

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

KRISTIN MALLOCH,
Appellant,

v.

G2-12-278

TOWN OF HANOVER,
Respondent.

Appearance for Appellant:

Frank J. McGee, Esq.
1952 Ocean Street
Marshfield, MA 02050-3424

Appearance for Respondent:

Kevin Feeley, Esq.
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Commissioner:

Christopher C. Bowman

DECISION

On October 5, 2012, the Appellant, Kristin Malloch (Officer Malloch), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Hanover (Town) to bypass her for promotional appointment to the position of permanent, full-time police sergeant in the Town's Police Department (Department). A pre-hearing conference was held on November 6, 2012 at the offices of the Commission. A full hearing was held at the same location on December 12, 2012. The hearing was digitally recorded and both parties were provided with a CD of the hearing. Proposed decisions were submitted by both parties.

Since the Town was reasonably justified in bypassing Officer Malloch based on her poor interview performances, her appeal is dismissed.

FINDINGS OF FACT:

Twelve (12) exhibits were entered into evidence at the hearing. After the hearing, Officer Malloch sought to enter two additional exhibits, which I have allowed and marked as Exhibits 12A and 12B respectively. Based on the exhibits, the stipulated facts, and the testimony of:

Called by the Town:

- Michael J. McDonough, Police Captain, Town of Marshfield (member of interview panel);
- Gregory Nihan, Police Lieutenant, Town of Hanover (member of interview panel);
- Nicholas P. Zeoli, Police Lieutenant, Town of Rockland (member of interview panel);
- Troy Clarkson, Town Manager, Town of Hanover (Appointing Authority);
- Walter Sweeney, Jr., Police Chief, Town of Hanover;

Called by the Appellant:

- Kristin Malloch, Appellant;

I make the following findings of fact:

1. Officer Malloch is married, has two (2) children and lives in Hanover, Massachusetts. She has been a police officer in Hanover for approximately eight (8) years. Prior to that, she served as a police officer for the Harvard University Police Department. She is one (1) of only two (2) female police officers in Hanover. (Testimony of Officer Malloch) She graduated from Hanover High School and received a bachelors degree in criminal justice from Stonehill College. (Exhibit 10) Officer Malloch's cousin currently serves as a police lieutenant in Hanover and her father was a Hanover police officer for many years. (Testimony of Officer Malloch)

2. On October 15, 2011, Officer Malloch took a promotional examination for police sergeant and received a score of 86. As a result, her name appeared on an eligible list of candidates for Hanover police sergeant, established by the state's Human Resources Division (HRD) on March 31, 2012. (Stipulated Facts)
3. On April 3, 2012, in order to fill two (2) vacancies for police sergeant in Hanover, the Town created Certification No. 202714. Officer Malloch's name appeared first on this Certification among those willing to accept employment based on her exam score of 86. The names of Officers Timothy Kane, Karl Buzalsky and Derek Richards appeared second, third and fourth respectively. Although all three of these officers initially signed the Certification as willing to accept appointment, Officer Buzalsky subsequently withdrew his name from consideration. (Stipulated Facts and Exhibit 2)¹
4. As part of the review and selection process, Chief Sweeney assembled a three (3)-member interview panel to make a recommendation to him and the Town Manager, who is the Appointing Authority. The interview panel consisted of Hanover Police Lieutenant Gregory Nihan and two (2) superior officers from other towns: Marshfield Police Captain Michael J. McDonough and Rockland Police Lieutenant Nicholas Zeoli. (Testimony of Chief Sweeney and Exhibit 7)

¹ Counsel for the Appellant sent written correspondence to HRD seeking the exam scores of Officers Kane and Richards. HRD refused to disclose the information. After the filing of the instant appeal, counsel for the Appellant asked the Commission to authorize the issuance of a subpoena to HRD to obtain these exam scores. I authorized a subpoena requiring the keeper of the records to appear and provide the scores requested. Service was made shortly thereafter. HRD did not respond to the subpoena. At the conclusion of the full hearing, I informed the parties that counsel for the Appellant would be given sufficient time to enforce the subpoena, report back to the Commission and opposing counsel and that, if necessary, the record and/or hearing would be re-opened to enter the exam scores. The Appellant subsequently notified the Commission that she would not seek to enforce the subpoena in Superior Court. In correspondence submitted to the Commission, the Appellant stated that the two candidates who bypassed her received scores of 81 and 76 respectively. Even if this information is accurate, it does not change my conclusion that the Town was reasonably justified in bypassing the Appellant in favor of the two lower-ranked candidates who received lower scores on their written examinations than the Appellant.

5. Except for occasionally seeing some of the officers in court, neither Captain McDonough or Lieutenant Zeoli knew any of the three (3) candidates. (Testimony of Captain McDonough and Lieutenant Zeoli)
6. Prior to the interview panel convening, Lt. Nihan forwarded ten (10) suggested questions, which were provided by Chief Sweeney, to the other interview panelists and asked them if they wanted to add to or modify any of the questions. They did not. (Testimony of Lt. Nihan and Exhibit 6)
7. The ten (10) interview questions include some standard interview questions (i.e. – address your strengths and weaknesses), some more specific questions about the Department (i.e. – how would you improve the Department’s efficiency?) as well as some case scenarios (i.e. – how would you respond to a shooting at a local mall?) (Exhibit 6) All of the questions appear to be appropriate, job-related questions gauged to assess a candidate’s ability to perform the duties of a police sergeant.
8. At 8:30 A.M. on September 10, 2012, the three-member interview panel, along with Chief Sweeney, convened and reviewed the resumes and personal written statements of each of the candidates. (Testimony of Lt. Nihan, Captain McDonough and Lt. Zeoli) The written statements submitted by each candidate addressed each candidate’s “biggest accomplishment and disappointment in life and what [they’ve] learned from both.” (Exhibit 11)
9. Each of the candidates’ well-written and poignant personal statements referenced their families and their ability to balance work, family and school as their biggest accomplishments. (Exhibit 11)
10. At 10:00 A.M. on September 10, 2012, the three (3)-member interview panel began interviewing the three (3) candidates in the order that they appeared on the Certification:

Officer Malloch, Officer Kane, Officer Richards. (Testimony of Lt. Nihan, Captain McDonough and Lt. Zeoli)

11. Each of the three (3) interview panelists took notes regarding each of the candidates and, using a scale of 1 to 5, rated the candidates in four (4) categories: Communication Skills; Poise-Presentation; Appearance; and Response to Questions. Thus, the highest rating a candidate could receive from an individual panelist was 16. (Exhibit 5)

Captain McDonough's review of the candidates

12. Captain McDonough has been a police officer in Marshfield for approximately eighteen (18) years and has been in his current position of captain for four (4) months. He served as a lieutenant for eleven (11) years. During his tenure, he has participated in approximately seventy-five (75) interview panels. (Testimony of Captain McDonough)
13. Captain McDonough observed that Officer Malloch was on time for the interview and professionally dressed. However, he found Officer Malloch to be “nervous”; “unable to settle down” throughout the 30-35 minute interview; and that she did not exhibit a “command presence”. Captain McDonough was concerned that when Officer Malloch was asked a follow-up question regarding who was considered the “go-to” person when she was on-duty, she did not identify herself. He was concerned that Officer Malloch did not identify any concrete suggestions for improving the efficiency of the Department. He was also troubled by Officer Malloch’s insufficient response to the case-scenario involving a shooting at a local mall. (Testimony of Captain McDonough) He gave Officer Malloch a rating of 14 out of 20, giving her 3 out of 5 points in those categories related to communication skills, poise-presentation and response to questions. (Exhibit 5)

14. In contrast, Captain McDonough found Officer Kane to be “dead-on” and someone who “instilled confidence” and was “clear, concise and thorough” in his answers. (Testimony of Captain McDonough) Officer Kane provided good examples of situations and seemed to draw on his police experience in Abington and Hanover to answer the questions. (Exhibit 4) Captain McDonough gave Officer Kane a rating of 20 out of 20, giving him the maximum 5 points in each category. (Exhibit 5)
15. Captain McDonough observed that although Officer Richards started the interview a little rigid and nervous, he became more confident and less rigid as the interview progressed. Officer Richards’s answers were well thought out. He specifically identified a field training program as a way to improve the efficiency of the Department and offered a complete, well thought-out plan of action in response to the two case scenarios. (Exhibit 4) Captain McDonough gave Officer Richards a rating of 16.5 out of 20, giving him a 3.5 in regard to poise-presentation, and a 4 in the categories of communication and response to questions. (Exhibit 5)

Lieutenant Nihan’s review of the candidates

16. Lt. Nihan has been a police officer in Hanover since 1987 and has served as a lieutenant for the past four and a half (4 ½) years. He has participated in dozens of review panels during his tenure. As a long-time police officer in Hanover, he was familiar with all three (3) candidates, but has never socialized with any of them outside of Department-sponsored holiday parties. (Testimony of Lt. Nihan)
17. Lt. Nihan observed that Officer Malloch appeared nervous during the interview and that her nervousness never waned. He found certain answers from Officer Malloch to be “vague” and was particularly concerned about Officer Malloch’s response to the scenario regarding a

hypothetical shooting incident at the local mall and questioned whether her response (“go in”) was indicative of someone who would be able to provide a quick, but tactical decision when it was required in a crisis situation. He felt that Officer Malloch’s response to the question regarding improved efficiencies (get more officers out on the road) was not well thought out or substantive. Lt. Nihan also noted that Officer Malloch lacked a “command presence.” (Testimony of Lt. Nihan and Exhibit 3) He gave Officer Malloch a rating of 14 out of 20, giving her only 3 points in the categories of communication, poise-presentation and response to questions. (Exhibit 5)

18. Lt. Nihan found Officer Kane to be “outstanding” and “energetic” and someone who had a “command presence” who answered questions without hesitation and always maintained eye contact. He was impressed that Officer Kane identified himself as the “go-to-guy” on shifts that he is working on. He was particularly impressed with Officer Kane’s response to the shooter question as Officer Kane laid out the tactical steps necessary to respond to the crisis. (Testimony of Lt. Nihan and Exhibit 3) He gave Officer Kane a rating of 20 out of 20. (Exhibit 5)

19. Lt. Nihan found Officer Richards to be nervous at the beginning of the interview, but less nervous as the interview progressed. He was impressed by Officer Richards’s response to the shooter question which included references to a plan to enter the building utilizing a tactical entry and aiding the (hypothetical) injured woman. He was also impressed with Officer Richards’s response to the other hypothetical question about a lost child, noting that Officer Richards instinctively identified the need to immediately address the possibility that an abduction had occurred. (Testimony of Nihan and Exhibit 3) He gave Officer Richards a rating of 20 out of 20. (Exhibit 5)

Lieutenant Zeoli's review of the candidates

20. Lt. Zeoli has been a Rockland police officer for seventeen (17) years and has been a lieutenant for the past three (3) years. He has served on approximately 40-50 interview panels during his tenure. (Testimony of Lt. Zeoli)
21. Lt. Zeoli found Officer Malloch to be articulate, but was concerned that she gave inadequate and inappropriate answers to some of the questions asked of her. He too was concerned that Officer Malloch did not identify herself as a “go-to person” and was also concerned about the lack of specifics in response to the shooter scenario. Overall, he found Officer Malloch to be nervous and tentative throughout the interview. (Testimony of Lt. Zeoli) He gave Officer Malloch a rating of 14 out of 20, giving her a 3 in the categories of communication, poise-presentation and response to questions. (Exhibit 5)
22. Lt. Zeoli found Officer Kane to be someone who was eager, energetic and able to answer questions thoughtfully without hesitation. (Testimony of Lt. Zeoli) He gave Officer Kane a rating of 20 out of 20. (Exhibit 5)
23. Lt. Zeoli was also impressed with answers provided by Officer Richards. (Testimony of Lt. Zeoli). He gave Officer Richards a rating of 19 out of 20, giving him a rating of 4 out of 5 in poise-presentation. (Exhibit 5)
24. Each of the panelists penned written summaries of their observations and Lt. Zeoli was tasked with writing a summary of their recommendations, which he did on September 17, 2012, noting that they ranked Officer Kane first, Officer Richards second and Officer Malloch third. (Exhibit 7)

25. On September 19, 2012, Town Manager Troy Clarkson and Chief Sweeney conducted another round of interviews with each of the candidates. (Testimony of Mr. Clarkson and Chief Sweeney)
26. Mr. Clarkson has been the Town Manager of Hanover for approximately eight (8) months. Prior to that, he served as the Town Manager in Bridgewater for two (2) years, Plymouth County Administrator for two (2) years and Director of Business Services in the Town of Bourne for four (4) years. (Testimony of Mr. Clarkson)
27. Chief Sweeney has served as the Town's Police Chief for four and a half (4 ½) years and has been with the Department for fourteen (14) years. (Testimony of Chief Sweeney)
28. Both Chief Sweeney and Mr. Clarkson posed questions to the candidates and then discussed the results of the interviews and their initial thoughts about who should be promoted to sergeant. (Testimony of Chief Sweeney and Mr. Clarkson)
29. Mr. Clarkson asked each candidate two (2) questions: 1) What is the last book you read?; and 2) explain the difference between management and leadership. In regard to the first question, Mr. Clarkson was looking to gauge how each of the candidates would respond to an "out-of-the-box" question. In regard to the second question, he wanted to see if the candidate understood the difference between the administrative / operational duties associated with a manager as opposed to a leader who needs to inspire – and lead - other people. (Testimony of Mr. Clarkson)
30. Chief Sweeney recalled that Officer Malloch had recently read "a book about animals", but Mr. Clarkson recalled that that the name of the book was "Watership Down."² Mr. Richards

² I take administrative notice of the following summary of *Watership Down* from the website Amazon.com: "*Watership Down* has been a staple of high-school English classes for years. Despite the fact that it's often a hard sell ...Richard Adams's bunny-centric epic rarely fails to win the love and respect of anyone who reads it ... *Watership Down* is a rich story that can be read ... on many different levels. The book is often praised as an allegory, with its analogs between human and rabbit culture ...".

indicated that he doesn't read books, but, rather, reads various police manuals and training material. Mr. Clarkson could not recall what answer Mr. Kane gave. (Testimony of Mr. Clarkson)

31. Mr. Clarkson was troubled by the fact that Officer Malloch was unable to offer any answer regarding the difference between leadership and management. Despite taking some time to think about the question, she was unable to answer the question and did not ask to come back to it later in the interview. In sharp contrast, both Officers Kane and Richards provided thoughtful answers that convinced Mr. Clarkson that they understood the importance of being a leader, and not just a manager. Based on the responses to the questions and the demeanor of the candidates, Mr. Clarkson concluded that while both Officers Kane and Richards were ready to serve in a leadership position, Officer Malloch was not. (Testimony of Mr. Clarkson) Chief Sweeney agreed with this initial assessment and indicated as such to Mr. Clarkson. (Testimony of Chief Sweeney)
32. After reviewing the summary of the interview panel and reflecting on his own observations of the candidates and after considering the recommendation of Chief Sweeney, Mr. Clarkson opted to bypass Officer Malloch, the first ranked candidate, and appoint Officers Kane and Richards, the second and third-ranked candidates. This appeal followed.

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel

administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

ANALYSIS

I carefully considered whether Officer Malloch’s gender contributed to the Town’s decision to bypass her for promotional appointment to sergeant, which would be a violation of basic merit principles warranting intervention by the Commission.

Standing alone, there are certain factors that were of concern to me in this regard. The Town employs only two (2) female police officers and no female has ever served as a superior officer. The Town assembled two all-male review interview panels who rated Officer Malloch below her

two (2) male colleagues for reasons partly related to “poise-presentation” and lack of “command presence”. The members of the review panels met jointly prior to their Commission testimony, resulting in parts of their testimony (i.e. – comments about the nervousness of Officer Malloch during her testimony) sounding rehearsed and exaggerated as compared to the nervousness of one of the male candidates. Finally, the Police Chief’s dismissive testimony about Ms. Malloch’s recent reading choice of a novel as a “book about animals” - and the Town Manager’s praise for a male candidate’s candor that he didn’t read books- only reinforced concerns I had that an all-male review team may have been predisposed to not recommending Officer Malloch for promotion to sergeant because of her gender.

However, after reviewing the entirety of the testimony and documents, as discussed below, a preponderance of the evidence shows that the Town had reasonable justification to bypass Officer Malloch for this promotional appointment and that her gender was not a factor in her non-selection.

First, although I had concerns about the somewhat uniform nature of the testimony from the Town’s sequestered witnesses, I nevertheless found each of them to be credible. The Town’s decision to ask two (2) superior officers from other towns to participate in the review process was a good one. Captain McDonough and Lt. Zeoli did not know the candidates under consideration and they struck me as veteran police officers with a sincere desire to assist Hanover in choosing the right candidate for this promotion. They offered specific examples to support their conclusions regarding Officer Malloch’s demeanor during the interview as well as her insufficient responses to critical questions asked of all candidates, including the mall shooting scenario. Lt. Nihan of Hanover was also a credible witness and he showed no

indication that he was predisposed to choosing any of the candidates prior to the commencement of the review process.

The three (3) interview panelists were all troubled by the lack of specificity and the failure to identify a quick, but tactical plan regarding the mall shooting scenario. Officer Malloch's testimony before the Commission regarding this question was telling. She focused more on a conversation she purportedly had with Lt. Nihan at a recent training session in which Lt. Nihan told her of the need to "go in" and neutralize the perpetrator. Officer Malloch appeared more focused on giving the "right answer" as opposed to a thoughtful reflection about the appropriate tactical response to the crisis. The interview panelists credibly testified that the other candidates' answers to this scenario were more substantive and indicative of someone who would employ the right strategy in a time of crisis.

The panelists also credibly testified that the other candidates offered a more substantive response regarding improving the efficiency of the Police Department, with references to field training and other ideas, where Officer Malloch offered a more limited response regarding the need to get more officers out on the road.

Finally, Officer Malloch acknowledged during her testimony that she was indeed nervous throughout the interview and unable to "get her groove", partly attributing her anxiousness to the fact that individuals were walking through the back of the conference room during her interview. Even if true, the panelists were justified in considering her nervousness during an interview that lasted more than thirty (30) minutes as a negative factor.

In regard to her interview with the Town Manager and Police Chief, it is clear that Mr. Clarkson gave great weight to a candidate's ability to offer a thoughtful answer regarding the difference between management and leadership. This is a reasonable and job-related question to

ask of candidates seeking to be a superior officer. In short, Officer Malloch was stumped by the question and wasn't able to offer any type of substantive response. She candidly acknowledged as much during her testimony. In contrast, the other candidates offered the types of answers that showed they understood the importance of being a leader – and not just a manager – in the position of police sergeant. After the interviews, Mr. Clarkson was left with the impression that Officer Malloch was not yet ready to be promoted to sergeant. After a careful review of his testimony, and that of Officer Malloch, I don't believe that conclusion was based on Officer Malloch's gender.

Finally, Officer Malloch argues that two other issues call into question this promotional appointment. First, Officer Malloch argues that HRD should have provided the Town with the examination scores of the individual candidates and that the Town should have considered the point spread, instead of just the rank of the three (3) candidates on the Certification. While I concur that HRD should release the test scores related to promotional examinations (a longstanding practice that HRD abandoned a few years ago), it would not have changed the outcome of this appeal. Even if I accept Officer Malloch's contention that she scored ten points higher than one of the selected candidates, it would not have changed my conclusion that the Town was reasonably justified in bypassing her. Second, counsel for Officer Malloch questions whether HRD was statutorily permitted to delegate certain aspects of the review process (including the approval of sound and sufficient reasons for bypass) to cities and towns in 2009. That is a broader question that impacts hundreds of appointments and promotions throughout the Commonwealth. The appropriate venue to address that issues should not be addressed through an individual appeal and is likely best addressed via the Court.

CONCLUSION

For all of the reasons cited above, Officer Malloch’s appeal under Docket No. G2-12-278 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell – Absent]) on February 21, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Frank McGee, Esq. (for Appellant)
Kevin Feeley, Esq. (for Respondent)