

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

ADAM BOURGERY,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: G1-12-216

DECISION

The Civil Service Commission (Commission) voted at an executive session on February 7, 2013 to acknowledge receipt of: 1) the Recommended Decision of the Administrative Law Magistrate dated December 12, 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 and Stein, Commissioners [McDowell-Absent]) on February 7, 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:

Adam Bourgeri (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, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200
FAX: 617-626-7220
WEBSITE: www.mass.gov/dala

December 12, 2012

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

Re: Adam Bourgerie v. Department of Correction
DALA Docket No. CS-12-556
CSC Docket No. G1-12-216

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: Adam Bourgerie
Kerry A. Rice

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals


Adam Bourgery,
Appellant

v.

Docket No. G1-12-216
DALA No. CS-12-556

Department of Correction
Respondent

Appearance for Appellant:

Adam Bourgery, *pro se*


Appearance for Respondent:

Kerry A. Rice
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Maria A. Imparato, Esq.

SUMMARY OF RECOMMENDED DECISION

The DOC has met its burden of demonstrating reasonable justification for the bypass of the Appellant for original appointment as a CO I based on his termination from employment at C&C Plastics for failure to follow instructions to wear gloves, which led to an injury to his hand that he did not report for 18 hours, and for his failure to disclose this termination on his application for employment.

RECOMMENDED DECISION

Adam Bourgery filed a timely appeal under M.G.L. c. 31, s. 2(b) of the decision of the Department of Correction (DOC) to bypass him for original appointment to the position of Correction Officer I (CO I).

I held a hearing on October 5, 2012 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, MA.

I admitted documents into evidence. (Exs. 1 – 8.) James O’Gara, Personnel Officer II at the DOC testified on behalf of the DOC. Adam Bourgery testified on his own behalf. The hearing was digitally recorded.

FINDINGS OF FACT

1. Adam Bourgery was a candidate for the position of CO I with DOC from Certification No. 4012004 dated February 1, 2012. His Civil Service test score was 80. (Ex. 3.)
2. By letter of June 21, 2012 from the Commonwealth Division of Human Resources (HRD), Mr. Bourgery was informed that he was not considered for appointment to the June 2012 Academy because of an unsatisfactory background check and a negative employment history. (Ex. 2.)
3. Mr. Bourgery filed a timely appeal. (Ex. 1.)
4. Between March 5 and March 10, 2012, an HRD investigator, Ana Rosas, completed a background investigation of Mr. Bourgery. (Exs. 4, 5.)
5. Ms. Rosas’s investigation revealed that Mr. Bourgery had worked at C & C Plastics as a laborer from August 8 to September 19, 2011, and that he was terminated on September 19, 2011 for violation of a work rule. Mr. Bourgery’s job duties were to drive a fork lift and place items in a machine to be ground up. (Exs. 6, 7.)
6. The employer provided Ms. Rosas with five written warning reports. (Ex. 7.)
7. The first written warning report is dated August 30, 2011 and indicates that Mr. Bourgery was verbally warned by his supervisor, Buzz, about wearing gloves that all employees

were required to wear. (Ex. 7, "A.") Mr. Bourgerie recalls getting this verbal warning.

(Testimony, Bourgerie.)

8. The second written warning report is dated September 8, 2011, and indicates that Mr. Bourgerie was verbally warned for being lazy, noting that none of the other employees wanted to work with him because he was not pulling his weight. (Ex. 7, "B.") Mr. Bourgerie recalls receiving this verbal warning. (Testimony, Bourgerie.)
9. The third written warning is dated September 14, 2011, and indicates that Mr. Bourgerie was told again to get gloves because plastic pieces can have sharp edges, and that Mr. Bourgerie ignored his supervisor. (Ex. 7, "C.")
10. On September 15, 2011, Mr. Bourgerie cut his finger in a machine. He bandaged his finger and went back to work. (Testimony, Bourgerie.)
11. The next day, Mr. Bourgerie came to work and thought his finger looked infected. He told his employer. His employer told him to sit in the break room, and then the employer would take Mr. Bourgerie to the hospital. (Testimony, Bourgerie.)
12. While Mr. Bourgerie sat in the break room, his employer prepared five written employee warning reports. The report dated September 15, 2011 indicated that Mr. Bourgerie failed to report that he cut his finger that day, but continued to work wearing gloves to cover the cut. (Ex. 7, "D.")
13. The employer took Mr. Bourgerie to the hospital on September 16, 2011, but because of the time lapse between the injury and his arrival in the hospital, Mr. Bourgerie was told that stitches were not indicated. Mr. Bourgerie returned to work, but he was sent home. (Testimony, Bourgerie; Ex. 7.)

14. The last written warning is dated September 16, 2011 and indicates that Mr. Bourgery cut his finger, failed to report it, came in Friday morning stating he needed stitches, and failed to seek medical attention for 18 hours. (Ex. 7, "E.")
15. Mr. Bourgery signed all of the written warnings, indicating on all of them that he agreed with the company statement. (Ex. 7, "A," "B," "C," "D," "E.")
16. Mr. Bourgery returned to work on Monday, September 19, 2011 when he was terminated by Donald Corriveau. Mr. Corriveau told Mr. Bourgery that he was more of a friend than an employer and would hate to see Mr. Bourgery get hurt again, so he was letting him go. (Testimony, Bourgery.)
17. Mr. Bourgery completed an application for employment with the Commonwealth dated February 27, 2012. When asked whether he had ever been formally disciplined by an employer, Mr. Bourgery indicated that he had not ever been formally disciplined. When Ms. Rosas made a home visit on March 9, 2012 as part of her investigation, Mr. Bourgery changed his application to indicate that he had been terminated from C&C Plastics for not wearing proper gear. (Ex. 8, Employment history addendum.)
18. Mr. Bourgery chose not to subpoena his employer to the hearing, although he was told that he could do so. (Testimony, Bourgery.)

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required "to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997). Justified means "done upon adequate reasons sufficiently supported

by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.*, at 304. If the Commission finds by a preponderance of evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004). 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, 334 (1983).

The Commission’s role, while important, is relatively narrow in scope; reviewing the legitimacy and reasonableness of the appointing authority’s action. *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 187 (2010).

M.G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence requires the Commission to determine whether, on the 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 Commission*, 31 Mass. App. Ct. 315 (1991).

In order to prevail in a bypass case, the Appellant must demonstrate that the reasons proffered by the Appointing Authority were untrue, apply equally to the selected candidate and the bypassed candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons. *Borelli v. MBTA*, G-1160, 1 MCSR 6.

I conclude that the DOC had reasonable justification for bypassing Adam Bourgerly for appointment as a CO I based on his termination caused by his failure to follow instructions to wear gloves that resulted in an injury that he failed to report for 18 hours, and based on his failure to disclose his termination on his application for employment.

The Appellant argues that his employer at C&C Plastics lied about the reason for his termination. The employer told the Appellant that he was terminated because the employer did not want to see him get hurt again in view of their friendship. The Appellant was not told that he was terminated for failing to report his cut finger and not seeking medical attention for 18 hours. The Appellant does not dispute, however, that the events that led to the written warnings occurred. Furthermore, he failed to subpoena his employer to the hearing, although he was aware that he could do so.

The Appellant argues that he did not report his termination from C&C Plastics on his application for employment because he did not think the termination was a disciplinary action. He knows now that that was a mistake.

I conclude, based on the Appellant's short employment with C&C Plastics, that he repeatedly failed to wear gloves as instructed, and that that failure resulted in an injury to his finger that he failed to report for 18 hours, which led ultimately to his termination. I also conclude that the Appellant knew, or should have known, that his termination was a disciplinary action that should have been reported on his employment application. Both of these events demonstrate a lack of good judgment, and a lack of ability to follow orders.

The reasons for the bypass of the Appellant were more probably than not sound and sufficient. The Appellant has not demonstrated that the reasons for his bypass are untrue, apply equally to the selected and the bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons. I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imperato
Maria A. Imperato
Administrative Magistrate

Dated: **DEC 12 2012**