

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael J. Mullen :
 :
 v. : No. 1469 C.D. 2007
 : Argued: February 11, 2008
 City of Pittsburgh Civil Service :
 Commission :
 :
 Appeal of: City of Pittsburgh :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE PELLEGRINI

FILED: March 28, 2008

We had remanded this matter in a previous appeal to the Civil Service Commission of the City of Pittsburgh (Commission) to determine whether the personnel file of Michael J. Mullen (Mullen) should have been admitted into evidence and then to determine whether just cause existed to deny his promotion to Deputy Chief in the Fire Bureau (Bureau) of the City of Pittsburgh (City). On remand, the Commission found that it had not relied upon the personnel file, but rather a summary (Summary) of the contents of the file and concluded that the Summary, among other things, constituted substantial evidence to deny Mullen's promotion. The Court of Common Pleas of Allegheny County (trial court) again reversed the Commission's decision and ordered that Mullen be promoted because

the Summary constituted hearsay and there was not substantial evidence to support the Commission's conclusion that he was unfit for the position of Deputy Chief. The City now appeals the trial court's decision ordering Mullen to be promoted to Deputy Chief.

The facts leading to this current appeal may be summarized as follows.¹ Mullen began his employment as a firefighter with the City in 1980 and worked his way up the ranks of the Bureau to the position of Battalion Chief in May 1999. He successfully passed the competitive civil service test² and was first on the list for promotion to the rank of Deputy Chief. However, Mullen was notified by the City's Director of Government Operations and Public Safety Robert A. Kennedy (Kennedy) that he would be denied the promotion because his personnel file included numerous instances demonstrating his inability to execute the expected requirements of the Deputy Chief position. Alleging that there was no just cause to deny him the promotion, Mullen appealed to the Commission.

Before the Commission, both the City and Mullen offered testimony³ and evidence. Kennedy testified that he became aware of Mullen's promotion during

¹ For a full recitation of the facts, see *Michael J. Mullen v. City of Pittsburgh and City of Pittsburgh Civil Service Commission*, Pa. Cmwlth., No. 2101 C.D. 2005, filed June 2, 2006.

² The competitive civil service test is required by what is commonly referred to as the Second Class City Firemen's Civil Service Act (Act), Act of June 27, 1939, P.L. 1207, as amended, 53 P.S. §§23491-23497.1.

³ Testifying on behalf of the City were Kennedy; Denise Haas, Bureau Manager of Personnel and Finance; and Bishop. Bureau Deputy Chiefs Robert Modrak and John Gourly testified on Mullen's behalf as did Mullen himself.

a meeting with Edward Gentry (Gentry), counsel for the City's Law Department, and offered to go over the Summary prepared by Andrew Bishop (Bishop), a law clerk for the City's Law Department, to determine whether Mullen's appointment to Deputy Chief was appropriate. He stated that based on the documentation provided to him at the time, including the Summary, he noted a period of incidents ranging from the early 1990s to as late as March 2004. Kennedy explained that as Public Safety Director, he had a fiduciary duty to ensure that the City would not be unduly exposed to future litigation regarding some of Mullen's past behavioral patterns, and that was the reason he denied Mullen the promotion. Mullen's counsel objected to Kennedy's reliance on the Summary on the basis that it was hearsay and inadmissible, but the Commission overruled the objection.

Bishop testified that Gentry assigned him the task of going through the documents in Mullen's personnel file. He stated that he prepared the Summary by going through the file page by page and compiling all the information he felt was relevant, whether it was "good, bad or indifferent." When offered into evidence, Mullen's counsel objected to the Summary on the grounds that it was hearsay, but the Commission overruled his objection. On cross-examination, Bishop indicated that he went through Mullen's personnel file cataloguing everything to the best of his ability and that he had recorded the bad instances in the file, but not any of Mullen's certificates of training because he believed that the certificates did not necessarily mean an individual was qualified for a promotion.

The City also attempted to introduce Mullen's personnel file in its entirety into evidence. The Commission did not admit the personnel file, but it did

state, though, that it would review other documents accepted into evidence during the hearing and notify the parties if it needed to examine documents in the personnel file.

In its decision, the Commission stated that it had decided not to consider Bishop's Summary as evidence, even though it had been admitted into evidence, because it was only a synopsis of Mullen's personnel file. Instead, the Commission almost totally relied on the personnel file in arriving at its decision, explaining that it contained both commendations for Mullen's past performances as well as "numerous instances of conduct that [were] less than desirable." (Supplemental Reproduced Record at 77.) Giving deference to the City, the Commission found it reasonable to review the personnel file and concluded that Mullen was not suitable for the Deputy Chief position. It affirmed the City's decision that there was just cause not to promote Mullen, and he appealed to the trial court.

In that appeal, the trial court concluded that Bishop's Summary was third-hand hearsay and did not constitute substantial evidence to deny Mullen the promotion. The City then appealed to us, and we vacated the decisions of the Commission and trial court because the Commission, contrary to its statement that it would not receive the personnel file into evidence until it notified the parties and gave them an opportunity to respond, expressly relied on it in finding just cause for Mullen to not be promoted. We also noted that the Commission had admitted Bishop's Summary into evidence, but then stated that it was not evidence and its decision would not be based on that document. Because the parties were "blindsided" as to what evidence the Commission considered in rendering its decision, we remanded the matter to the Commission with the following order:

AND NOW, this 2nd day of June, 2006, the decisions of the Court of Common Pleas of Allegheny County dated November 4, 2005 and the Civil Service Commission of the City of Pittsburgh dated December 20, 2004 are vacated. The matter is remanded to the Civil Service Commission of the City of Pittsburgh so that **it may hear argument on and decide the evidentiary status of Battalion Chief Michael J. Mullen's personnel file** and thereafter issue a new adjudication regarding his promotion to Deputy Chief.

(Emphasis added.) (Reproduced Record at 14a.)

Contrary to our remand order, the Commission held another hearing at which Kennedy again testified that when he decided not to promote Mullen, he relied on the Summary as well as his personal knowledge of an incident of misconduct. Mullen stated that as former chief of emergency medical services, he was “privy” to an incident involving Mullen and a group of paramedics where he ordered them around in an “unprofessional manner” when an individual was being treated for smoke inhalation. (Reproduced Record at 156a-157a.) Kennedy also testified that he did not consider Mullen’s personnel file itself. Rather, Kennedy explained that the Summary revealed a pattern of behavior which demonstrated that Mullen “wouldn’t be best suited to move up the rank.” (Reproduced Record at 153a.)

Finding that it had not relied on the personnel file but rather on the Summary of its contents, despite language contained in its original decision that could have been interpreted as suggesting that it based its decision on the file itself, the Commission affirmed the City’s decision that there was just cause not to promote Mullen to the position of Deputy Chief. The Commission further stated that the decision to deny a promotion was within the discretion of the appointing officer and

concluded that Kennedy had not abused his discretion in deciding to not promote Mullen because Bishop's Summary contained ample evidence which revealed a pattern of behavior on the part of Mullen that constituted just cause for passing over his promotion.

Mullen again appealed to the trial court which reversed, concluding that the evidence relied upon by the Commission in making its decision, namely, Bishop's Summary, constituted third-hand hearsay. Because the Summary should have been excluded under the hearsay rule and Kennedy had no first-hand non-hearsay knowledge of any incident of misconduct involving Mullen, the trial court reversed the Commission's decision because there was not substantial evidence to support that the City had just cause to deny Mullen's promotion to Deputy Chief and ordered that Mullen be promoted and "that he be made whole with back pay, lost benefits, restored seniority, and any and all other rights that he lost as a result of the City's failure to promote him." (Reproduced Record at 61a.) This appeal by the City followed.⁴

On appeal, the City contends that the trial court erred in concluding that there was not substantial evidence to support the Commission's decision to not promote Mullen to the rank of Deputy Chief. It maintains that the trial court

⁴ Our scope of review in civil service cases is limited to a determination of whether constitutional rights have been violated, an error of law was committed, or necessary findings of fact were unsupported by substantial evidence. *Daley v. Fayette County Housing Authority*, 654 A.2d 21 (Pa. Cmwlth. 1994). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Cola v. State Civil Service Commission*, 861 A.2d 434 (Pa. Cmwlth. 2004).

improperly found that the Commission relied on third-hand hearsay to reach its determination because the rules of evidence are not strictly adhered to during administrative proceedings, and the infractions included in Bishop's Summary as well as Kennedy's testimony regarding a specific incident of misconduct involving Mullen and some paramedics constitute substantial evidence to establish just cause that he was unfit for the promotion.

Under the Local Agency Law, agencies such as the Commission are not bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Section 554 of the Local Agency Law, 2 Pa. C.S. §554. However, while local agencies may not be bound by technical rules of evidence, the hearsay rule is not a mere technical rule of evidence, but a fundamental rule of law which is to be followed by administrative agencies when crucial facts are sought to be placed on the record and an objection is made on the grounds that the evidence constitutes hearsay. *Franklin v. Department of Environmental Resources*, 657 A.2d 100 (Pa. Cmwlth. 1995). Hearsay evidence, properly objected to, is not competent evidence to support a finding in administrative proceedings. *Groce v. Department of Environmental Protection*, 921 A.2d 567 (Pa. Cmwlth. 2007).

On remand, the evidence the Commission mainly relied on to find that Mullen should not have been promoted to Deputy Chief was the Summary, which even the City admitted was hearsay and was properly objected to by Mullen's

counsel. *See Pa. R.E. 801(c)*.⁵ Other than contending that the Commission was not constrained by the technical rules of evidence, the City has cited no authority or rule⁶ providing that the Summary was admissible as an exception to the hearsay rule. Because the Summary was impermissible hearsay, the trial court properly found that there was not substantial evidence offered by the City to establish just cause for Mullen not to be promoted to the position of Deputy Chief.

The other basis that the Commission found as to why Mullen should not be promoted was Kennedy's testimony regarding an incident of purported misconduct involving some paramedics. Ignoring that it was taken outside the scope of our remand order,⁷ the testimony was not probative evidence because Kennedy admittedly lacked first-hand knowledge of the event, not witnessing it or knowing exactly when it occurred, but was merely "privy" to it, i.e., he heard about it.

⁵ Although the Summary was based on Mullen's personnel file which could be evidence excepted from the hearsay rule under the "business record exception" set forth in Section 6108(b) of the Uniform Business Records Act, 42 Pa. C.S. §6108(b), it does not qualify under this exception because it was prepared in anticipation of litigation rather than during the regular course of the Bureau's business.

⁶ Though never raised by the City in its brief, Pa. R.E. 1006, which permits the admission of summaries of writings when their contents are too voluminous to be examined in court, is inapplicable because the personnel file on which the Summary was based was offered by the City to the Commission, but on remand, the Commission inexplicably decided that it relied on the Summary instead of the personnel file in ruling on Mullen's promotion to Deputy Chief. The personnel file, then, cannot be considered too voluminous under Rule 1006 if it was originally offered into evidence by the City.

⁷ Kennedy's testimony must be disregarded because it should not have been taken by the Commission outside of this Court's remand order, which instructed it to *only* determine the evidentiary status of the personnel file and make a new adjudication regarding Mullen's promotion to Deputy Chief.

Consequently, this testimony would not support the Commission's decision that Mullen should not be promoted.

Accordingly, the order of the trial court is affirmed.

DAN PELLEGRINI, JUDGE

President Judge Leadbetter dissents.

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ORDER

AND NOW, this 28th day of March, 2008, the order of the Court of
Common Pleas of Allegheny County, dated July 13, 2007, is affirmed.

DAN PELLEGRINI, JUDGE