
Commonwealth of Massachusetts
Supreme Judicial Court
Suffolk County

No. SJC - 12653

BOSTON POLICE DEPARTMENT

Plaintiff-Appellee,

vs.

MICHAEL GANNON and the CIVIL SERVICE
COMMISSION

Defendants-Appellants.

Appeal from a Judgment of the Superior Court Sitting in Suffolk County

**BRIEF OF AMICUS CURIAE
MASSACHUSETTS MUNICIPAL LAWYERS
ASSOCIATION**

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ISSUES PRESENTED

1. Whether the Civil Service Commission's decision reversing the police department's decision to bypass an applicant on the sole basis that his hair had tested positive for cocaine was supported by substantial evidence.

2. Whether the Superior Court erred in holding that the Civil Service Commission, in this case, improperly took administrative notice of its decision in an earlier case involving the scientific reliability of the same type of drug testing at issue here.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Municipal Lawyers Association ("MMLA"), formerly known as the City Solicitors and Town Counsel Association, is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. Its members include attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of the MMLA also include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. MMLA's mission is to promote better local government through the advancement of municipal law.

MMLA's concern in this matter is the challenge to the Boston Police Department's ("BPD") exercise of discretion in refusing to hire Mr. Gannon ("Gannon") as a Police Officer after he failed a drug test. While this case presents a complex and disputed fact pattern, those facts must be analyzed against the backdrop of a long and well-established principle that is not in dispute in this case:

"[T]he commission owes substantial deference to the appointing authority's exercise of judgment ... [s]uch deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held (citation omitted), appointing authorities are given significant latitude in screening candidates." *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188 (2010).

As the *Beverly* court explained, the decision whether to hire an applicant as a police officer poses a risk to a community making that decision; thus, "whether to take such a risk ... is ... for the appointing authority to decide." Id. at 190 citing *Cambridge v. Civil Serv. Comm'n*. 43 Mass. App. Ct. 300, 305 (1997). Here, that exercise of discretion was overruled by the Civil Service Commission ("CSC"), a ruling appropriately reversed by the trial court that remains nonetheless challenged on appeal.

In a state facing the expansion of lawful medicinal and recreational drug use, against a backdrop of evolving testing mechanisms available by employers to determine impairment, municipalities are increasingly required to make the type of determinations made by the BPD in this instance regarding the level of risk that is acceptable when an employment candidate appears to have used drugs. MMLA respectfully submits this amicus curiae brief to urge a ruling that preserves municipal discretion in the hiring of police officers and candidates for other public safety positions. Such a ruling would serve to preserve the "substantial deference" currently afforded municipalities in making such decisions, consistent with the *Beverly* court's recognition of (i) the "sensitive position" occupied by police officers in our society, and (ii) the fact that the risk associated with such decisions is borne by those who make them. *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. at 188-189.¹

¹MMLA is also concerned that CSC failed to take into account the timing of BPD's decision - an equally serious concern, but beyond the scope of this amicus brief. CSC is not charged with simply finding facts and reaching conclusions; rather, it is to find facts and decide whether "there was reasonable justification for the

STATEMENT OF THE CASE

The MMLA adopts the statement of the case and the statement of facts as set forth in the BPD's brief.

ARGUMENT

I. BPD'S DECISION NOT TO HIRE GANNON DID NOT OFFEND THE UNDERLYING PURPOSE OF THE CIVIL SERVICE LAWS AND SHOULD THEREFORE BE AFFORDED DEFERENCE.

The parties do not dispute the well-settled legal principles, referenced by all in their briefs, that apply generally to the judicial review of civil service decisions. Among those MMLA considers to be most significant here is this foundational precept:

[T]he underlying purpose of the civil service system [is] "to guard against political considerations, favoritism, and bias in governmental employment decisions." *Falmouth v. Civil Serv. Comm'n.* 447 Mass. 814, 824 (2006) citing *Falmouth v. Civil Serv. Comm'n.*, 61 Mass. App. Ct. 796, 800 (2004), quoting *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304 (1997).

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, 334 (1983) (emphasis added). CSC's incorporation into this appeal of its subsequent decision in the *BPD Drug Testing Appeal*, while not a deference issue, is a noteworthy procedural encroachment.

The significance is this: neither CSC nor Gannon assert at any time in either brief that BPD acted with political considerations, favoritism, and/or bias. Where, as here, there is not so much as an allegation in this regard, it is clear that the underlying purpose of the civil service system has not been frustrated. That much is clear and not disputed.

This honorable court most recently addressed this very situation in *Sherman v. Town of Randolph et al.*, 472 Mass. 802 (2015). There, a candidate for promotion in the Randolph Police Department appealed his bypass without making a claim of bias. Instead, like Gannon does here, the candidate challenged what he alleged was a flawed process. The *Sherman* challenge failed, however, as this court determined that

"the appointing authority had a reasonable justification on the merits for deciding to bypass a candidate, and the flaws in the selection process are not so severe that it is impossible to evaluate the merits from the record. In such a case, the candidate's bypass appeal should be denied despite the presence of procedural flaws, because the appointing authority comported with "'the fundamental purpose of the civil service system . . . to ensure decision-making in accordance with basic merit principles.'" *Id.* at 813 citing *Mass. Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-265 (2001).

Gannon's challenge fails for precisely the same reasons. BPD demonstrated on the record its reasonable justification for deciding not to appoint Gannon (discussed below). Its decision comported with basic merit principles, as is evidenced by the absence of allegations that BPD's decision was tainted by political considerations, favoritism, and/or bias. So long as BPD established, as it did, that it reasonably relied on a testing process (even an imperfect one), its decision should be sustained as a reasonable exercise of discretion consistent with the holdings in *Falmouth* and *Sherman*.

Sherman is further instructive for the following reason. The decision recognized the role even a flawed selection process can play in arriving at hiring decisions suited to the particular needs of a community based on subjective criteria tailored to the community. Specifically, the *Sherman* court upheld a flawed selection process that nonetheless elicited relevant information concerning i) how candidates applied community policing principles to the town given its demographics (Id. at 805, n.3), (ii) *Sherman's* issues with follow-up and "taking those extra steps in an investigation" (Id. at 806-807, n.

8), and (iii) the relative "work ethic and command presence" of the three candidates chosen for promotion (Id. at 808).

Randolph's size, like that of many communities across this commonwealth, gives rise to two phenomena: people know each other well, and leaders know the unique needs of their community. In a smaller community, choosing public safety personnel based on work ethic is important because there are - by dint of size - fewer officers. Grasp of concepts like community policing in such a community may be more significant than in a neighboring community for any number of reasons. It is axiomatic that communities know best their own needs and their own people.

The civil service law recognizes this basic proposition. For this reason it is directed not at eliminating subjectivity, but rather, in guarding "against political considerations, favoritism, and bias in governmental employment decisions, including, of course, promotions, and to protect efficient public employees from political control." *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300 , 304 (1997). The system entrusts to each community the responsibility to

"ensure decision-making in accordance with basic merit principles" (citation omitted). *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264 (2001).

MMLA's position - expressed on behalf of the municipalities its members represent - is that where, as here, there is not even so much as an allegation of a decision made contrary to basis merit principles, a municipality's discretionary selection of public safety personnel should not be disturbed. The *Sherman* court essentially agreed, concluding as it did by quoting from *Flynn v. Civil Serv. Comm'n*, 15 Mass. App. Ct. 206 (1983), a decision that upheld a bypass "against challenges to interview and scoring procedures used in selection process because there was 'no evidence to show that the appointing authority was motivated by anything other than merit or that its actions were . . . designed to conceal improper reasons' ". Id. at 814 citing *Flynn v. Civil Serv. Comm'n*, 15 Mass. App. Ct. at 208-211.

MMLA urges this honorable court to continue to preserve municipal discretion in public safety hiring/promoting in instances such as that presented here.

CONCLUSION

The absence of political considerations, favoritism and/or bias in this case allow for this court to yet again confirm the importance of local discretion in regard to the hiring and discipline of public safety personnel in municipalities across this commonwealth. MMLA respectfully requests that this honorable court affirm the lower court's judgment, thereby preserving this important doctrine.

RESPECTFULLY SUBMITTED,

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CERTIFICATION of SERVICE

I, James S. Timmins, certify that I have caused an electronic copy of this brief to be served upon counsel of record for the each of the parties delivered via electronic mail to the addresses that appear on the docket of this court.

James S. Timmins

James S. Timmins

CERTIFICATION PURSUANT TO MASS. R. APP.P. 16(k)

I, James S. Timmins, certify that this brief complies with the provisions of the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.

James S. Timmins

James S. Timmins