Decision mailed: 9/5/08
Civil Service Commission
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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

SUFFOLK, ss.

Lance Budka,
Appellant,

v. G2-07-41

Department of Correction,
Respondent.

Appellant's Attorney: Stephen C. Plaff, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Respondent's Attorney: Alexandra McInnis, Esq.
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner: John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Lance Budka (hereinafter "Budka" or "Appellant") seeks review of the Department of Correction (hereinafter "Appointing Authority", or "DOC"), bypassing him for original appointment to the

position of Correctional Officer III (Lieutenant). The appeal was timely filed. A pre-hearing was held on April 2, 2007 and a full hearing was held on March 11, 2008 at the offices of the Civil Service Commission. One tape was made of the hearing. As no notice was received from either party, the hearing was declared private. Following the hearing, both parties submitted proposed decisions.

FINDINGS OF FACT:

Based on the documents entered into evidence, (Joint Exhibits 1-4) and the testimony of Lance Budka, I make the following findings of fact:

1. The Appellant was appointed to the position of Correction Officer I on January 5, 1986. (Testimony of Appellant)
2. In 1993, the Appellant received a five day suspension, later reduced to two days, for failure to report an inmate out of place. (Exhibit #2)
3. The Appellant was promoted to the title of Correction Officer II (Sergeant) on June 21, 2003. (Testimony of Appellant)
4. The Appellant was assigned to the Souza-Baranowski Correctional Center. (Exhibit 3)
5. There was unrest and turmoil at SBCC in the month of October 2003 as this was a few months after a defrocked priest inmate was killed by a fellow inmate. (Testimony)
6. On October 15, 2003, the Appellant was placed under investigation as a result of an incident at the Souza Baranowski Correctional Center (SBCC) that resulted in a disruptive inmate's injury. The Appellant was part of the extraction/move team responsible for the move of the disruptive inmate.

7. The appellant did not injure the inmate but was merely a member of the move team. (Testimony of Appellant)
8. On March 20, 2004, the Appellant took and passed the promotional exam for Correction Officer III (Lieutenant), receiving a score of 85.
9. In April of 2004, the investigation was completed and the Appellant was found to be in violation of the use of force rules, along with members of the extraction/move team. Subsequent arbitration reduced the discipline from a demotion to a thirty day suspension on March 17, 2006.
10. In August of 2006, the DOC requested certification #4050036 to fill 40 Correction Officer III (Lieutenant) vacancies from the promotional list. The Appellant signed this list and completed all necessary paperwork to be considered for the promotion on August 15, 2006.
11. Based on the October 15, 2003 incident, the Appellant was bypassed for promotion and notified of the DOC's decision on December 4, 2006.
12. His appeal was timely filed with the Commission on January 11, 2007.
13. On March 11, 2008, the Appellant testified before the Commission that for the last year, on some shifts he has the position of acting lieutenant at SBCC. (Testimony of Appellant and Exhibit #3)
14. The Appellant also testified that he knew of four correction officers who were disciplined that were promoted. (Testimony of Appellant)
15. The Appellant was a credible, straight forward witness with a professional demeanor. (Testimony of Appellant)

16. However there was no testimony given or evidence entered into the record that would indicate disparate treatment regarding the Appellant in this matter. No one from the move team involved in the incident has been promoted. There was no evidence that the other CO's that had been promoted had the same or worse discipline imposed on them.
17. No one testified on behalf of the Appointing Authority.
18. The Appellant has received good commendations for his work performance from 2002-2007. (Exhibit #4)
19. An exam for Correction Officer III was given on May 12, 2007. The Appellant did not take this exam and his name no longer appears on the eligible list.

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." City of Cambridge v. Civil Service Commission, 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, s. 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 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). ; G.L. c. 31, § 43.

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). *See* Commissioners of Civil Servo V. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster V. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

In the present case, the Department of Correction did show that Appellant's bypass was reasonably justified. The Appellant offered uncorroborated testimony that at least four individuals throughout the DOC had been promoted to the position of sergeant or lieutenant despite having some type of disciplinary history. (Testimony of Appellant)

However there was neither testimony given nor evidence presented that these four individuals had the same or worse discipline imposed on them than the Appellant.

The Appointing Authority, for all the above stated reasons, did have a reasonable justification for bypassing the Appellant for a Correctional Officer III position.

The appeal under Docket No. G2-07-41 is hereby

denied.

Civil Service Commission

John E. Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor Commissioners) on September 4, 2008.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. C. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

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