

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**CHRISTIAN BERRIOS,**  
*Appellant*

v.

**Case No.: G1-12-221**

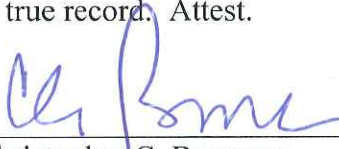
**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

**DECISION**

The Civil Service Commission (Commission) voted at an executive session on January 10, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated November 20, 2012. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 10, 2013.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Christian Berrios (Appellant)

Kerry A. Rice (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

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November 20, 2012

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108

**Re: Christian Berrios v. Department of Correction**  
**DALA Docket No. CS-12-593**  
**CSC Docket No. G1-12-221**

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CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,  
  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Christian Berrios  
Kerry A. Rice

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

**Christian Berrios,**  
Petitioner

v.

Docket Nos. CS-12-593;  
(G1-12-221, Civil Service Commission)

**Department of Correction,**  
Respondent

Dated: **NOV 20 2012**

**Appearance for Appellant:**

**Christian Berrios, *pro se***

82 Landing Drive  
Taunton, MA 02780

**Appearance for Appointing Authority:**

**Kerry A. Rice**  
Human Resources Division  
Department of Correction  
P.O. Box 946, Industries Drive  
Norfolk, MA 02056

**Administrative Magistrate:**

**Sarah H. Luick, Esq.**

**Summary of Recommended Decision**

The Department of Correction (DOC) had a reasonable justification to bypass the Petitioner for hire as a Correction Officer (CO) I based on being disciplined in his current and prior jobs that involved work similar to the work of a CO I. The Petitioner was also bypassed for not being forthcoming and complete about his prior discipline in his application. The Petitioner was bypassed following an investigation by a trained DOC Sergeant Investigator that included an interview with the Petitioner, and a final decision by the DOC-Human Resources Director reviewing the investigation report and the application. Use of an Investigator once the candidate reached the point of completing his application is a process followed for all candidates. I recommend that DOC's bypass decision be affirmed by the Civil Service Commission.

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### **RECOMMENDED DECISION**

Pursuant to G.L. c. 31, § 2(b), the Petitioner, Christian Berrios, is appealing the June 21, 2012 decision of the Respondent (Appointing Authority), DOC, bypassing him for appointment to the position of CO I. (Ex. 2.) The appeal was timely filed July 30, 2012. (Ex. 1.) A hearing was held for the Civil Service Commission on October 19, 2012 at the offices of the Division of Administrative Law Appeals, One Congress Street, 11th Floor, Boston, MA 02114.

Various documents are in evidence. (Exs. 1 – 7.) The hearing was digitally recorded. The Respondent filed a pre-hearing memorandum. (Ex. A.) The parties entered into a stipulation of facts at the pre-hearing conference held August 28, 2012, and those stipulations were read into the record at the hearing. The Respondent presented the testimony of DOC Human Resources Division Personnel Officer James O’Gara. The Petitioner testified on his own behalf and presented no other witnesses. Both parties made arguments on the record.

### **FINDINGS OF FACT**

Based on the documents entered into evidence, the testimony presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Christian Berrios, born in 1973, took and passed a civil service examination for the position of CO I on March 10, 2010. Mr. Berrios scored a 76 on the examination. (Exs. A, 3, 4 & 7. Stipulation. Testimony.)
2. On July 14, 2010, DOC established a list (#4012004) of eligible candidates for appointment to CO I. Mr. Berrios was ranked 370 on the certification list

of those candidates willing to accept employment. 69 candidates were selected. (Exs. A & 3. Stipulation. Testimony.)

3. In February 2012, in connection with seeking the job of CO I, Mr. Berrios completed required DOC forms including the "Background Information Request and Waiver" form and a "Pre-Employment Background Investigation Initial Interview Check List" form. He also completed an application. (Exs. 3, 4 & 5. Testimony.)

4. Mr. Berrios passed the criminal background check and the Registry of Motor Vehicles background check. As was done for each candidate reaching this same stage in the hiring process, his application was assigned to an experienced DOC Investigator, Sergeant Mark J. Hobart, for further investigation about his prior employment and his references. Sergeant Hobart began his investigation March 5, 2012 and completed his investigation the week ending March 10, 2012. He produced a report that was reviewed by DOC's Human Resources Division. (Exs. 6 & 7; Testimony.)

5. Mr. Berrios had never worked for the Commonwealth of Massachusetts before. He has always lived in Massachusetts. He graduated from high school and took criminal justice courses between 1994 and 1998 at Fischer College. He secured a certificate in public speaking from the Dale Carnegie Institute. On his application he listed an aunt as a current CO I within DOC. He listed two CO Is as professional references. He is experienced in martial arts and is a certified first responder. He has been employed from March 2010 at the Judge Rottenberg Center in Canton where he holds the job of Crisis Specialist. He listed on his application prior employment as a Security Officer at Massachusetts General Hospital (MGH) in Boston from February 2005 through February 2010. He listed that he left this position for "personal" reasons.

He listed prior employment at the Expo Design Center in Burlington as a Sales Associate from November 2002 until November 2005, listing that he left this position because he "found a better position." He listed prior employment at Equity Residential Properties in Malden as a Security Guard from March 2000 through July 2002, listing that he left his position because he "found a better position." Mr. Berrios is not a veteran. (Ex. 5. Testimony.)

6. Included with his application, Mr. Berrios filled out an "Employment History Addendum" addressing his formal discipline with his employers. For the Judge Rottenberg Center employment, he listed May 2011 discipline for improperly implementing restraints on a client. He wrote that he received "points deducted off of evaluation." He also listed a July 2011 discipline for use of improper restraint techniques for which he wrote that he received "points off evaluation." At his MGH employment he listed discipline in September 2009 for "failing to call for back-up," for which he wrote he received a "written warning." (Ex. 5. Testimony.)

7. Sgt. Hobart was only able to secure from the Judge Rotenberg Center, "a written acknowledgement form" and no personnel file about Mr. Berrios. He was not able to interview any of Mr. Berrios's supervisors. At MGH Sgt. Hobart was able to review Mr. Berrios's file in person with no copies made. He was not able to interview any of Mr. Berrios's supervisors. Sgt. Hobart found "performance reviews from years 2006 through March 2009 [that] were of an above average rating." He found two disciplines.

One [was] dated May 30, 2008 concerning the applicant losing a set of keys. He was issued a "final warning." The other dated December 19, 2008 [was] for not following departmental procedures/protocols while un-



restraining a patient. Patient was injured and due to the seriousness of the offense was issued a second "final warning."

(Ex. 7.) Sgt. Hobart learned no details about the end of the MGH employment other than that information was provided to Mr. Berrios "on what to do when filing for unemployment." Mr. Berrios had good references. (Ex. 7.)

8. At his interview with Mr. Berrios about the information in his application, Sgt. Hobart found him to be "pleasant and friendly." When asked about his discipline at his MGH job, Mr. Berrios explained:

[H]e was involved in an incident where he had to restrain someone while working and that his superiors supported him but it came down from higher up that his actions were not appropriate even though there was nothing in writing. He said he was let go by the hospital ... [and Sgt. Hobart] asked if he was terminated. He replied, it sure felt that way ... [Sgt. Hobart] asked again if he was given any type of notice that he was fired or terminated because of job performance and he replied no ... [Sgt. Hobart] asked if he had anything given to him in writing stating why he was let go. He said he had nothing other than a letter from MGH stating that his benefits were being terminated on such and such a date ... [Sgt. Hobart] asked him for that letter but he could not provide it. He went on to say that MGH offered him a severance package ... they wanted to just see me leave I guess and that I never wanted to pursue anything because the hospital had been so good to me getting my legs straightened out ... had physical therapy through the hospital on them because he was not walking correctly.

(Ex. 7.)

9. The clients at the Judge Rotenberg Center whom Mr. Berrios works with are typically in their twenties and are sent there to address their difficult behaviors. They are often gang members. Mr. Berrios was disciplined or had points off his job performance evaluations on two occasions when he did not use proper restraint techniques with clients. Job performance evaluations are done quarterly. (Testimony.)

10. At MGH, Mr. Berrios failed to call for back-up when escorting an unrestrained former patient being discharged from the hospital who had been abusive to MGH staff. Mr. Berrios was working alone at the time and decided that because his discharged patient was not being physically combative just verbally abusive, he could release him without back-up. Also during his employment at MGH, Mr. Berrios lost a set of keys. He had taken off his jacket in the guards' area at the end of his shift and hung up the jacket. The keys could not be located. They were uncovered after a week or more had passed. He did not list this incident in his application. Because the keys were found, he did not feel the incident mattered all that much. He left his MGH job because he and his employer were dissatisfied with how his employment was going. He was offered a severance package and had an attorney negotiating it. That process fell through and he was terminated with his benefits stopped after being on a leave status. He was able to secure unemployment benefits. Mr. Berrios felt because he was always willing to resign with an agreeable severance package, that he was correct in listing on his application that he left this job for personal reasons instead of indicating that he was terminated.

(Testimony.)

11. Mr. Berrios felt that his application was presenting the basic information about his employment history and prior discipline, and felt he could explain in an interview setting more specifics. He felt this is what happened when he spoke to Sgt. Hobart. (Testimony.)

12. The DOC Human Resources Division's James O'Gara, a Personnel Officer II, who monitors the CO I hiring process, reviewed Mr. Berrios's application documents and Sgt. Hobart's investigation report. At this point in the hiring process, he



made a recommendation to the Human Resources Director who makes the final decision on whether candidates can move onto the next stages in the hiring process or are denied employment at this stage. Mr. O’Gara and the Human Resources Director discussed Mr. Berrios’s application and investigation report. This is the process they followed on each of the candidates reaching this stage in the hiring process. The result of this discussion was the Director’s decision to disqualify Mr. Berrios from continuing in the hiring process based on his prior work discipline and his failure to disclose on his application prior work discipline, or to adequately disclose significant circumstances about his prior discipline and departure from his MGH job on his application. These transgressions were viewed as pertinent to the work of a CO I, so that they were viewed as significant matters impacting Mr. Berrios’s abilities to perform in this public safety position. (Testimony.)

13. By letter to Mr. Berrios of June 21, 2012, the DOC Human Resources Division informed him that he was not being “considered for appointment” because of the background investigation that revealed “unsatisfactory” information that was “negative” in terms of his employment history. He was provided with his rights to appeal this decision to the Civil Service Commission. He was given the telephone number for Mr. O’Gara to contact with any questions. (Ex. 1.)

14. Eight candidates who scored below Mr. Berrios on the examination were selected for appointment. (Stipulation.)

15. Mr. Berrios filed a timely appeal of this decision with the Civil Service Commission on July 30, 2012. (Ex. 2.)

### **Conclusion and Recommendation**

I recommend that DOC’s bypass decision be affirmed. The findings make clear

that DOC had a reasonable justification for bypassing Mr. Berrios based on the discipline he received in his employment in 2009 and 2011. He was disciplined in positions that included Security Guard and Crisis Specialist with wrongful conduct including improper application of restraints, lost keys, and failing to secure required back-up support when dealing with an abusive person. He also failed to note one discipline, losing important keys, until he had an interview with the DOC investigating Sergeant. This interview also revealed that he failed to acknowledge in his application that he had not resigned, but had been terminated from his Security Guard position.

Mr. Berrios's candidacy ended at this point in the hiring process. DOC applied its routine protocol, that when a candidate is found to have an unacceptable profile in terms of prior work history, he is found to be disqualified from securing the CO I position and does not advance to future aspects in the hiring process. This is what Mr. O'Gara's credible testimony explained. The record shows Mr. Berrios was in no way treated differently than any of the other candidates for this same CO I position when he had an investigation done on his application information. No different set of considerations in assessing his job history, prior discipline, and completeness of information in his application was involved in his evaluation than was employed in assessing all candidates for the CO I position.

G.L. c. 31, § 1 defines basic merit principles in pertinent part as follows:

(a) recruiting, selecting ... employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political

purposes, and are protected from arbitrary and capricious actions.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all potential candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Serv. Commission*, 43 Mass. App. Ct. at 304. Reasonable justification requires that the Appointing Authority based its actions on adequate reasons, supported by creditable evidence, guided by common sense, and weighed by an unprejudiced mind. *See Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Serv. Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b).

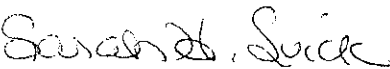
Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. The Civil Service Commission’s role is to “protect against overtones of political control ... and assure neutrally applied public policy.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 303. So long as the Appointing Authority provides a sound and sufficient reason for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

It is not for the Civil Service Commission to disagree with DOC's assessment of Mr. Berrios's prior discipline and his failure to adequately disclose his work history on his application as egregious enough to disqualify him from appointment. There would need to be evidence of arbitrary action in disqualifying Mr. Berrios, and no such evidence has been shown. Rather, Mr. O'Gara credibly explained how after an experienced DOC Investigator has produced his report on the candidate, a discussion occurs between himself and the Human Resources Director to decide whether or not there are solid grounds to disqualify the candidate, who by this time has also had the opportunity to explain his application information to the Investigator. This is a process that is followed for each job candidate for CO I.

Mr. Berrios points out that he had good recommendations from his references. Sgt. Hobart's investigation of these named references bears that out. Mr. Berrios argues that just focusing on the negatives in his work history is unfair and provides an unbalanced view of his candidacy. This objection to the DOC process pursued to assess his candidacy does not overcome the reasonable justifications DOC has to disqualify him from appointment as a result of what the investigation and his application information uncovered.

For these reasons I recommend that the Civil Service Commission affirm the DOC's bypass determination.

DIVISION OF ADMINISTRATIVE  
LAW APPEALS

  
Sarah H. Luick, Esq.  
Administrative Magistrate

DATED: **NOV 20 2012**