

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
617) 727-2293

JULIO ACOSTA,
Appellant

v.

G1-10-90

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Representative:

Peter J. Martino, Esq.
986 Saratoga Street
Boston, MA 02128

Respondent's Representative:

Jeffrey S. Bolger
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION (CORRECTED COPY 10/25/10)

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Julio Acosta (hereinafter "Acosta" or "Appellant"), filed an appeal on May 5, 2010 regarding the Department of Correction's (hereinafter "DOC" or "Appointing Authority") decision¹ to bypass him for original appointment to the position of Correction Officer I. A pre-hearing conference was held on June 15, 2010 and a full hearing was held on August 10, 2010 at the offices of the Civil Service Commission (hereinafter "Commission"). The

¹ The state's Human Resources Division (HRD) has delegated civil service functions to the Department of Correction.

full hearing was digitally recorded and 1 CD was made of the proceeding. A copy of the CD was provided to the parties. The parties submitted post-hearing briefs.

FINDINGS OF FACT

Eight (8) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

*For the Appointing Authority:*²

- Alexandra McInnis, Director of Personnel, Department of Correction;

For the Appellant:

- Julio Acosta, Appellant

I make the following findings of facts:

1. The Appellant is a twenty-nine (29) year old male who moved to the United States in 1986 from the Dominican Republic. He graduated from Washington Irving High School in New York and enlisted in the United States Navy in 2000. He served aboard the USS Simpson as a personnel specialist. In July 2003, the Appellant was involved in an accident on the aircraft carrier in which he was struck by an electric shock which injured his arm. He was deemed “50% disabled” and was honorably discharged from the Navy in January 2004. He is currently employed as a Transportation Security Administration (TSA) agent at Logan International Airport.

(Testimony of Appellant)
2. While serving in the Navy, the Appellant married his now ex-wife, Rosa, who lived in the Dominican Republic. Upon his discharge from the Navy, Rosa relocated to the

² After obtaining permission from the Commission, DOC served a subpoena upon New Bedford police officer Paul Fonseca, the author of an incident report regarding the Appellant. Officer Fonseca failed to appear. I contacted the the New Bedford Police and was informed that Officer Fonseca had recently returned from vacation, but was not on duty and could not be reached.

United States. They had a child together on August 11, 2004. The parties subsequently filed for divorce in January 2008. (Testimony of Appellant) The underlying reason for bypassing the Appellant, discussed in more detail below, was an incident that occurred between the Appellant and Rosa in July 2008.

3. The Appellant took and passed a civil service examination for the position of Correction Officer I on March 21, 2009. He scored an 85 on the examination and was provided with the statutory preference afforded to disabled veterans. (Stipulated Facts)
4. An eligible list of candidates for Correction Officer I was established on July 20, 2009. (Stipulated Fact)
5. Sometime after July 20, 2009, a Certification of eligible candidates, based on their rank, was created to fill thirty-six (36) Correction Officer I vacancies at DOC. (Stipulated Facts)
6. The Appellant was ranked 13th among those candidates willing to accept employment. Of the thirty-six (36) candidates selected for appointment, thirty-two (32) were ranked below the Appellant. (Stipulated Facts)
7. On March 5, 2010, DOC notified the Appellant that he was being bypassed for appointment due to an “unsatisfactory criminal history check – 2008 A&B”. (Stipulated Facts and Exhibit 2)
8. Alexandra McInnis, DOC’s Director of Personnel, testified before the Commission that it is DOC’s practice to “screen applicants out” if there is a recent assault and battery charge on their criminal history record. The only exception to this practice is

when an individual has been found not guilty of the criminal charge. (Testimony of McInnis)

9. Ms. McInnis testified that prior to recommending the non-selection of the Appellant, she reviewed the police report regarding the underlying incident that resulted in the criminal charge against the Appellant. She considered the charge to be a serious one that related to the character of the Appellant. She was also aware at the time that the assault and battery charge against the Appellant had been dismissed against the Appellant in November 2008. (Testimony of McInnis)
10. Ms McInnis was also aware at the time of the Appellant's non-selection that a restraining order had been issued against him on July 23, 2008 and was vacated on December 1, 2008. She did not review the actual restraining order. She testified that the primary reason for bypassing the Appellant related to the assault and battery charge. (Testimony of McInnis)
11. It is undisputed that the New Bedford police was dispatched to the Appellant's residence on July 22, 2008. (Testimony of Appellant and Exhibit 5) Although a complaint for divorce had been filed several months prior to July 22, 2008, the Appellant and his then-wife were still living together in the same home. (Testimony of Appellant)
12. One of the two police officers who responded to the call interviewed both the Appellant and his then-wife and completed an incident report. (Exhibit 5)
13. The police officer's incident report stated the following regarding his observations and interview with the Appellant:

“Upon arrival at the listed address I was met outside by a male, later identified as Julio Costa. Julio was clearly distraught and agitated stating that he and his wife had been involved in an argument and she had struck him in the

left side rib area. Julio went on to state that he and his wife Rosa ... have been involved in a divorce battle and that it's become an everyday thing with the two arguing. This argument began when the two confronted each other over their daughter spending equal time with grandparents in Dominican Republic. Julio stated he had entered his wife's bedroom and that she struck him in the ribs, Julio then smacked her in the leg. (emphasis added)

Be advised that Julio did in fact have some swelling and redness on the location he was complaining of which was consistent with a strike." (Exhibit 5)

14. The police officer's incident report also stated that he interviewed Rosa with the assistance of another officer who served as an interpreter. The police officer's incident report stated the following regarding his observations and interview with Rosa:

[According to Rosa] "An argument had begun due to the custody of their daughter who is currently in the Dominican Republic with family. Julio was so irate that his daughter was spending to (sic) much time with her parents and not his, Julio became so enraged he entered the room and struck her on the left lower leg area. Rosa then attempted to defend herself by kicking Julio and punching him but was unable to do so because Julio ran away from her and stated he was calling police.

Rosa also had some swelling and redness consistent with what appeared to be a hand mark to her left leg just below her knee. Be advised that when questioned earlier Rosa stated that she never touched or went after Julio. (Exhibit 5)

15. The police officer's incident report stated the following regarding his subsequent observations of both parties and the actions he took:

"As I continued further questioning, both parties were still very irate and continued stating that they were struck by one and other (sic). Both appeared to be equally agitated and aggressive.

As a result of the assault and continuance of abuse according to both parties, I confirmed with the Supervisor and both parties were arrested for the Assault and Battery on household. "(Exhibit 5)

16. The Court issued cross complaints. Both parties refused to testify against each other, so the charges against both parties were dismissed. (Exhibits 6 & 7)

17. The Appellant testified before the Commission regarding the events of July 22, 2008.

According to the Appellant, he worked at Logan Airport from 3:30 A.M. to 12:30 P.M. that day and then drove his aunt's ice cream truck from 2:00 P.M. to 6:30 P.M. He then attended classes at Bristol Community College from 7:00 P.M. to 10:00 P.M. (Testimony of Appellant)

18. The Appellant testified that he arrived home around 10:00 P.M. on July 22nd. Rosa was in the house, but their daughter was visiting the Appellant's mother in the Dominican Republic. While sitting at a table and having something to eat, the Appellant heard Rosa "talking loud" on the phone with her father, who lives across the street from the Appellant's mother in the Dominican Republic. (Testimony of Appellant)

19. The Appellant testified that after taking a shower, he again heard Rosa talking on the phone, now with his mother in the Dominican Republic. According to the Appellant, he picked up the phone and began talking to his mother and Rosa re-joined the phone conversation at some point. The Appellant testified that the phone conversation between Rosa and his mother started to get "out of control" at some point and he tried to intervene. At this point, according the Appellant, Rosa "punched me right here in the stomach ... with all her force. The only thing I did was pull away from her and walk outside." The Appellant testified that he then went to his brother's apartment upstairs and called the police. (Testimony of Appellant)

20. The Appellant stated later in his direct testimony that he never told police that he kicked Rosa. Rather, the Appellant testified that, "I told him [the police officer] that she kicked me and the only thing I did was pull away from her" at which point "she

became even more upset that I wouldn't let her provoke me more and she went for my face." (Testimony of Appellant)

21. Asked later during his direct testimony to confirm that he never touched Rosa, the Appellant stated: "The only thing I did was ... when she kicked me ... I basically went like this on her leg (demonstrating a holding grip with his hand) because she tried to kick me again." (Testimony of Appellant)
22. Asked to clarify if Rosa kicked him or punched him, the Appellant stated that Rosa "punched me with her leg." (Testimony of Appellant)
23. Asked during cross examination to clarify if he ever initiated physical contact with Rosa that night, he stated, "I just held her hand" because she "tried to smack me." The Appellant later testified he made no physical contact with Rosa and simply "put my hand up to defend myself." (Testimony of Appellant)
24. I do not credit the Appellant's testimony that he did not strike Rosa on the night of July 22, 2008. His recollection changed markedly in the span of a few minutes of testimony regarding key facts. He first stated that Rosa punched him in the stomach, then stated that she kicked him and then stated that she punched him with her foot. He first stated that after being struck, he simply walked outside. He then stated that before walking outside, he held her foot, but later contradicted himself by saying he held her hand and later changed that testimony to state that he simply put his hand up to defend himself from another attempted strike by Rosa. Standing alone, his evolving, contradictory testimony did not ring true to me. Further, it is inconsistent with a police officer's account of his conversation with the Appellant. According to

that report, the Appellant admitted to the police officer that he “smacked (Rosa) in the leg” on the night in question. (Testimony, demeanor of Appellant and Exhibit 5)

CONCLUSION

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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, 43 Mass. App. Ct. at 304.

The Appellant is a likeable 29-year old male with a compelling life story. He moved to the United States from the Dominican Republic and enlisted in the United States Navy before being honorably discharged due to a disabling injury. He then married a childhood friend and neighbor from the Dominican Republic and moved to New Bedford. At the time of the incident that resulted in his bypass, he was attending Bristol Community College while working full-time at Logan Airport and working part-time for his aunt's ice cream business. I do not doubt his sincere desire to serve as a correction officer as a next step in his well-planned career path.

Notwithstanding these positive attributes, DOC has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant for the position of Correction Officer I. The primary reason for the Appellant's bypass was a recent assault and battery charge that appeared on his criminal record. While the Commission has expressed its disfavor with such a limited review in the past, "it is permissible for the Department to review a CORI and make a determination based on the record as to whether the applicant should be denied." See Dep't of Correction v. Anderson and Civ. Serv. Comm'n, No. 09-0290, Suffolk Sup. Ct. (2010).

Further, DOC may rely on information in a CORI report to bypass a candidate, even if the charge(s) on the CORI report were ultimately dismissed. Anderson at p. 6 citing prior Commission decisions. Preece v. Dep't of Correction, 20 MCSR 152 (2007) (DOC could rely on a CORI report even though the Appellant was exonerated on all criminal charges); Lavaud v. Boston Police Dep't, 17 MCSR 125 (2004) (Commission upheld bypass du to Appellant's long record of arrests although the charges were later dismissed); Brooks v. Boston Police Dep't, 12 MCSR 19 (1999) (Commission upheld original bypass despite age of criminal record).

In this case, DOC took the extra step of reviewing the underlying police incident report regarding the criminal charges in the instant matter. The incident report showed that the charges were related to a domestic violence incident. The police officer's report indicates that after being called to the Appellant's home on July 22, 2008, the Appellant told the police officer that was he struck by his wife and that he struck her back. After reviewing the CORI report and the police incident report, DOC decided to bypass the Appellant.

The Appellant disputes the accuracy of the incident report of the police officer, who failed to appear despite being served with a subpoena. I listened carefully to the Appellant's testimony. He first stated that his wife at the time (Rosa) punched him in the stomach, then stated that she kicked him and then stated that she punched him with her foot. He first stated that after being struck, he simply walked outside. He then stated that before walking outside, he held her foot, but later contradicted himself by saying he held her hand and later changed that testimony to state that he simply put his hand up to defend himself from another attempted strike by Rosa. Standing alone, his evolving,

contradictory testimony did not ring true to me. Further, it is inconsistent with the above-referenced incident report of the New Bedford police officer. It is undisputed that both the Appellant and his wife were charged with assault and battery and the charges were subsequently dismissed partly due to a failure to prosecute.

DOC, as noted in Anderson, must hire applicants who demonstrate good judgment, controlled behavior; and respect for others and the law. As in Anderson, DOC could reasonably conclude that the Appellant's behavior, which occurred within approximately one year of DOC's review of his application and resulted in criminal charges against him, demonstrated a risk that if put in a similar situation again, the Appellant may respond with the same poor judgment as a correction officer. This was a valid exercise of discretion based on merit and policy in which there was no evidence of political favoritism or bias.

In my judgment, the Appellant's behavior on July 22, 2008, was an unfortunate exception to an otherwise commendable life history. The Commission, however does not have the authority "to substitute its judgment about a valid exercise of discretion based on merit and policy consideration by an appointing authority ...," Burlington v. McCarthy, 60 Mass. App. Ct. 914 (2004) quoting City of Cambridge, 43 Mass. App. Ct. 300, 304-305 (1997). "It is not for the Commission to assume the role of super-appointing agency, and to revise those employment determinations with which the Commission may disagree." Burlington, 60 Mass. App. Ct. 914 (2004).

Should the Appellant's name appear on an eligible list of candidates in the future, however, I would encourage DOC to re-examine his application closely and determine,

with the passage of time, whether the 2008 incident, standing alone, should exclude the Appellant from a career at DOC.

For all of the above reasons, the Appellant's appeal under Docket No. G1-10-90 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Marquis, Commissioner – Yes; McDowell, Commissioner – Yes; Stein, Commissioner – Yes; Henderson, Commissioner - No) on October 21, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice:

Peter Martino, Jr., Esq. (for Appellant)
Jeffrey Bolger (for Appointing Authority)
John Marra, Esq. (HRD)