

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

CEDRIC CAVACO,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: G1-14-22

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Department of Correction to bypass Mr. Cavaco is affirmed and his appeal under Docket No. G1-14-22 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on July 24, 2014.

Civil Service Commission

/s/ Christopher C. Bowman
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:

Cedric Cavaco (Appellant)

Jeffrey Bolger (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Cedric Cavaco,
Appellant

v.

Docket No. G1-14-22
DALA No. CS-14-138

Department of Correction,
Respondent

Appearance for Appellant:

Cedric Cavaco, *pro se*

Appearance for Respondent:

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

SUMMARY OF TENTATIVE DECISION

The Department of Correction had reasonable justification to bypass the Appellant for original appointment as a Correction Officer I based on his criminal record and his driving history.

TENTATIVE DECISION

Cedric Cavaco 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 March 31, 2014 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, Massachusetts. I admitted documents into evidence. (Exs. 1 – 8.) I heard the testimony of James O’Gara, a Personnel Analyst III at the DOC. Cedric Cavaco testified on his own behalf. The hearing was digitally recorded.

FINDINGS OF FACT

1. Cedric Cavaco took a civil service examination for the position of CO I on March 24, 2012. He received a score of 90 or 91. (Ex. 8, Stipulated Facts.)

2. An eligible list of candidates for CO I, Certification #00974, was established on August 7, 2012. (Ex. 8, Stipulated Facts.)
3. The Human Resources Division (HRD) sent the certification of eligible candidates to the DOC on June 26, 2013. (Ex. 8, Stipulated Facts.)
4. Mr. Cavaco was ranked 57th among the candidates willing to accept employment. Of the 182 candidates selected for appointment, 145 were ranked below Mr. Cavaco. (Ex. 8, Stipulated Facts.)
5. By letter of November 26, 2013, Mr. Cavaco was notified that he had been bypassed for appointment because “Failed CJIS-Negative Criminal History-Open Case: Operating after Suspended License; Shoplifting 11/4/09; Larceny 11/4/09; Poor Driving History.” (Ex. 2.)
6. Mr. Cavaco signed the eligibility list indicating that he was willing to accept appointment. On July 10, 2013, he signed a Background Information Request and Waiver allowing a background investigation to be performed. (Ex. 3.)
7. Eugene T. Jalette performed the background check on July 10, 2013, using the Criminal Justice Information System (CJIS) checklist. He checked Mr. Cavaco’s criminal history, looked for outstanding warrants, and checked his driver’s license history and his driving record. (Ex. 4.)
8. Mr. Cavaco’s criminal history revealed an open case in Brockton District Court dated May 8, 2013 for operating after a license suspension, and two closed cases: one for shoplifting on November 4, 2009 that was dismissed on January 7, 2010; and one for larceny less than \$250 that was continued without a finding and dismissed on July 7, 2010. (Ex. 5; Testimony, O’Gara.)
9. Mr. O’Gara reviewed the CJIS results. He was concerned about Mr. Cavaco’s open case because DOC will not consider anyone for appointment who has an open case.

He was also concerned because DOC's focus is to look back five years. All of the criminal cases occurred within the previous three years. (Testimony, O'Gara.)

10. Mr. Cavaco's driving history revealed an active, but non-renewable driver's license.

Mr. O'Gara was concerned about this because all COs need an active driver's license. (Testimony, O'Gara.)

11. Mr. Cavaco's driving history was poor in other respects. It includes a license revocation, the receipt of three speeding tickets in thirty days, a license suspension out of Brockton, and a speeding ticket out of Avon, all within one year prior to his application. (Testimony, O'Gara; Ex. 5.)

12. After Mr. O'Gara flagged Mr. Cavaco's application, he notified the DOC Director of Human Resources Operations, Ellen Gotovich. Ms. Gotovich reviewed the CJIS checklist and sent it back to Mr. O'Gara with instructions to bypass Mr. Cavaco based on the open case for operating after a license suspension, the shoplifting and larceny charges, and his driving record. (Testimony, O'Gara.)

13. Mr. O'Gara's staff prepared the bypass letter for Ms. Gotovich's signature. The decision to bypass Mr. Cavaco was based on the reasons stated in the bypass letter. There was no political influence involved in the decision. None of the selected candidates had a criminal record or a driving record like Mr. Cavaco's. (Testimony, O'Gara.)

14. Mr. Cavaco's license was suspended for only one day. He had been laid off, so he could not pay the fine. He paid it when he could. His license is no longer non-renewable, and the open case has been closed. (Testimony, Cavaco.)

15. With respect to the shoplifting and larceny charges on November 4, 2009, Mr. Cavaco did commit the crime. He was working in a store from which he stole shoes and shorts. He needed them, so he took them. He had no criminal record before that event, and no criminal record since that event. (Testimony, Cavaco.)

16. Mr. Cavaco received an Associate's degree from Dean College in May 2011. He is now working to complete a BA at Bridgewater State University. (Testimony, Cavaco.)
17. Mr. Cavaco's driving record has been clean since May 2013. (Testimony, Cavaco.)

TENTATIVE 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 rule of law." *Id.* at 304.

If the Commission finds by a preponderance of the 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 fundamental purpose of the Civil Service Commission is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The Commission is charged with ensuring that the system operates on "[b]asic merit principles." *City of Cambridge*, 43 Mass. App. Ct. at 304. "Basic merit principles" means, among other things,

“assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” M.G.L. c. 31, s. 1.

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).

Bypass cases must be decided 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 reason 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*, 1 MCSR 6 (1988).

I conclude that the DOC had reasonable justification for bypassing Cedric Cavaco for appointment as a CO I based on his criminal record and his driving history.

The Appellant admitted at hearing that he committed the crimes of shoplifting and larceny by stealing merchandise from his employer’s store. Although the larceny case was continued without a finding and both cases were ultimately dismissed, the fact that the Appellant would steal from an employer is especially troubling. It calls into questions the Appellant’s ability to conform his behavior to the law and reflects immaturity, and bad judgment. The DOC may bypass a candidate based on his criminal record, even if he was never convicted. *Preece v. Department of Correction*, 20 MCSR 152 (2007); *Louis v. Department of Correction*, 27 MCSR 31 (2014)(bypass was justified in light of Appellant’s history of arraignments and restraining orders despite the absence of any convictions).

The Appellant's driving record is equally troubling because it again demonstrates an inability to conform his behavior to the law, immaturity and bad judgment. The Appellant had three speeding tickets in thirty days and an active, but non-renewable license, all within one year. *Solbo v. Department of Correction*, 24 MCSR 519 (2011)(bypass upheld based on driving record that included a non-renewable, indefinite driver's license); *Gleba v. Department of Correction*, 26 MCSR 251 (2013)(bypass was justified based on driving record in five year period before the CJIS search that showed Appellant was stopped four times, resulting in six violations).

The DOC was reasonably justified in bypassing the Appellant based on his recent criminal record and recent driving record. The Appellant has not demonstrated that the reasons for his bypass were untrue, apply equally to the selected candidates, are incapable of substantiation or are a pretext for some other impermissible reasons for bypass.

I recommend that the bypass of the Appellant based on his criminal record and his driving record be upheld.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imparato
Administrative Magistrate

Dated: