

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. MICV2009-04468

BELMONT FIRE DEPARTMENT
Plaintiff

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

RULING ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

In September 2007, the Town of Belmont's ("Belmont") appointing authority, Chief David L. Frizzell ("Chief Frizzell"), notified the Commonwealth's Human Resource Department (the "HRD") of his decision to bypass fire Lieutenant Stephen Wilcinski ("Wilcinski") for promotion to the position of captain with the Belmont Fire Department (the "Department"), and instead select a lower ranked individual, Kenneth Gardiner ("Gardiner"). The HRD approved Belmont's reasons for bypassing Wilcinski. Thereafter, Wilcinski exercised his right to administrative review by appealing the bypass to the Civil Service Commission (the "Commission"). In August 2009, the Commission voted 3-2 to allow Wilcinski's bypass appeal concluding that, in bypassing Wilcinski, Belmont violated basic merit principles. The Commission directed Belmont to vacate Gardiner's appointment, place Wilcinski at the top of the current and next civil service list, and redo the previous appointment.

Belmont brought the current action pursuant to G. L. c. 31, § 44, seeking judicial review

¹Stephen Wilcinski

of the Commission's decision. The matter is currently before the court on the parties' Cross-Motions for Judgment on the Pleadings. After reviewing the pleadings and for the reasons stated below this court determines that the Commission's decision was not supported by substantial evidence and that the Commission impermissibly substituted its judgment for that of the appointing authority.

BACKGROUND

On July 10, 2007, Chief Frizzell requested a promotional list from the HRD for the position of Permanent Full-Time Captain. Chief Frizzell is the appointing authority for the Department. When Chief Frizzell received the civil service promotional list for Captain from the HRD, Lieutenant Daniel Scannell was first on the list with a score of 91, Wilcinski was second with a score of 84, and Gardiner was third with a score of 76. Wilcinski began working for Belmont as a firefighter on February 3, 1986 and was promoted to the rank of Lieutenant on March 27, 1997. Gardiner began working for Belmont as a firefighter on June 2, 1997 and was promoted to the rank of Lieutenant on July 9, 2003. .

Unlike many other communities where a Captain is a company-level position, meaning the Captain rides a truck and supervises a small number of people, in Belmont, the Captain's position is actually the Shift Commander's position. This means that, at least once every four days, each Captain serves as Shift Commander. As Shift Commander, the Captain is responsible for making sure the shift is filled, all personnel are present, and the assigned duties are completed. In addition, in this role, the Captain is responsible for making sure that all laws, rules, regulations, and department policies are followed.

Because of the Captain's varied responsibilities, Chief Frizzell and Assistant Chief Edward Angus Davison ("Assistant Chief Davison") devised a panel interview and scenario-based interview process to evaluate the candidates.² In addition to firefighting knowledge and skill, Chief Frizzell and Assistant Chief Davison identified the following five areas as important for the Captain position: (1) the ability to follow written and verbal directions; (2) the ability to properly interpret written documents; (3) attention to detail; (4) leadership skills; and (5) the ability to communicate, both verbally and in writing.

On August 13, 2007, all of the candidates were given written instructions regarding the promotional process. All of the candidates were asked to submit a letter of intent along with their resume. The candidates were also given a written assignment, which asked them to describe their most difficult leadership challenge as a Lieutenant in the Department, what they might do differently in the future, and what they saw as trends or issues within the Department. Thereafter, the candidates participated in a formal interview and answered questions posed by Chief Frizzell and Assistant Chief Davison. The candidates were then required to give an oral presentation, in the form of a training class, pertaining to seat belt usage for firefighters. Finally, Chief Frizzell and Assistant Chief Davison evaluated the candidates based on what independent initiative they had taken to better themselves as a member of the fire service and how their outside interests would benefit the Department.

Following the above-described process, Chief Frizzell and Assistant Chief Davison discussed each candidate and made a determination as to where each candidate ranked relative to

² Since Chief Frizzell became Belmont's Fire Chief in 2004, he has utilized, to varying degrees, this type of interview panel and scenario-based interview process twice for Captain's vacancies in 2004 and 2007, and once for a Lieutenant vacancy in 2004.

the others with respect to the five skill areas previously identified. Chief Frizzell and Assistant Chief Davison separately ranked Gardiner ahead of Wilcinski in the following categories: interpreting written documentation, attention to detail, leadership abilities, written and oral communication skills, and in participating in outside interests that benefited the Department. In fact, Chief Frizzell and Assistant Chief Davison separately ranked Gardiner as the best overall candidate for the vacant Captain's position. Thus, on September 9, 2007, Chief Frizzell bypassed Wilcinski and promoted Gardiner to the position of Captain, effective September 25, 2007.

As required by G. L. c. 31, § 27 for a promotional bypass, Chief Frizzell submitted a written list of reasons explaining the bypass to the HRD (the "Bypass Letter"). The Bypass Letter covered all of the components of the Department's interview process, as well as the criteria used by Chief Frizzell and Assistant Chief Davison to evaluate all three candidates.

With respect to the ability to follow directions, the Bypass Letter states "[t]he ability to follow directions, both written and oral, is paramount to a safe and successful work environment. The ability to follow directions on the fire ground is imperative for firefighter and citizen safety." As to this skill, Chief Frizzell and Assistant Chief Davison ranked Gardiner first and Wilcinski second. According to the Bypass Letter, "[w]ithout exception Gardiner followed all written direction (sic) for the interview process," while "Wilcinski did a fair job but did not follow all written direction (sic) [for the interview process]."

Regarding the interpretation of written documents, the Bypass Letter indicates [t]he ability to interpret written documentation is another critical skill. Many of the Town's and Department's General Orders, Standing Operating Guidelines (SOG), Policies, Material Safety

Data Sheets and other critical documentation are in a written format. The correct interpretation of these documents has a direct correlation to the safety of the Department members and the citizens.

In assessing this skill area, Chief Frizzell and Assistant Chief Davison analyzed the candidate's performance on the assigned scenario, which required the candidate to interpret a Department General Order/SOG that required discipline. Under this criteria, Chief Frizzell and Assistant Chief Davison ranked Gardiner first and Wilcinski second. . According to the Bypass Letter, "Gardiner . . . was able to interpret the documents and provided the required responses [and] [h]e followed the appropriate course of discipline for the scenario." In contrast, the Bypass Letter indicated Wilcinski "did a fair job with his responses. [However,] [a]lthough he appeared to understand the concept of progressive discipline he exhibited a reluctance to apply the concept."

Regarding attention to detail, the Bypass Letter explains that paperwork "is a very important aspect of [the Department's] work. [The Department] produce[s] documents that must meet a legal standard. Improperly completed documents can cause legal expenses for the Town." Further, according to the Bypass Letter, "[a]ttention to detail is a character trait which can be correlated to and have impacts in areas other than paperwork. If a member does not pay attention to details it could lead to firefighters getting injured or worse. Small details about a building fire, for instance, may affect what tactics firefighters should or should not use in fighting that fire." In this skill area, Chief Frizzell and Assistant Chief Davison ranked Gardiner first and Wilcinski third.. The Bypass Letter indicates "Gardiner appropriately completed all of his documentation" while "Wilcinski's attention to detail was lacking."

With respect to leadership skills, the Bypass Letter states that, because the Captain's position is that of Shift Commander, "the candidate must have good leadership characteristics." In this area, Chief Frizzell and Assistant Chief Davison again ranked Gardiner first, claiming "all three candidates have had experience leading small companies and some have had the ability to lead a group on an intermittent basis," but "only candidate Gardiner has led a much larger organization being the President of the Firefighters Union." Having personally observed him in this role, Chief Frizzell felt this experience "set [Gardiner] above the other candidates."

As to the ability to communicate, both verbally and orally, the Bypass Letter states "[t]he Fire Captain in Belmont must be able to communicate both up and down the chain of command. The Captain must be able to take information learned and distribute that information to the members under his command. In addition he must be able to report items or conditions to superiors." In assessing this skill area, Captain Frizzell and Assistant Chief Davison analyzed the candidates' written responses to the writing assignment, the candidates' verbal answers to the interview questions, and the candidates' performance during the training class presentation. Again, Chief Frizzell and Assistant Chief Davison ranked Gardiner first and Wilcinski second.

First, with respect to the candidates written responses, Chief Frizzell and Assistant Chief Davison were checking to see that the candidate answered the question asked and that the answer was cohesive. According to the Bypass Letter, "Candidate Gardiner responded in a clear and concise manner and answered the questions," while "Candidate Wilcinski responded in a clear manner but did not directly answer the questions asked." Next, the Bypass Letter indicated that all the candidates did well regarding their verbal answers to the general interview questions. Lastly, as to the oral presentation, the Bypass Letter states "Candidate Gardiner's presentation

was well balanced and engaging. He used Power Point slides and commentary that detailed the Department's policy and the foundation behind the policy. His presentation was easily understood by the interview panel." In contrast, the Bypass Letter indicates "Wilcinski simply presented the interview panel with a series of handouts and did not explain the seatbelt policy or engage his audience. It was not an effective presentation."

In addition to these areas, the candidates were evaluated on their initiative in broadening their knowledge of the fire service, their current job performance, and their potential future performance as Captain. Both Wilcinski and Gardiner had pursued advanced training. Wilcinski was certified as a Fire Inspector Officer I, a Fire Inspector Grade I and II, a Fire Apparatus Engineer, and an Emergency Medical Technician ("EMT"). Gardiner was certified as an Incident Safety Officer, a Trench Rescue Tactician, a Peer Counselor, a Fire Officer Supervisor, and an EMT.

On September 24, 2007, the HRD approved the list of reasons the Department set forth in the Bypass Letter. On this same date, the HRD notified Wilcinski it had approved the bypass. On November 9, 2007, Wilcinski filed an appeal with the Commission. On March 11, 2008, the Commission held an evidentiary hearing.

During this hearing, the Commission heard testimony from five witnesses and reviewed twelve exhibits. Although Chief Frizzell testified that Wilcinski was "a good firefighter a good company officer," in the end, he concluded Gardiner was the "solid leader."

During the hearing, Chief Frizzell testified regarding the criteria used to evaluate each candidate's placement with respect to the five skill areas he and Assistant Chief Davison had established for the selection process. Regarding the ability to follow directions, Chief Frizzell

testified that “with Lieutenant Wilcinski, we feel that he didn’t follow the direction (sic) as far as his writing assignment.” With respect to the ability to interpret written documents, Chief Frizzell testified that “Captain Gardiner did the best.” As to attention to detail, Chief Frizzell testified that “some of the documents that Lieutenant Wilcinski submitted failed to have signatures, had a wrong cell phone number and things like that.” Regarding the ability to communicate, primarily analyzed through each candidate’s training presentation, Chief Frizzell testified that Gardiner “did a tremendous job on his presentation” while Wilcinski “did some commentary, handed out some printouts from the worldwide web . . . on different types of firefighter accidents where seatbelt use may have saved a firefighter’s life.”³

At the hearing, Chief Frizzell testified that neither he nor Assistant Chief Davison interviewed either Wilcinski or Gardiner’s supervisors or subordinates.⁴ In addition, Chief Frizzell indicated the interview did not contain any questions specifically about firefighting tactics or procedures because “firefighting tactics and procedures questions were answered as part of the [civil service] exam.” Further, Chief Frizzell testified he did not place any great weight on the disparity in experience between Wilcinski and Gardiner, stating “I look more at job performance and things like that than actual time on the job.”⁵

³ Chief Frizzell acknowledged that a Standard Operating Guideline for seatbelt usage would typically be handed out in written format or posted on a bulletin board, but Assistant Chief Davison testified that the training presentation was part of a scenario and the candidates were expected to do more than merely handout a copy of the guideline.

⁴ Nevertheless, the two Captains that testified on behalf of Wilcinski, John Pizzi and Wayne Haley, testified they would rank Wilcinski and Gardiner equal in the five areas identified by Chief Frizzell and Assistant Chief Davison. (A.R. TR., p. 135; pp. 148-149).

⁵ At the time of the selection process, Wilcinski had held the rank of Lieutenant for approximately ten years and had logged more than 400 hours as Acting Captain. (A.R. TR., p. 56; p. 62). Meanwhile, Gardiner had held the rank of Lieutenant for approximately four years and had logged seventy-eight hours as Acting Captain.

In addition, at the hearing, Chief Frizzell indicated that he and Assistant Chief Davison reviewed issues related to discipline and attendance as part of each candidate's job performance. (A.R. TR., pp. 98-99).⁶ Wilcinski was the only candidate that had had a disciplinary violation. He was one of several members of the Department who were perceived to be in violation of Belmont's sexual harassment policy and its computer usage policy. The Department issued letters of warning to the offending parties, including Wilcinski, and the whole Department was required to attend sexual harassment training.⁷ As far as attendance, the only real question was related to sick leave; Gardiner averaged two and one half sick days per year while Wilcinski averaged approximately twelve sick days per year. Ultimately, Chief Frizzell and Assistant Chief Davison concluded that "[a]s a result of our comprehensive interview process and assessing each of the candidate's key traits, Candidate Gardiner is clearly the best candidate for promotion to the rank of Fire Captain."

On August 21, 2009, the Commission issued its decision, allowing Wilcinski's appeal by a three to two vote. According to the Commission, Chief Frizzell, as Belmont's appointing authority, violated basic merit principles by: (1) ignoring the eight-point difference between Wilcinski's and Gardiner's civil service examination scores; (2) failing to adequately consider and describe the candidates' day-to-day work performance; and (3) placing too much weight on the seatbelt training presentation rather than the more objective measurements of work

⁶ In 2004, Wilcinski was previously bypassed for promotion to the position of Captain by Chief Frizzell. This bypass was premised on his inappropriate use of sick time. In January 2006, Wilcinski approached Chief Frizzell and asked whether he should take the civil service exam; he wanted to know if his previous discipline would prevent him from being promoted. Chief Frizzell informed Wilcinski he should take the exam and move forward. More specifically, Chief Frizzell indicated Wilcinski had a "clean slate" and that the reasons for the 2004 bypass would not apply to the current round of promotions. Nevertheless, Assistant Chief Davison testified that discipline was a consideration during the selection process.

⁷ Gardiner was not in violation of either the sexual harassment policy or the computer usage policy.

performance, test score, and time on the job. Ultimately, the commission concluded Belmont's bypass prejudiced Wilcinski's rights, and thus, it directed:

"The Town of Belmont Fire Department and HRD to vacate forthwith its most recent appointment, (Gardiner) to the position of Captain for the Belmont Fire Department. The Civil Service Commission further directs the Human Resources Division to place Stephen J. Wilcinski's name at the top of the current eligibility list and/or the next eligibility list for promotional appointment for said position, so that his name appears at the top of the next certification which is requested by the Town of Belmont Fire Department and from which the next appointment to the position of Captain for the Belmont Fire Department shall be made, so that the Appellant receive at least one opportunity for consideration. It is expected that the Town then will employ a selection process that comports with the tenor and tone of this decision and the purposed of Chapter 31. The Town may choose to employ as part of the next candidate evaluation process, segments which are recognized as subjective determinations, such as interviews and training presentations. However, if the Town chooses to employ such subjective segments, it must audio and video record such segments of all the competing candidates. If selected, upon appointment to the position of Captain, the Appellant shall receive the additional relief consisting of a retroactive seniority date, for civil service purposes only, back to the date of the improper bypass."

On September 3, 2009, Belmont filed a Motion for Reconsideration with the Commission. On October 19, 2009, Belmont received by mail a copy of the Commission's decision, in which the Commission allowed, in part, Belmont's Motion for Reconsideration and amended the previous order to add the following:

"Notwithstanding the expiration date of November 1, 2009, the current certification list with the Appellant's name now placed at the top of said list will remain active and the expiration date will be extended until such time as the next permanent appointment to the vacated position of Captain is made thereby allowing the three

(3) eligible candidates from the previous appointment to remain eligible for the permanent appointment for the vacated position of Captain. It is expected that the selection process for this appointment will begin immediately."

DISCUSSION

Pursuant to G. L. c. 30A, a court may reverse, remand, or modify an agency decision if the substantial rights of any party have been prejudiced because the agency's decision was based upon an error of law, was not supported by substantial evidence, or was arbitrary and capricious. G. L. c. 30A, § 14(7)(c),(e),(g).

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); see also G. L. c. 30A, § 1(6) (defining substantial evidence). "A decision is not arbitrary and capricious unless there is no ground which 'reasonable men might deem proper' to support it." T.D.J. Dev. Corp. v. Conservation Comm'n of N. Andover, 36 Mass. App. Ct. 124, 128 (1994) (citation omitted).

Judicial review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(5). A court must give due weight to the experience, technical competence, and specialized knowledge of the agency in reviewing an agency decision, and may not substitute its own judgment for that of the agency on questions of fact. G. L. c. 30A, § 14(7); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). The court "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), and may not engage in a de novo determination of the facts. Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 351 (1987). As the appealing party, Belmont bears the burden of proving that the Commission's decision is invalid. Brackett v. Civil Service Comm'n, 447 Mass. 233, 242 (2006).

In reviewing employment actions of appointing authorities, the Commission's role is to find whether "on the basis of the evidence before [the Commission], the appointing authority has sustained its burden of proving [by a preponderance of the evidence] that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997), citing Mayor of Revere v. Civil Serv. Commission, 31 Mass. App. Ct. 315, 320 n.10 (1991). In this context, reasonable justification means there existed "adequate reasons [which were] sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Cambridge, 43 Mass. App. Ct. at 304, quoting Wakefield v. Judge of First Dist. Court of E. Middlesex, 262 Mass. 477, 482 (1928). The Commission must make this assessment with a "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. Although appointing authorities are given broad discretion in selecting public employees, when personnel decisions appear to be based on "political control or objectives unrelated to merit standards or neutrally applied public policy" the Commission may intervene. Id. at 304-305. However, the Commission cannot "substitute its judgment about a valid exercise of discretion

based on merit or policy considerations.”⁸ Id. at 304.

Although, this court does not engage in a de novo review of the facts as found by the Commission, this court is not required to accept facts if they are unsupported by substantial evidence. Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). After a thorough review of the Commission’s decision, this court determines that several of the Commission’s factual findings are not supported by substantial evidence.

The Commission faults the Appointing Authority because it ignored the eight-point differential between Wilcinski and Gardiner’s Civil Service Examination scores, their firefighting knowledge,⁹ their work performance, as well as the fact that too much reliance was placed on the “subjective” interview process.

Chief Frizzell stated that he did not consider the eight-point exam score significant, because in his opinion, the examination results only identifies who is the better test taker. This however, is not determinative, because a candidates’ civil service examination score, although the primary tool in determining relative ability, knowledge and skills, “does not in and of itself give [the higher scorer] a legal right to be appointed” to a vacant position. Murphy v. Cambridge, 16 MCSR 4, 5. Chief Frizzell later testified that the examination gives you one “view of the candidate” but that it does not give you a “total picture.” If the civil service examination was the only method to determine who is the most qualified candidate, then the Appointing Authority

⁸ General Laws c.31, §1, defines “basic merit principles” as “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment . . .”

⁹ Chief Frizzell did not ask the candidates questions regarding firefighting tactics because those types of questions were “answered as part of the [Civil Service Exam].” Vol. II, 92:15-20. The Commission found that Chief Frizzell failed to evaluate the candidates’ firefighting knowledge in an attempt to “unfairly disadvantage [Wilcinski], as Captain John Pizzi rated his knowledge of firefighting tactics and procedures as good to excellent.” Vol. I, 160. This finding is not supported by substantial evidence, because Captain Pizzi also stated that Gardiner’s firefighting tactics were “more than acceptable and [he] does a fine job.” Vol. II, 132:2-9.

could never use its discretion in making appointments.

The Commission's finding that Chief Frizzell failed to adequately consider and describe the candidates' day-to-day work performance and experience is also unsupported by substantial evidence. The Commission based this finding on Chief Frizzell's failure to consult the candidates' supervisors or subordinates. However, in the bypass letter, Chief Frizzell discusses the candidates' job performance. Although his analysis of each candidate was brief, this indicates he was aware of each candidates' job performance and considered it in making the appointment. Furthermore, Chief Frizzell testified before the Commission that he considered each candidate's job performance when making the appointment. Vol. II, 97:15-17. Assistant Chief Davison also testified that job performance was considered as part of the evaluation process.¹⁰

The Commission's determination that the Appointing Authority relied too heavily on the subjective component of the selection process is not supported by substantial evidence. The Commission's first complaint with the subjective component used to assist in the selection of a candidate to fill the vacant position was that no scoring sheets or model answers were used to grade the interviews and oral presentations. However, there is no requirement that scoring sheets or model answers be used, what is required is that evaluations be based on a predetermined list of criteria, which was used in this case. See Flynn v. Civil Serv. Comm., 15 Mass. App. Ct. 206,

¹⁰ The Commission also found that Chief Frizzell failed to consider Wilcinski and Gardiner's experience as Acting Captain and that the failure to consider this indicated the process was "not actually designed to select the best candidate for the position, but it was designed instead to unfairly advantage [Gardiner] over [Wilcinski]." Vol. I, 157. At the time of the bypass, Wilcinski had approximately 416 hours experience as Acting Captain, whereas Gardiner had approximately 78 hours of experience as Acting Captain. See *supra*, fn. 6. Although Chief Frizzell did not specifically address the number of hours each candidate worked as Acting Captain, this was discussed in the bypass letter. Vol. I, 38. Assistant Chief Davison testified that the candidates' experience as Acting Captain, including the amount of time each candidate spent as Acting Captain was considered. Vol. II, 173:10-19. Although the number of hours Wilcinski and Gardiner worked, as Acting Captain was not directly stated in the bypass letter, it is apparent that their experience as Acting Captain was considered.

208 (1983). Second, the Commission discusses the Appointing Authority's failure to videotape the interview and oral presentation, based on the memorandum submitted to the candidates stating that the "presentation may be videoed." However, the memorandum stated that the presentation may be video recorded; therefore, it was within the Appointing Authority's discretion to determine whether to video record the presentation.

The Commission also discussed the fact that in the history of the Belmont Fire Department, prior to the bypass at issue here, the only person ever bypassed was Wilcinski. In August of 2004, Chief Frizzell bypassed Wilcinski for the position of Fire Captain. Chief Frizzell's decision to bypass Wilcinski in 2004 was based on Wilcinski's recent suspension. Based on Wilcinski's suspension, the 2004 bypass was justified.¹¹ Furthermore, Chief Frizzell wrote in the 2007 bypass letter that Wilcinski "ha[d] been able to correct his previous shortcomings[.]" which indicates that he did not take Wilcinski's prior actions into consideration during this evaluation.

The Commission also emphasizes the Appointing Authority's reliance on the candidates' performance during the oral presentation. Specifically, the Commission found that Gardiner was credited for using PowerPoint while Wilcinski was penalized for not creating a PowerPoint presentation. The Commission found this to be "fundamentally unfair" because General Orders had never been presented using PowerPoint. Chief Frizzell, however, was impressed with Gardiner's oral presentation not simply because of his use of PowerPoint. Unlike Wilcinski, Gardiner discussed the department's seatbelt policy in detail and the reasons why the policy was instituted. Gardiner's presentation was also more engaging than Wilcinski's presentation.

¹¹ Wilcinski called in sick and went on vacation. When confronted about his abuse of sick time, he submitted a fabricated doctor's note. He was suspended for this offense.

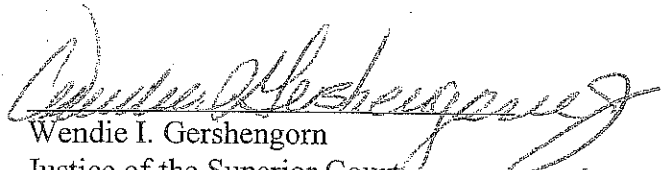
Although, Chief Frizzell mentioned Gardiner's use of PowerPoint, that was not his sole basis for ranking Gardiner higher than Wilcinski in this exercise. Therefore, the Commission's determination that the oral presentation was unfairly prejudicial is not supported by substantial evidence.

Without the unsupported facts that the Commission relied upon, this court must review the Commission's decision to overrule Chief Frizzell's choice between Wilcinski and Gardiner, both of who were qualified. The Commission cannot, however, "substitute its judgment about a valid exercise of discretion based on merit or policy considerations" made by an Appointing Authority. Cambridge, 43 Mass. App. Ct. at 304. In this case, Chief Frizzell exercised the broad discretion he had as the appointing authority to choose between two qualified candidates. The Commission is not allowed to substitute its judgment for that of the appointing authority merely because it would have chosen Wilcinski had the matter been before it de novo. Despite the Commission's belief that more consideration should have been give to the Civil Service Examination results, while less weight should have given to the subjective component of the examination, that decision is left to the Appointing Authority. Id. Therefore, this court concludes that the Commission acted arbitrarily and capriciously by substituting its judgment for that of the Appointing Authority's regarding who should have been appointed to the vacant Full-Time Fire Captain position.

CONCLUSION

The Commission impermissibly substituted its judgment for that of the Appointing Authority, and therefore the Commission's decision to reverse the Appointing Authority's decision to bypass Wilcinski for Gardiner was an arbitrary and capricious.

For the above reasons, Plaintiff's Motion for Judgment on the Pleadings is **ALLOWED**. Defendant Massachusetts Civil Service Commission's Motion for Judgment on the Pleadings is **DENIED**.


Wendie I. Gershengorn
Justice of the Superior Court

Dated:

August 5, 2000