12

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. SUCV 2016-3429-L1

DANIEL OTERO,
Plaintiff,

vs.

THE CITY OF LOWELL and CIVIL SERVICE COMMISSION,
Defendants.

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

The City of Lowell ("City") bypassed plaintiff, Daniel Otero ("Mr. Otero") for appointment to the position of Police Sergeant, having previously suspending him for five-days for conduct unbecoming an officer. Otero has filed this appeal under G. L. c. 30A, § 14 from a final decision, dated October 27, 2016 ("Decision") of the Civil Service Commission ("Commission") upholding the City's bypass decision. Pursuant to Standing Order 1-96, Mr. Otero has filed a Motion for Judgment on the Pleadings ("Motion"), which the Commission has opposed. After review of the administrative record, motion and memorandum and upon consideration of oral arguments, the Motion is **ALLOWED**.

BACKGROUND

The Commission found the following facts, which are not challenged in this appeal.

The Bypass

Otero has been employed as a Patrolman in the Lowell Police Department since 1996. He received a five-day suspension on November 13, 2014 (as discussed below) and had a prior disciplinary record.

Otero took and passed the October 2012 civil service exam for Sergeant, receiving a score of 81. The state's Human Resources Division ("HRD") sent Lowell an eligible list for promotion to the position of Sergeant on April 26, 2013. From that list Lowell generated a certification of candidates, dated November 12, 2014, on which Otero was ranked first. Lowell chose one candidate, Officer Perrin and promoted him to Sergeant. Officer Perrin was ranked third on the Certification. The second-ranked candidate was Officer Timothy Golden.

On November 12, 2014, Lowell Police Superintendent Taylor issued a memorandum to Otero stating that the Lowell police Department was "planning to fill one (1) permanent full time police sergeant position. Please report to the Superintendent's Office where you will be asked to sign a form stating whether you will or will not accept the position . . . You have until 4:30 p.m. Friday, November 21, 2014, to sign the list for this position." The officers' union asked Superintendent Taylor to hold off on the Sergeant promotion until resolution of Otero's discipline (described below under the hearing "The Five Day Suspension"). Superintendent Taylor agreed to do so. On November 13, 2014, Superintendent Taylor issued a Notice of Five (5)-Day Suspension to Otero for conduct unbecoming a police officer.

On December 12, 2014, Personnel Order No: 35-14, regarding a permanent promotion, was posted at the Lowell Police Department stating, 'Effective Sunday,

December 14, 2014, the following permanent Promotion shall take place: Officer Daniel Perrin Promoted to Permanent Sergeant." Superintendent Taylor signed the Order. Before posting this order, Superintendent had provided information to City Manager Murphy about all three (3) candidates for the Sergeant position at that time. The candidates were not interviewed. Superintendent Taylor recommended that Officer Perrin be promoted to Sergeant after reviewing the candidates' personnel files, the candidates' positives and negatives, and after checking for any outstanding internal affairs complaints against the candidates. Officer Perrin was an exemplary candidate who sends a positive message and has no suspensions, although there was a 2012 reprimand in his personnel file. Superintendent Taylor discussed this information with City Manager Murphy for approximately fifteen (15) minutes. City Manager Murphy asked Superintendent Taylor questions about the candidates; they discussed the pending discipline of Otero and Officer Golden. They noted that Otero's disciplines occurred within the last couple of years and that, although he may be considered for a leadership role in the future, it was not appropriate at that time. City Manager Murphy approved Officer Perrin's promotion.

By letter dated January 9, 2015, addressed to HRD, City Manager Murphy wrote, in pertinent part:

> As the appointing authority, I exercised my right to bypass the top two candidates on the certified promotional list for Sergeant of police. This action was taken due to the fact that the third place candidate, Daniel Perrin, is uniquely qualified to be promoted to this position. [discussion of Perrin's qualifications omitted].
>
> . . . I am exercising my right to bypass candidate number one, Officer Daniel Otero. The reason for bypass is based on the following: [discussion of formal counselling dated June 6, 2012; official remand of June 11, 2013; official remand dated January 31, 2014; detailed discussion of November 14, 2014 Five-Day Suspension (discussed below); discussion of a pending complaint before the

MCAD regarding his actions towards a female academy classmate while both were students at the Lowell Police Academy.]

Superintendent Taylor discussed the Sergeant promotion with Deputy Superintendent Deborah Friedl, who drafted the bypass letter, which was reviewed by Superintendent Taylor and the City Solicitor's office and was signed by City manager Murphy.

Although Deputy Superintendent Friedl was aware that HRD had delegated certain hiring and promotional processes, she was under the mistaken belief that Lowell had to notify HRD of any bypasses. She was not aware whether the letter addressed to HRD was actually mailed to HRD and to Otero, because the letter was to be mailed from the City Manager's office. The bypass letter addressed to the HRD was delivered to Otero and the Commission at the Commission's prehearing conference after Otero filed his Civil Service Commission bypass appeal.

The Five Day Suspension

On April 25, 2013, during an investigation of alleged harassment by a fellow officer against his ex-wife, "Ms. M" -- now Otero's wife – Otero told Lieutenant Buckley that Officer Golden had sent a video of their child was holding a laser pointer, with the light going on and off and that the child was penetrating herself in the vaginal area with the laser. Lt. Buckley determined that this description departed significantly from a description of the video that Otero provided at an earlier interview on December 12, 2012. He filed a report of possible child abuse against Officer Golden pursuant to G.L. c. 119, § 51A. Otero never filed such a report. During the DCH investigation, he gave a different account of the video than he gave on April 25, 2013. DCF found no substantiation for the 51A report, and the Middlesex District Attorney's Office closed its

investigation into the matter. Otero and Ms. M. told investigators that the video had been lost.

Ms. M. then made a complaint against Officer Golden for domestic violence. Lt. Laferriere of the Internal Affairs department investigated the complaint and concluded that Officer Golden had exercised poor judgment in taking and sending the video, but did not violate police department rules and regulations in doing so. He concluded that Otero had provided differing reports of the video, had made a serious allegation against another officer which turned out to be unfounded. On February 12, 2014, Lt. Laferriere found that Officer Otero had violated rules and regulations by engaging in conduct unbecoming an officer. He delayed disseminating his report until August 12, 2014, because the District Attorney's investigation of Officer Golden was still pending.

Officer Otero received the findings of the internal affairs investigation, dated September 9, 2014, on September 11, 2014. Superintendent Taylor testified that, because he desires to protect confidentiality and privacy, he does not release the full findings of an Internal Affairs Investigation to interested parties until a decision has been finalized about the action the Department will take as a result of the investigation. On November 13, 2014, the Superintendent issued a Notice of Five Day Suspension to Officer Otero, based upon Lt. Laferriere's finding that Officer Otero had engaged in conduct unbecoming a police officer. Superintendent Taylor endorsed Lt. Laferriere's finding and increased the discipline because of Otero's past infractions, pursuant to the Department's policy of progressive discipline. That prior disciplinary history includes two official reprimands and one incident which result in counselling.

The City manager upheld the discipline based on a recommendation of an independent hearing officer who presided at Officer Otero's Appointing Authority hearing. Officer Otero appealed the City's decision to the Commission on December 23, 2014. After an evidentiary hearing, the Hearing Officer issued the Decision, upholding the 5-day suspension. Otero timely appealed to this Court. By Memorandum of Decision and Order, dated November 28, 2017, this court affirmed the Commission's disciplinary decision. Otero v. Civil Service Commission, Suffolk Superior Court No. 16-3751-D (Wilkins, J.).

DISCUSSION

A. Standard of Review

Under G. L. c. 30A, § 14(7), this Court has limited power to set aside or modify the Decision. It may do so if his substantial rights may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). The court must consider the entire record, including whatever "fairly detracts" from the agency's finding, but the Court has no power to substitute its judgment for that of the agency if the record contains substantial evidence to support conflicting propositions; nor may it second guess the agency's judgment regarding credibility of witnesses and the weight to be given to particular evidence. See Doherty v. Retirement Commission of Medford, 425 Mass. 130, 135 (1997). When reviewing an agency decision, the court is required to give "due weight to the experience, technical competence, and specialized

knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7).

The appealing party bears the burden of demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986). The Supreme Judicial Court has noted that the appellant's "'burden is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

B. Failure to Provide Reasons "Immediately"

Officer Otero's principal argument is that Lowell violated G.L. c. 31, §27 and implementing regulations by failing to memorialize and serve a statement of the reasons for the bypass at the time it made the bypass decision. That statute reads, in relevant part:

> Except as provided otherwise by section fifteen, if the [personnel] administrator certifies from an eligible list the names of three persons who are qualified for and willing to accept appointment, the appointing authority, pursuant to the civil service law and rules, may appoint only from among such persons. . ..
>
> If 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.** Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department. [Emphasis added].

To administer this statute, the Personnel Administrator has promulgated the following rule:

> (4) Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, **an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons** for bypassing a person or persons more highly ranked, or of the reason or

> reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. **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.** . . . The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. [Emphasis Added].

Personnel Administration Rule, PAR.08(4).

The statute and rule are clear. The appointing authority must "immediately" provide a written statement of reasons for a bypass. The rule clearly sets forth the remedy for a failure to comply: the failure makes inadmissible any reasons that were not so disclosed (unless discovered later, which is not the case here). The only wrinkle is that the Personnel Administrator has delegated responsibility for receipt to the reasons to the City, requiring that the City send the written statement to the affected job applicant and that the City keep a copy of the written reasons in case of audit. Malloch v. Town of Hanover, 472 Mass. 783, 795 (2015) ("According to the record, the administrator trained appointing authorities, provided each authority with a manual detailing acceptable and unacceptable reasons for a bypass, and retained the authority to audit appointing authorities to ensure compliance with basic merit principles."). That delegation is lawful. Id. ("We therefore conclude that the administrator permissibly could delegate its administrative functions under G.L. c. 31, § 27.").

Here, the Personnel Order No: 35-14 promoting Daniel Perrin to Sergeant was issued on December 12, 2014. No statement of reasons accompanied it "immediately" or until about a month later. Under Rule PAR.08(4), the purported statement of reasons

provided at the Commission's pretrial conference on January 12, 2015 was not "admissible as reasons for selection or bypass" in the Commission's proceeding. Nor was any allegedly contemporaneous oral statement, because the law requires a written one.

The Commission's Decision does not rule otherwise. On the contrary, it states that Lowell's "process of notifying bypassed candidates should be remedied to ensure that such candidates receive more timely written notice of the reasons for their bypass." Decision at 15 (A.R. 359). The Commission's rationale for rejecting Otero's appeal, despite non-compliance with G.L. c. 30, § 27 and PAR.08(4) was that Otero "was not aggrieved, pursuant to G.L. c. 31, § 2(b) by not having received the bypass letter from the Respondent (pursuant to HRD's delectation to municipalities" until the Commission's prehearing conference." Id. This was a misreading of § 2(b), which grants the Commission the "powers and duties: . . . (b) To hear and decide appeals by a person **aggrieved by any decision, action,** or failure to **act by the administrator**, except as limited by the provisions of section twenty-four relating to the grading of examinations; . . ."

Otero properly proceeded under this section, because he was obviously aggrieved by the decision to bypass him for promotion to Sergeant and appoint someone else. While this was the City's decision, the power in question was delegated by the Personnel Administrator and therefore fell within § 2(b). Otero did not need to appeal – and was not appealing -- the failure to provide reasons immediately. That was not what caused his aggrievement; the bypass did.

Section 2(b) is a jurisdictional grant. Its language does not even hint that the Commission has the power (asserted here) to ignore a violation of Rule .08(4) and G.L. c. 30, § 27, by applying a "harmless error" rule. On the contrary, upholding a bypass because the belatedly-stated reasons were sufficient would squarely violate the letter and spirit of Rule .08(4) and G.L. c. 30, § 27. Otero's memorandum (at 13-14) cites numerous instances in which the Commission in fact applied these rules as written. Moreover, Otero was prejudiced not only by the bypass itself, but by denial of his right to a lawful and procedurally fair decision-making process. The protections of Rule .08(4) and G.L. c. 30, § 27, operate to ensure the application of basic merit principles, free of inaccuracies, convenient memories or even post hoc manipulation. Otero was prejudiced by the deprivation of those protections. If he must prove that the City would have promoted him if it employed a lawful bypass process, then Commission would be adding a new burden to a bypass appellant – precisely the burden that PAR.08(4) and G.L. c. 30, § 27 expressly eliminate.

The plain language of Personnel Administrator's rule precludes belated reasons and oral statements from being "admissible as reasons for selection or bypass." This exclusionary rule operates prophylactically to prevent manipulation both by the appointing authority in the bypass and by the Commission on appeal.[1] As to purpose, it

[1] The law reveals numerous instances where, to protect individual rights, the government must provide contemporaneous written documentation prior to official action. For instance, a prophylactic rule prohibits a police officer from "writing a ticket" for traffic violations at a later date. See G.L. c. 90C, § 2 (mandating the issuance of a traffic citation "at the time and place of the violation . . ." and making failure to do so "a defense in any court proceeding for such violation," with certain exceptions). Similar purposes underlie the requirement for a warrant authorizing search and seizure, based upon the four corners of a written affidavit, even if additional information then known to the police

reflects, in large part, the Personnel Administrator's controlling concern that there is too much room for manipulation and rationalizing when appointing authorities offer after-the-fact rationales, not committed to writing contemporaneously.[2] The requirement to make the statement "available for public inspection" also reflects a concern for transparency and orderly processes designed to promote confidence in the integrity of civil service promotions. If the appointing authority cannot even comply with these simple procedural requirements, it leaves both the appearance of impropriety and the possibility of actual impropriety. The same concerns underlie the Legislature's use of the words "written" and "immediately" in G.L. c. 30, § 27, which the Personnel Administrator has authoritatively implemented in Rule .08(4). Cf. Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 723, appeal dismissed, 464 U.S. 923, cert. denied, 464 U.S. 936 (1983) (A duly adopted regulation "has the force of law and must be accorded all the deference due to a statute.").

While the Commission's decision is entitled to substantial deference, in this case, both the statute and the regulation are unambiguous. G.L. c. 30, § 27 and PAR.08(4) explicit require immediate written statement of the reasons, with exclusion from evidence as the remedy for violation. Particularly where PAR.08(4) imposes an exclusionary rule that relieves an employee from showing actual prejudice, G.L. c. 31, § 2(b) cannot reasonably be construed as a harmless error provision, where it is a jurisdictional statute addressing an aggrieved party's right to challenge a bypass, discipline or the like. The

---

but omitted from the affidavit would support the warrant. See G.L. c. 276, § 2B; Commonwealth v. O'Day, 440 Mass. 296, 297-298 (2003).

[2] See Pl. Mem. at 13-14 and cases cited; Def. Mem. at 16, quoting Mulachy v. City of Fitchburg, 2011 DALA LEXIS 158, 17-18 (2011) (PER.08(4) "is meant to limit the ability of Appointing Authorities to create additional after-acquired reasons learned after the bypass decision was made and while an appeal process is on-going.").

Commission's approach "cannot by any reasonable construction be interpreted in harmony with the legislative mandate." See Craft Beer Guild, LLC v. Alcoholic Beverages Control Commission, 481 Mass. ___, slip op. at 25 (February 28, 2019) (citations omitted).

The uncontested testimony in this case – on issues about which the hearing examiner made no findings – shows just how fraught with error the City's process was, and illustrates why PAR.08(4) requires contemporaneous writing. See A.R. Vol. III, pp. 209-230. The December 9 bypass letter was drafted by an official, Deputy Superintendent Friedl, who was not present during the pre-bypass discussions with the appointing authority. She was not even told about those discussions. Rather, she was told the result and asked to draft a letter. She reviewed the relevant personnel records and wrote an extensive letter based on those files. The appointing authority then signed the letter without, for instance, correcting a wrong date that appeared in the draft. The possibility that anything less than a thorough and critical review of the letter and its sources might result in honest mistakes (such as the wrong date or even more material mistakes) is obvious. The power of suggestion from Deputy Friedl's draft has the potential to alter the appointing authority's memory of the true, original reasons for the bypass, so that his memory was no longer accurate. Cf. Supreme Judicial Court Model Instruction on Eyewitness Memory, 473 Mass. 1051 (2015), ("An identification made after suggestive conduct by the police or others should be scrutinized with great care."). Moreover, the decision-maker here, the City Manager, had recused himself from the underlying disciplinary matter because he had represented one of the parties during related proceedings. The parties do not question that decision, although the possibility of

unconscious influences upon the appointing authority remained unless he turned square corners. PAR.08(4) lays down the law that wisely protects bypass appellants from all these human frailties (which could easily have played a part in this case), not to mention the appearance of manipulation and, of course, in some cases, actual, intentional manipulation (without suggesting that this occurred here).

Where the law explicitly prohibits the Commission from even considering the belated letter or the oral testimony about alleged contemporaneous discussions, the Commission cannot go on (as it did here) to consider this inadmissible "evidence" and find the reasons given in that oral discussion letter are genuine and adequate. The mere admonition that the City should remedy "its process of notifying bypassed candidates . . . to ensure that such candidates receive more timely written notice of the reasons for their bypass" falls well short of the exclusionary remedy explicitly provided by PAR.08(4) Therefore, the Commission cannot uphold a bypass on the ground that the failure to give immediate, written notice of reasons "aggrieved" the employee. It follows that such a failure cannot be excused by a "harmless error" principle, let alone one derived from § 2(b). Because that leaves the City with no admissible evidence or rationale for the bypass in the Commission's proceeding, the Decision cannot stand.

In case of a further appeal, the court proceeds to address the substantial evidence issue, in order to avoid the necessity of a remand for that purpose, as occurred in Malloch, 472 Mass. at 800. This court previously affirmed the Commission's Decision upholding the 5-day suspension against Officer Otero. Otero v. Civil Service Commission, Suffolk Superior Court No. 16-3751-D (Wilkins, J.). Otero did not seriously contest that, if that disciplinary action were upheld, there were sound and

efficient reasons for the bypass. See Commission Hearing Tr. 1-6. Assuming that the Commission may consider testimony about the oral discussions with the appointing authority at the time of the bypass decision, it had substantial evidence in the testimony of Superintendent Taylor for the conclusion that Otero's disciplinary record and Perrin's superior performance were the reasons for the bypass and were sufficient under basic merit principles to justify the bypass. It was not required to adopt Otero's theory that the discipline over the incident involving officer Golden was motivated by a desire to rig the promotional process. Of course, if the appointing authority had complied with PAR.08(4) and G.L. c. 30, § 27, the allegation of a rigged process would have far less traction. As it stands, the court's alternative holding is that, if the belated letter in fact represents the real reasons for the bypass, then substantial evidence exists to support those reasons and the bypass itself.

The proper remedy in this situation is apparent (though ultimately for the Commission to decide): to require the City to place Otero's name first on the next certification list for promotion to Sergeant. This remedy grants Otero the protections afforded by statute and regulation for any promotional decision, while avoiding injury to innocent third parties, including Perrin. It is the alternative remedy proposed by the City to the Commission (A.R. at 56-57[3]). It is a remedy requested by Otero at the hearing in this court. It preserves the City's authority over promotions and is even consistent with the testimony that the City may consider Otero for future promotional opportunities. Overall, placing Otero's name at the top of the next list of eligible candidates for promotion best implements the statute and regulation, with the least detriment to all the

[3] The City cited Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 261-262 (2001); Belanger v. Town of Ludlow, 20 MSCR 285 (2007).

parties. It is possible that the Personnel Administrator was comfortable imposing the exclusionary rule in PAR.08(4) in part because requiring priority listing on the next civil service list – allowing a bypass if the City believes it appropriate -- is minimally intrusive on the appointing authority.

Of course, the Commission has the final say on the matter of remedy. Accordingly, the court remands the matter for further consideration.

CONCLUSION

For the above reasons:

1. The plaintiff's Motion for Judgment on the Pleadings is ALLOWED.
2. The defendants' Cross-Motion for Judgment on the Pleadings is DENIED.
3. FINAL JUDGMENT SHALL ENTER VACATING the Final Decision of the Civil Service Commission, dated October 27, 2016 and remanding the matter for further proceedings before the Commission, consistent with this Memorandum of Decision.

Douglas H. Wilkins
Justice of the Superior Court

Dated: March 18, 2019