

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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CARLA SULLIVAN

VS.

(sc)

CIVIL SERVICE COMMISSION & others¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS AND DEFENDANT BOSTON POLICE
DEPARTMENT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

This dispute arises from the dismissal by defendant Civil Service Commission ("Commission") of the appeal of plaintiff Boston Police Department Detective Carla Sullivan ("Det. Sullivan") challenging the decision of defendant Boston Police Department ("BPD") to bypass her for a promotion. Pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44, Det. Sullivan requests judicial review of the Commission's dismissal of her appeal.

Det. Sullivan now moves for judgment on the pleadings on the grounds that the decision to dismiss improperly concluded that the evidence presented in the appeal would be similar to the evidence introduced in a previous case among the same parties. Det. Sullivan's motion urges that she had new evidence regarding the BPD's determination of her "light duty" status, her qualifications compared to other candidates that bypassed her in the recent promotions, and the inconsistency in the BPD's policy to promote only officers who were fit for full duty.

The BPD opposes Det. Sullivan's motion and cross-moves for judgment on the

¹ Human Resources Division and Boston Police Department

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pleadings.² The BPD contends that a hearing on any “new evidence” would have been futile because the Commission unquestionably based its decision to bypass on undisputed facts presented in the prior decision that have not changed. Without allegation of other grounds for reversal, the BPD argues it is entitled to judgment on the pleadings. After hearing, and for the reasons set forth below, Det. Sullivan’s motion is **DENIED**; and the BPD’s motion is **ALLOWED**.

BACKGROUND

In light of the fact that a “reviewing court is bound to accept the findings of fact of the commission’s hearing officer,” the following facts are based on the Commission’s decision to dismiss and the exhibits relied upon therein. *Malloch v. Hanover*, 472 Mass. 783, 796 (2015) (quotations omitted).

Det. Sullivan is a tenured civil service employee whom the BPD swore in as a police officer in 1996. She became a detective in 2000. From 2000 through 2009, Det. Sullivan transferred six times to different stations and/or units due to various issues with co-workers and insubordination.³

On one occasion in August 2005, Det. Sullivan was assigned to investigate allegations of child abuse that appeared to involve children of police officers; and she stated that she was “afraid” to investigate BPD officers or their families because she had an on-going complaint of being harassed due to an investigation she performed in 2001 or 2002 involving a BPD officer.

² The Human Resources Division and the Commission have neither moved for judgment on the pleadings nor joined in the BPD’s motion.

³ For a more in-depth history of Det. Sullivan’s insubordination and issues with co-workers, see Administrative Record, 147-154.

Upon her supervisor informing her that it was unfair to her colleagues to allow an officer to refuse assignments and in light of her continuing refusal to accept the assignment, her supervisor concluded that Det. Sullivan needed "professional psychological assistance" due to her accusations regarding her coworkers. Det. Sullivan's supervisor subsequently denied her request to transfer because "[t]ransferring Detective Sullivan will not solve her behavioral and personal problems. Detective Sullivan has been riding the transfer circuit too long . . . and it is time to deal with the root causes of her problems. A transfer will not accomplish that goal."

From 2002 to 2009, Det. Sullivan had met with BPD's staff psychiatrist, Dr. Marcia Scott ("Dr. Scott"). In or about July 2009, Dr. Scott directed that Det. Sullivan's supervisors begin filing weekly reports regarding Det. Sullivan's work status. In these reports, Det. Sullivan's supervisors described her as refusing to speak to her colleagues and responding only to e-mails or other written forms of communication. Moreover, her supervisor rescinded approval for Det. Sullivan's vacation request because she failed to arrange for cover during her absence and then failed to follow the appropriate procedure to requesting time off. In light of these issues, Det. Sullivan was ordered to report to a meeting with her superiors on December 10, 2009.

On December 5, 2009, Det. Sullivan's supervisor, Captain Hayes, wrote a "To/From" Memorandum to Deputy Superintendent King in which he reviewed Det. Sullivan's documented work history, including the events of 2009 and his concerns for her "mental health, state of mind and psychological fitness to perform the duties of a police officer." In this memorandum, Captain Hayes twice reported that Det. Sullivan's co-workers feared that "she may shoot them" and requested authority to confiscate her firearm at the December 10, 2009, meeting.

During Det. Sullivan's absence, the Chief of the Family Protection and Sexual Assault Bureau of the Suffolk County District Attorney's Office wrote to BPD Commissioner Edward Davis ("Commissioner Davis"), advising "the outstanding work done . . . by Detective Carla Sullivan" had resulted in a guilty plea and sentencing of a defendant. The letter praised her "thorough, thoughtful and effective" investigation. Commissioner Davis acknowledged this letter and ordered it placed as a permanent record in Det. Sullivan's personnel file.

On December 10, 2009, Det. Sullivan and her union representative met with her supervisors. At the meeting, Captain Hayes confiscated her firearm and ordered her to take her remaining vacation days and report back to duty on December 21, 2009. She further was ordered to report on December 15, 2009, to the BPD Occupational Health Unit for a fitness-for-duty evaluation to be performed by Dr. Scott. Det. Sullivan complied with all of Captain Hayes' directives.

On December 21, 2009, the acting captain of Det. Sullivan's unit was instructed to inform Det. Sullivan that Dr. Scott had determined that Det. Sullivan was not fit for duty. Upon arriving late to work that day, the captain informed Det. Sullivan of her lack of fitness. In the following days, Det. Sullivan expressed frustration by refusing eye contact and accusing the staff of sabotaging her ability to access files on her computer.

On August 10, 2010, Det. Sullivan sought a psychiatric evaluation from Dr. James C. Beck ("Dr. Beck") to support her return to duty. Dr. Beck interviewed Det. Sullivan for approximately two hours and reviewed the notes of her prior sessions with Dr. Scott. The scope of his interview was to determine whether Det. Sullivan suffered from any psychiatric condition, not to assess whether she was fit for duty. Dr. Beck concluded that Det. Sullivan did not suffer

from a personality disorder but that she required appropriate supervision for her to complete her duties as a police officer.

On June 20, 2011, Det. Sullivan met with Dr. Thomas G. Gutheil ("Dr. Gutheil") on the joint referral of BPD's Occupational Health Unit and her union. After reviewing Det. Sullivan's file and the reports by Dr. Scott and Dr. Beck, Dr. Gutheil concluded that Det. Sullivan "does not suffer from a diagnosable mental disorder that would be inconsistent with a return to duty" and found "no evidence that she would be unsafe with a firearm." Nonetheless, Dr. Gutheil also stated "she does manifest certain traits that may prove problematic in her current circumstances," such as social and personal distances from co-workers and supervisors, her "obsessive-compulsive" traits, and "tendency toward social isolation and a likely problem with perspective taking." Dr. Gutheil stated that her "problem with perspective-taking . . . can cause difficulties in areas of negotiation with others over daily chores, tasks and personal arrangements; this factor may also come across as entitlement or, under some extreme circumstances, as insubordination." He recommended that Det. Sullivan receive an assignment with "significant solo responsibility" and that "[t]his could, but need not, involve firearms carrying." Based on this recommendation, the BPD created a position for Det. Sullivan in the Forensic Unit, reporting to Captain Dowd, and returned her to duty in October 2011 but did not return her firearm.

In May 2012, the BPD Occupational Health Unit referred Det. Sullivan for further evaluation by Dr. Andrew Brown ("Dr. Brown"), the BPD's lead consulting psychiatrist. After taking into account Det. Sullivan's self-reporting during two interviews and the collateral and independent information found in her previous evaluations, he concluded that, although Det. Sullivan was "motivated and inclined to cooperate" with the BPD's efforts to return her to full

duty, her re-integration should proceed cautiously and that she had not demonstrated that she was able to “adequately communicate, coordinate and collaborate” with team members. In light of the “astonishingly large volume of reports” about her style of communication, limited capacity to engage in productive relations with others and other interpersonal risks, and her tendency to see her difficulties as unconnected to her interpersonal challenges but solely attributable to her being at the receiving end of injustice, Dr. Brown found sufficient reason to conclude that Det. Sullivan should not be allowed to carry a firearm. In September 2012, after Det. Sullivan submitted additional documents and another evaluation by Paul Zeizel, Psy.D. (“Dr. Zeizel”), concluding she was fit for active duty, Dr. Brown opined that his conclusions had not changed.

Det. Sullivan’s diminished “fitness for duty” caused the BPD to bypass her for promotion to the rank of sergeant in or around March 2013 because the issues that compelled her light duty assignment had not yet fully resolved and her colleagues continued to express reluctance about working with her. Det. Sullivan continued to avoid interpersonal contact with peers and supervisors, which meant she could not be relied upon to communicate with and supervise others effectively; had not developed her interpersonal skills and ability or perspective to know how to evaluate, mediate and resolve disputes; and could not be counted on to work collaboratively with others. Det. Sullivan appealed the bypass.

On June 6, 2014, Dr. Brown met with Det. Sullivan’s supervisors to discuss her current work performance and update the assessment of her capacity to engage constructively and productively and collaborate with colleagues and supervisors. Det. Sullivan’s supervisors reported observations that led Dr. Brown to conclude that there was no change in Det. Sullivan’s performance.

On August 16, 2013, Det. Sullivan was again bypassed for promotion; she appealed this decision as well. On December 4, 2013, Dr. Beck prepared a second report concerning Det. Sullivan. After review of the evaluations by Drs. Brown, Gutheil, and Zeizel and Sullivan's file, and conducting an interview with Det. Sullivan, Dr. Beck agreed that Sullivan had a "lengthy history of documented personnel issues," which included "years at some assignments where she had known difficulties with other officers or administration." However, Dr. Beck discounted this history of "continued difficulties in her relationship with the [BPD]" as "primarily a result of their attitude toward her rather than her behavior on the job." He found "no evidence of a character problem or other similar condition that would in any way caused [sic] her to be unfit to carry a firearm." On November 14, 2014, Det. Sullivan was bypassed a third time for appointment to sergeant for the same reasons stated for bypassing her in March 2013 and August 2013, from which decision she also appealed.

On May 28, 2015, the Commission issued its written decision affirming the March 2013, August 2013, and November 2014 decisions to bypass Det. Sullivan for promotion to sergeant. The primary reason for the Commission's decision was that Det. Sullivan was assigned to limited, unarmed duty at the time she sought promotion. Her inability to collaborate with colleagues and supervisors (albeit supervising other officers) based on the assessments by Drs. Gutheil and Brown and the firsthand observations by Det. Sullivan's colleagues and supervisors sufficiently militated against her promotion. The Commission also found that the evidence failed to support Det. Sullivan's claims of unlawful bias against her based on her age, gender, educational status, and high ethical standards, as there were no indicia that anyone at the BPD harbored personal animus against her. In fact, the Commission determined that the BPD made

the best use of her skills and repeatedly demonstrated a willingness to accommodate her limitations. Significantly, the Commission held that, despite differing opinions as to Det. Sullivan's mental health, the salient fact justifying the bypass was her long-documented history of under-performance underlying her light-duty status.

The Commission also rejected Det. Sullivan's argument that the BPD sabotaged her chances for promotion by restricting her duty and refusing to issue her a firearm. During the appeal, Det. Sullivan acknowledged that "firearm use . . . is totally under the control of" the BPD and that she was not asking the Commonwealth to decide that "the BPD should give [her] a firearm."

On or about February 19, 2015, Det. Sullivan appeared again on the list of candidates eligible for promotion to the rank of sergeant. Twenty-four candidates appeared on the certification, and Det. Sullivan tied for the first group for promotion. By letter dated April 7, 2015, BPD informed Det. Sullivan that she was being bypassed for promotion because, "[c]urrently, you are on light duty status and are unable to perform the essential functions of your current position or any other sworn position."

On June 2, 2015, Det. Sullivan appealed the bypass for promotion to the Commission. She based her appeal on the arguments that the reasons for the bypass were untrue and that other, similarly situated candidates had been promoted. She also appealed "the non-action of the state Personnel Administrator who was neglected to perform his duties under Chapter 31, Section 27," which required him to review the reasons for bypassing her.

On August 14, 2015, the Human Resources Division ("HRD") moved to dismiss the appeal because it had delegated the responsibility for the promotional selection to the BPD and

the HRD's only function was the ministerial act of receiving the bypass reasons after receiving the BPD's approval. Det. Sullivan opposed the motion because, she alleged, the HRD had not properly delegated its authority in this instance.

That same day (and later amended on October 21, 2015), the BPD moved for summary decision on the grounds that there have been no material changes in the relevant facts that BPD was asserting as the reasonable justification for bypassing Det. Sullivan. For example, Det. Sullivan continued to be limited to light duty status, she still was not cleared to carry a firearm, and the BPD had never promoted any officer to a supervisory position who was not able to perform at a full-duty status. Det. Sullivan opposed the BPD's motion, arguing that there was no proof that she remained on light duty, that there was no rule prohibiting promotion of an officer on light duty, and that she was hampered by a medical condition that required treatment during her prior appeal, preventing her from being "fully alert or lucid."

The Commission held a hearing on this matter on October 6, 2015. On January 21, 2016, after reviewing the parties submissions and arguments, the Commission issued a written decision dismissing the appeal and allowing the motions of the HRD and the BPD ("the Commission's Decision"). As part of the Commission's Decision, the Commission found that Det. Sullivan's duty status had not changed since the prior bypass appeals were filed and decided. The Commission also found that, in accordance with long-standing policy, the BPD does not promote an officer to sergeant who is not cleared for full duty and capable of performing the duties of a first-level line supervisor. The Commission's Decision allowed the HRD's motion to dismiss in light of the common practice adopted by the HRD (and sanctioned by the Supreme Judicial Court

in *Malloch*, 472 Mass. at 790, to delegate its role in the promotional bypass process to the appointing authority, the BPD.

With respect to the BPD's motion for summary decision, the Commission concluded that "[t]he undisputed facts presented in the current appeal show that the reasons upon which BPD based its decision to bypass [Sullivan] are precisely the same reasons that the Commission found to be a reasonably justified basis for bypassing [Sullivan] in 2013 and 2014." Based on the sworn testimony of the BPD's Chief of Administration and Technology, Edward Callahan, the Commission held that "the material facts upon which the BPD made its prior bypass decisions have not changed." For the reasons expanded upon in the Commission's prior decision, Det. Sullivan's February 2015 bypass was justified because she remained on light duty and without access to a firearm, rendering her unfit for promotion under the BPD's long-standing policy of promoting only candidates who are fit for full duty. Although Det. Sullivan alleged there was "new evidence" relevant to the appeal, the Commission held that a full, evidentiary hearing on these allegations would be futile and unnecessary to justify the most recent bypass. Det. Sullivan's improved health did "not controvert the essential facts that justified her bypass, then and now." The Commission, however, stated, "[a]lthough . . . evidence of a change in circumstances may warrant the Commission taking a fresh look at an appellant's claims, when the record is not fairly controverted and is devoid of any reasonable expectation that the material and enduring reasons which justify the bypass have not changed, as here, summary judgment on that record is the appropriate disposition of the appeal."

DISCUSSION

I. Standard of Review

“Pursuant to G. L. c. 31, § 44, [the courts] review the commission’s decision to determine whether it was in conformity with the standards set forth in G. L. c. 30A, § 14 (7).” *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012). In light of the “the experience, technical competence, and specialized knowledge of the agency . . . [and] [its] discretionary authority,” courts “will not disturb the [agency’s] decision unless it was made in excess of the [agency]’s statutory authority; is unsupported by substantial evidence; or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” G. L. c. 30A, § 14; *J.M. Hollister, LLC v. Architectural Access Board*, 469 Mass. 49, 55 (2014). Plaintiff bears the burden of demonstrating the invalidity of an agency decision. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

“Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge.” *Pilon, Jr.’s Case*, 69 Mass. App. Ct. 167, 169. However, courts “must consider anything in the record that fairly detracts from the weight of the evidence supporting the [agency’s] determination.” *Salem v. Massachusetts Comm’n Against Discrimination*, 44 Mass. App. Ct. 627, 641 (1998). Nonetheless, “[t]his does not permit a court to treat the proceeding as a trial de novo on the record which was before the administrative board.” *Southern Worcester Cnty. Reg’l Vocational Sch. Dist. v. Labor Relations Comm’n*, 386 Mass. 414, 420 (1982).

II. Analysis

The dispositive issue here is whether the Commission's conclusion that Det. Sullivan's continuing light-duty status and unfitness to carry a firearm vitiates her eligibility for promotion regardless of any other evidence Det. Sullivan could offer. The court agrees with the Commission that any new evidence is moot in the face of Det. Sullivan's diminished status.

"When a candidate for appointment appeals from a bypass, the commission's role is not to determine whether that candidate should have been bypassed. Rather, the commission determines, 'on the basis of the evidence before it, whether the appointing authority [has] sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification' for the decision to bypass the candidate." *Kavaleski*, 463 Mass. at 688-89, quoting *Brckett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006). "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." *Brckett*, 447 Mass. at 241 (internal quotation omitted). "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.

It is undisputed that the BPD's records reflect that Det. Sullivan is still assigned to light duty. Despite Det. Sullivan's argument otherwise, the BPD has a consistent policy that prevents officers who do not possess full-duty status from being promoted to sergeant.⁴ See G. L. c. 41, §

⁴ Det. Sullivan contends the BPD does not require an officer to be on active, full duty to be promoted because of the Somerville Police Department's decision to promote posthumously Officer Sean Collier following his death in the aftermath of the Boston Marathon bombings. Det. Sullivan's argument is without merit. The

98 (Police officers “shall suppress and prevent all disturbances and disorder. They may carry within the commonwealth such weapons . . .”); *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 388 n.4 (“We have no doubt . . . that the ability to shoot a gun is essential to employment as a police officer.”); *Healy v. Massachusetts Civil Serv. Comm’n*, 1999 Mass. Super. LEXIS 145, *8 (Mass. Super. 1999) (Gants, J.) (“While a police officer limited to administrative duty because he cannot possess a firearm may be of some use to the City, he cannot be counted on to suppress and prevent disorder or to aid another police officer in distress”). In light of the case law and the supervisory role of a sergeant, the court finds that there is ample evidence to support the Commission’s determination that the BPD maintains a policy that a police sergeant must be fit for full duty. Thus, based on the undisputed facts, Det. Sullivan’s unchanged circumstances render her ineligible for promotion under the BPD’s policy; and no additional evidence can alter that conclusion.

Although the Commission left open the possibility that a change in Det. Sullivan’s circumstances could warrant a “fresh look” at her claims, she did not offer any evidence to discredit the material facts of her case, *i.e.*, that the BPD still has her on light duty and the BPD continues to promote who officers on full duty. Det. Sullivan’s evidence of her relative strength compared to the candidates on the promotion list of February 2015; of the BPD’s alleged attempts to stifle any potential for promotion by granting her little, if any, responsibility and refusing to reissue her a firearm; or of unfairness in her more recent psychological evaluations is irrelevant for the simple fact that she cannot perform essential job functions of a sergeant.

appointment of Officer Collier is wholly distinguishable from the case at bar as Det. Sullivan is not requesting the symbolic gesture of a promotion but the actual responsibilities of the appointment to sergeant.

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Beyond the lack of dispute of the material facts, the Commission's findings of fact and analysis were supported by substantial evidence, including Det. Sullivan's extensive psychological evaluations, her own complaints about the workplace, and the BPD's attempts to accommodate her in light of these issues. As a result, the court does not find that the Commission's Decision violates G. L. c. 30A, § 14. Accordingly, the BPD is entitled to judgment on the pleadings.⁵ Although neither the HRD nor the Commission has moved for judgment on the pleadings, these nominal parties also are entitled to judgment in light of the court's decision affirming the Commission's Decision.

ORDER FOR JUDGMENT

For all the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that:

1. Plaintiff Det. Sullivan's motion for judgment on the pleadings be **DENIED**;
2. Defendant BPD's cross-motion for judgment on the pleadings be **ALLOWED**; and
3. The complaint be **DISMISSED**.



Linda E. Giles,
Justice of the Superior Court

Dated: February 22, 2017

⁵ Det. Sullivan's challenge to the HRD's delegation of authority does not alter the court's conclusion. In the first place, the court agrees with the Commission that the HRD properly delegated to the BPD its authority to approve promotional bypasses. See *Malloch*, 472 Mass. at 790 ("We read G. L. c. 31, § 27, to require only receipt of bypass reasons by the administrator, and not approval thereof"). Furthermore, even if the court were to find this delegation of authority to be improper, the same undisputed facts before the BPD would have been presented to the HRD and, likewise, would have resulted in Det. Sullivan's bypass due to her ineligibility for promotion.