leading him to doubt the accuracy of the City’s original certificate of service stating that the City sent its response to the June 4 order to Mr. Seong dated July 30, 2013.

In his recommended decision, dated November 20, 2013, the hearing officer stated, among other things:

I draw an adverse inference from the following acts, omissions, and stances by the Malden Fire Department: It failed to tell the Civil Service Commission at the prehearing conference, or as soon as possible afterward, that the documents it had been ordered to turn over were not available. It failed to tell the Civil Service Commission, which could have ruled on its claim of privilege, that it was invoking privilege for some documents that it had been ordered to turn over. It failed to directly tell the Civil Service Commission or the Division of Administrative Law Appeals (DALA) that it was not turning over documents to Mr. Seong that it had been ordered to turn over; instead, it sent him a letter. It so delayed telling Mr. Seong that it was not turning over documents to him that it precluded him from objecting before the hearing. The Malden Fire Department professed to be unable to obtain another copy of KHL’s driving record. See *Chandler v. Prince*, 217 Mass. 451, 458 (1914) (“Failure to produce evidence, . . . if foundation for the drawing of adverse inferences”). See also 801 CMR 1.01(8)(i).

The hearing officer concluded that there was no credible evidence to support the MFD’s justifications to by-pass Mr. Seong. He rejected the MFD’s post hoc attempt to withdraw Mr. Seong’s driving record as a justification for the bypass, as well as any attempt to offer new justifications for selecting KHL over Mr. Seong. He drew an adverse inference from the MFD’s failure to present KHL’s driving record. He also found the process “deficient because it did not assess the candidates’ fluency in Cantonese.”

By decision dated January 9, 2014, the Commission unanimously adopted the Administrative Magistrate’s decision, ruling that “the decision of the Malden Fire Department to bypass the Appellant for appointment is *not* affirmed and the Appellant’s

appeal is *allowed*.” (emphasis and italics in original). The Commission issued the following order:

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the Human Resources Division or the Malden Fire Department in its delegated capacity to take the following actions:

- Place the name of Garlen Seong at the top of the current or next certification for appointment to the position of permanent full-time firefighter in the Malden Fire Department until he is appointed or bypassed. [footnote omitted]
- If Mr. Seong is appointed, he shall receive a retroactive seniority date for civil service purposes only the same as those appointed from Certification No. 00386. This seniority date is not meant to provide Mr. Seong with any additional compensation or benefits including credit towards retirement.

DISCUSSION

I.

Pursuant to the Civil Service statute, G. L. c. 31, the personnel administrator “shall make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions . . . Such rules shall include provisions for . . . [p]romotional appointments, on the basis of merit as determined by examination, performance evaluation, seniority of service or any other combination of factors which fairly test the applicant’s ability to perform the duties of the position as determined by the administrator.” G. L. c. 31, § 3(e). The administrator must maintain certified lists of candidates eligible for appointment or promotion. G. L. c. 31, § 25. Candidates are ranked on this list according to their examination scores. Id.

G. L. c. 31, §27 provides, “[i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is

willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.” According to Personnel Administration Rules, promulgated by the Human Resources Division pursuant to G. L. c. 31, § 3(d) and 5, a “bypass” is defined as “the selection of a person or persons whose name or names . . . appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification.”

II.

A court may set aside an administrative agency’s final decision only where the court determines a petitioner’s substantial rights have been prejudiced because the decision was based upon error of law, was unsupported by substantial evidence, or was arbitrary or capricious or an abuse of discretion. G. L. c. 30A, § 14(7); Connolly v. Suffolk County Sheriff’s Dept., 62 Mass. App. Ct. 187, 192-193 (2004). The court must defer to the fact-finding function of the administrative body where there is substantial evidence to support its findings and there is no other error of law. Wheelock College v. Massachusetts Comm’n. Against Discrimination, 371 Mass. 130, 133 (1976). The court may not substitute its fact-finding judgment for that of the agency. Id. The reviewing court gives “due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” Connolly, 62 Mass. App. Ct. at 192. The plaintiff bears the burden of demonstrating the invalidity of the agency decision. Bagley v. Contributory Retirement Appeal Bd., 397 Mass. 255, 258 (1986).

The first question is whether a bypass occurred. The Commission's affirmative answer has ample support in the evidence. For one thing the City itself described the action as a bypass in its April 2, 2013, 2013 letter to HRD. The City continued to refer to it as a bypass in the proceeding and stipulated that Seong ranked first on the certification. As the defendant notes, "[p]arties cannot steer administrative agencies into error and complaint of it on judicial review." Shamrock Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 333, 335 (1979). The agency did not err in treating the matter as a bypass appeal.

Malden had the power to bypass Seong if it had reasonable justification for doing so. Brackett v. Civil Service Commission, 447 Mass. 233, 241 (2006). The Commission "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 . . . In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." Town of Burlington v. James McCarthy, 60 Mass. App. Ct. 914, 914 (2006) (rescript), quoting Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304-305 (1997).

Malden did, however, have the "burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority." Brackett, 447 Mass. at 241. "Reasonable justification in this context 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.'" Police Department of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) quoting Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex, 262 Mass. 477, 482 (1928). "In

determining whether the department has shown a reasonable justification for a bypass, the commission's primary concern is to ensure that the department's action comports with '[b]asic merit principles,' as defined in G. L. c. 31, § 1" Kavaleski, 463 Mass. at 688. The requirement of support by "credible evidence" is not met by an appointing authority that, in effect, only says: "take our word for it."

The Magistrate, affirmed by the Commission, found that "there was no 'credible evidence,' . . . for" the first "purported justification to bypass Mr. Seong," namely the alleged inability to answer the most basic questions. This finding was supported by the City's failure to introduce evidence about which questions it asked Mr. Seong (except for the question what he would do in his free time) or about "what his responses, semi-responses, or non-responses were." The inability to specify which questions the MFD panel asked, off of the standard list, calls into question the credibility of the testimony that there were any such questions. It also undermines the objectivity of the panel's review, as it supports an inference of near-complete subjectivity, unsupported by specific facts that might take this case out of the "favoritism" category. The Magistrate also drew adverse inferences from the MFD's failure to produce rating sheets and interview notes. It is indeed suspicious that it did not retain any documentary evidence of what actually happened. The Magistrate was not required to accept generalized statements that Seong's responses were inadequate without proof, where proof (or written disproof) did exist at one time. To do so would defeat the Commission's role to ensure application of "basic merit principles" and the Magistrate's responsibility to make credibility determinations. The Magistrate was well within his authority in finding that City's first justification was not "supported by credible evidence."

Similarly, the absence of evidence about what made Mr. Seong's evaluation "below average" – or even "what an average evaluation is" – left the record devoid of credible evidence for the second purported reason for bypass. The Administrative Magistrate again drew an adverse inference from the failure to produce rating sheets or interview notes. He acted within his authority in finding an absence of "credible evidence" that Mr. Seong's evaluation was below average.

Likewise, the Magistrate was entitled, under Personnel Administrative Rule .08(4) to reject the belated claim that Mr. Seong's performance was below that of the other candidates, because the City "cannot offer one reason in its bypass letter and attempt to demonstrate a different reason for the bypass in the appeal:

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.

Capping the analysis is the City's claim about Seong's "questionable driving record." The record was, objectively considered, minor. It consisted of two speeding tickets, both more than six years earlier, one of which was dismissed. It has the flavor of grasping at straws to support a decision that otherwise lacks evidentiary support. The Magistrate properly rejected this justification as lacking "common sense." Moreover, he was entitled to draw an adverse inference from the failure to provide KHL's driving record. In particular, he could infer that the successful candidate's driving record would not support the City's determination that Seong's was "questionable" if considered consistently between candidates. The City's citation of such a thin rationale called into question the credibility of its entire decision-making process.

It follows that the Commission's decision was supported by substantial evidence, was consistent with applicable law, and was not arbitrary and capricious.

III.

The City also moves to strike the materials attached to the Commission's Memorandum in Opposition to the City's Motion for Judgment on the Pleadings. It appears that the primary, and perhaps only, objection is to the document entitled "A Certification Handbook/ Departmental Public Safety Promotions Subject to Civil Service" of the Civil Service Unit of the Human Resources Division.

The challenged Personal Administration Rules are quoted in the Magistrate's Decision (at 10) and therefore were considered by the agency. "The court may require or permit subsequent corrections or additions to the record when deemed desirable." G.L. c.30A, § 14(4), quoted verbatim in S.O. 1-96 (2), second paragraph, third sentence (implying that the same power also exists in certiorari and similar cases). The phrase "deemed desirable" is broad on its face, but obviously must be construed in terms of the case law. In the lead case, the trial judge acted within her authority in allowing additions to the record so that the record would "consist of any document or material that the agency decision makers directly or indirectly considered, including evidence contrary to the agency's position, but excluding documents that set forth motives and thought processes used in arriving at the agency's decision." Douglas Environmental Assocs. v. Dept. Of Env'tl. Protection, 429 Mass. 71, 74-75 (1999).

Pursuant to that authority, the court denies the motion to strike the materials. The agency did consider them "directly or indirectly" in making the decision. The court also

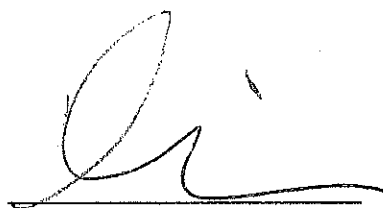
notes that it would affirm the Commission's decision, for the same reasons, without the materials attached to the defendant's Memorandum.

ORDER

For the foregoing reasons, the City of Malden's Motion For Judgment On The Pleadings is **DENIED**.

**FINAL JUDGMENT SHALL ENTER AFFIRMING THE DECISION OF
THE CIVIL SERVICE COMMISSION.**

DATED: September 26, 2014



Douglas H. Wilkins
Justice of the Superior Court