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COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

*W. J. [Signature]*

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2014-1743-H

BOSTON POLICE DEPARTMENT

vs.

ASHLEY SENA and another<sup>1</sup>

**DECISION ON PLAINTIFF BOSTON POLICE DEPARTMENT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS, AND ORDER OF REMAND**

The Defendant Massachusetts Civil Service Commission (the "Commission") has issued an Order for Relief in favor of Defendant Ashley Sena and against the Plaintiff Boston Police Department (the "BPD"). In this case, the BPD appeals that Order for Relief. The BPD has filed a motion for judgment on the pleadings. After review of the filings by the Commission, the BPD, and Sena, and hearing oral argument, I will allow that motion only to the extent of remanding this matter to the Commission.

Background

1. The Proceedings before the Commission

Sena appeared on a list of candidates for employment as a police officer by the BPD. In February 2014, the BPD informed Sena that the BPD was bypassing her for employment because she failed to meet the minimum vision standard. Representing herself, Sena immediately filed an appeal with the Commission.

There followed a series of pretrial and status conferences at the Commission. One issue in dispute was Sena's compliance with a requirement that she remedy the vision deficiency

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<sup>1</sup> Massachusetts Civil Service Commission

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within 16 weeks of being notified about it if she wanted to be further considered for employment by the BPD, and whether BPD had failed to notify Sena of this 16-week cure period until 18 weeks had passed after that notification. The Commission's hearing examiner attempted to get Sena and counsel for the BPD to agree to an order for relief, including an agreement that Sena's 16-week cure period would begin running from the date she was notified of the bypass, which, the hearing examiner apparently believed, was the first time that Sena became aware that she needed to cure the vision problem within 16 weeks. Things progressed to the point where the hearing examiner provided the parties with a draft of an assented-to order.

The BPD responded to this draft order by informing the Commission and Sena, for the first time, that Sena had failed the psychological screening as well as the vision test. The BPD stated before the hearing examiner that it had not informed Sena or the Commission of this fact because the psychological screening failure was not the reason for the bypass.

The hearing examiner was troubled by this late-revealed alleged failure, and was not impressed by the substance of the psychological screening report, which he apparently viewed as insufficient under applicable law. The hearing examiner may also have been concerned that, by raising the psychological issue when it did, the BPD was trying to evade a published civil service hiring rule that prohibited an Appointing Authority from bypassing an applicant for reasons that it chose not to cite in a bypass letter. Therefore, the Commission issued an Order of Relief on May 5, 2014, directing, among other things, that the BPD place Sena at the top of the next certification for appointment list, and that, in the event Sena was then granted a conditional offer of employment, BPD may require her to undergo a psychological evaluation, but only by mental health professionals other than those who had previously examined her. In this Order for Relief or elsewhere, the Commission also directed that the 16-week period in which Sena could cure

her vision problem (through laser surgery) had not begun running until the date on which she was notified that she been bypassed for this reason. In these various rulings, the Commission was relying on Chapter 310 of the Acts of 1993, which grants the Commission the authority to protect rights of applicants that have been prejudiced through no fault of their own, notwithstanding the failure of any person to comply with any requirement of the hiring process.

When it issued this Order for Relief, the Commission had not held an evidentiary hearing. Instead, the hearing examiner was acting based on the record compiled at the various pretrial and status conferences and through the parties' written submissions.

## 2. The Proceedings before this Court

The case before me is the BPD's appeal of the Commission's Order for Relief. Two days after its filing, the BPD filed a Motion to Stay Enforcement of the Commission's Decision. Judge Inge of this court then held a hearing on that motion. Before he issued his decision, however, the BPD complied with the Commission's order to the extent of placing Sena's name near the top of certification lists for the next round of BPD is hiring of new police officers. Thereafter, Judge Inge issued a memorandum and order in which he granted the requested stay of enforcement of the Commission's decision pending the outcome of this appeal.

The BPD ultimately filed a motion for judgment on the pleadings, which was opposed by the Commission. Sena, who had been representing herself throughout these proceedings, finally located an attorney, who belatedly filed an opposition at her behalf as well.<sup>2</sup> Yesterday I heard oral argument on that motion.

### Analysis

The Commission argues that this case is moot, because the BPD had already complied with the Commission's decision by placing Sena's name near the top of certification lists before

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<sup>2</sup> I allowed a motion for leave to file late, which was unopposed.

Judge Inge stayed the effectiveness of the Commission's decision. Then, the BPD argues, when it chose its next class of recruits the BPD invited Plaintiff to start her application process over, from the very beginning, based on her position on those new lists. Apparently Sena declined to begin anew, citing the fact that she had already successfully completed most of the application process in the course of the proceedings which were by then under judicial review. That is a reasonable position, particularly for an applicant who was not then represented by counsel.

I find that case is not moot. For much of the life of those certification lists, Judge Inge's order was in effect, staying the enforcement of the Commission's decision, and all parties were awaiting (as they still await) an ultimate decision on the merits of the BPD's appeal of the Commission's Order for Relief. More to the point, the BPD did not comply with the Commission's order simply by placing Sena's name near the top of certification lists, and then requiring her to begin a new application at square one.

Sena asks me to issue an order that would go even further than the Commission's Order for Relief. Sena wants me to order the BPD to accept Sena as a candidate for the next available recruit class, without any conditions, including further psychological testing. Even if that were appropriate action for a court take in deciding an administrative appeal under M.G.L. c. 30A, § 14, I am not prepared to take that action on the basis of this record.

The BPD simply asks that I overturn the Commission's decision. I agree with the BPD that the Commission's failure to hold an evidentiary hearing deprived the BPD of the opportunity to present testimony and evidence relevant to this matter. But that should not necessarily result in a reversal; under M.G.L. c. 30 A, §14(7), I am also authorized to "remand the matter for further proceedings before the agency."

That is the course I choose. This matter is rife with factual questions, which should be determined in the first instance at an evidentiary hearing before the Commission. Those issues concern, at the very least, what the BPD told Sena about the 16-week period in which she could cure her vision problem and when the BPD raised this issue with Sena, and the merits, if any, of the BPD's late-raised psychological screening issue. In addition, legal questions abound concerning, for example, whether, under civil service hiring rules that the Commission is charged with enforcing, the BPD is entitled to rely on Sena's alleged psychological screening failure, and whether the Commission has, and should exercise, the right to waive Sena's compliance with deadlines set by the BPD for its hiring processes. By mentioning these factual and legal questions, I do not intend to limit the scope of the evidentiary hearing that I am directing the Commission to hold. As in any other hearing, the Commission is free to decide what issues it needs to resolve, what evidence is relevant, and what law should be applied.

Conclusion and Order

Plaintiff Boston Police Department's Motion for Judgment on the Pleadings is **ALLOWED IN PART**, only to the extent that this case is **REMANDED** to the Massachusetts Civil Service Commission for an evidentiary hearing.



Paul D. Wilson  
Justice of the Superior Court

January 30, 2015