

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

EDWIN CONCEPCION,
Appellant

v.

G1-22-045

**DEPARTMENT
OF CORRECTION,**
Respondent

Appearance for Appellant:

Pro Se
Edwin Concepcion

Appearance for Respondent:

Joseph S. Santoro
Labor Relations Advisor
Department of Correction
50 Maple Street, 1st Floor
Milford, MA 01757

Commissioner:

Paul M. Stein¹

Summary of Decision

The Civil Service Commission upheld the bypass of the Appellant for original appointment as a Correction Officer I (CO-I) based on a series of serious allegations about his involvement in multiple incidents of violent behavior. Although DOC had extended a conditional offer of employment to the Appellant after it had learned of the alleged incidents of misconduct, a procedural mistake that should not be repeated in the future, this misstep did not materially affect the basis for this bypass decision.

DECISION

On March 6, 2022, the Appellant, Edwin Concepcion, timely appealed to the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 2(b), contesting his bypass for appointment by the Massachusetts Department of Correction (DOC) as a Correction Officer I (CO-I).² A pre-

¹ The Commission acknowledges the assistance of Law Clerk Daniel Taylor in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 (formal rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

hearing conference was held via videoconference (Webex) on April 19, 2022. A full hearing was held via videoconference (Webex) on June 28, 2022 and was digitally recorded.³ Neither party submitted a proposed decision. For the reasons stated below, the Appellant's appeal is denied.

FINDINGS OF FACT

Thirteen (13) exhibits were offered into evidence at and following the Commission hearing, all by the Respondent. Neither party chose to submit a post-hearing brief. Based on these exhibits and the testimony of the following witnesses:

Called by the Respondent:

- Eugene Jalette, Deputy Chief of Investigative Services, Department of Correction
- Thomas Galvin, Correction Officer I, Department of Correction

Called by the Appellant:

- Edwin Concepcion, Appellant

and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence, I make the following findings of fact:

Appellant's Background

1. The Appellant is a resident of Leominster, Massachusetts, and graduated from high school in 2005. (*Testimony of Appellant; Resp. Exh. 3*)
2. The Appellant took the civil service examination for CO-I on March 19-22, 2021. He received a score of 80. (*Stipulated Facts*)
3. As of the Commission hearing, the Appellant held a license to carry firearms. (*Resp. Exh. 3*)

³ A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

4. On July 1, 2021, the Massachusetts Human Resources Division (HRD) issued Certification No. 08017 to DOC. The Appellant was ranked 51st among those willing to accept appointment. Of the 138 candidates ultimately selected for appointment, 17 were ranked below the Appellant. (*Stipulated Facts*)
5. DOC assigned Correction Officer Thomas Galvin to conduct an investigation of the Appellant's background. This investigation was completed on October 12, 2021. CO Galvin found that the Appellant had a "positive current work history" and "positive references," and "appeared to be honest about history with law enforcement." (*Resp. Exh. 3*)
6. However, CO Galvin also noted that the Appellant had a "lack of long-term work history." Prior to 2017, the Appellant worked a number of temporary labor-related jobs for which he was unable to provide contact information. From 2017 to 2020, the Appellant worked as a sales person at a cell phone store. Since 2020, he has worked at a service station. (*Testimony of Appellant & Galvin; Resp. Exh. 3*)
7. In the course of CO Galvin's investigation, he learned of six incidents where the Appellant allegedly engaged in a "history of past domestic violence," and other criminal behavior. (*Testimony of Galvin; Resp. Exh. 3*)
8. These incidents include:
 - In May 2010, the Appellant was charged with alleged criminal misconduct, which charges were later dismissed in July 2011. (*Resp. Exhs. 5 & 12*)
 - In January 2011, the Appellant was named in a police report as one of two possible suspects in a residential breaking and entering. The Appellant was interviewed and denied any involvement and, as a result, he was never charged with any offenses. (*Testimony of Appellant; Resp. Exhs. 5 & 11*)

- In June 2014, while intoxicated, the Appellant pushed a member of his household, and then struck them in the head with a bottle. He was charged with Aggravated Assault & Battery, and Witness Intimidation, which charges were later dismissed in November 2014. The Appellant admitted to this misconduct and expressed regret for his behavior. (*Testimony of the Appellant; Resp. Exhs. 5 & 10*)
 - In December 2015, the Appellant was named as a suspect in an alleged Assault & Battery (with a knife), which the alleged victim claimed was not the first time the Appellant had purportedly threatened someone with a knife. The Appellant admitted that he had become upset and had a verbal argument with the alleged victim but denied the alleged threat with a knife. The Appellant was never charged with any offense. (*Resp. Exh. 5 & 9*)
 - In January 2017, the Appellant was charged with Assault & Battery on a Family Member, which charges were dismissed in March 2017. Other than a copy of the criminal docket, no information about the substance of this incident was introduced into evidence. (*Resp. Exhs. 5 & 8*)
 - In September 2019, the Appellant's estranged spouse accused him of slashing one of the tires on her car. Police officers responded to the scene, spoke with the Appellant who denied any vandalism. A police report was filed without charges. (*Resp. Exhs. 5 & 7*)⁴
9. By letter dated September 23, 2021, DOC notified the Appellant that it obtained his criminal offender record, informed him that a DOC background investigator would be discussing the record with him, and that DOC "may be inclined to make an adverse decision" on his

⁴The Appellant claims that there is recorded video of two other individuals engaging in the conduct of which he was accused in 2019, but no such evidence was produced at the Commission hearing. The police report of the 2019 incident stated that "there were no cameras pointed in the area" where the car was parked. (*Testimony of the Appellant; Resp. Exh. 7*)

application based on that record. The Appellant was provided with a copy of the criminal offender record, invited to review it carefully, and provided with information on how to correct a CORI record. (*Resp. Exh. 4*)

Current Bypass Appeal

10. The Appellant received a conditional offer of employment on November 5, 2021, contingent on the successful completion of a drug screening, a physical aptitude test (PAT), a psychological examination, and a background investigation. The Appellant successfully completed the drug screening, PAT, and psychological examination. (*Testimony of Appellant; Resp. Exh. 13*)

11. Upon completion of the background investigation, the Appellant's application was presented to a panel of senior DOC personnel, headed by the DOC Commissioner who, after receiving both the positive and negative results of the background investigation, decided that, based solely on the Appellant's prior criminal history, he would be bypassed. (*Testimony of Jalette*)

12. In a letter dated February 4, 2022, DOC informed the Appellant that he had been bypassed for the position of COI based on the results of his background investigation. (*Resp. Exh. 2*)

13. The February 4, 2022 letter informed the Appellant that he had "failed" his background investigation, citing "arrests in 2010, 2014 & 2017 for domestic related issues," and "negative police interactions in 2011 (alleged suspect in a home break), 2015 (alleged knife assault), and 2019 (suspected of slashing tires)." (*Resp. Exh. 2*)

14. This appeal duly ensued. (*Resp. Exh. 1*)

Subsequent Hiring Cycle

15. On February 10, 2022, HRD issued Certification # 08365 to DOC. The Appellant's name was included on this certification. (*Resp. Exh. 13*)

16. The Appellant’s background investigation for this subsequent hiring cycle was assigned and completed on or about April 29, 2022. (*Resp. Exh. 13*)
17. The Appellant received a conditional offer of employment dated May 9, 2022, again, contingent on his successful completion of a background investigation and drug screening. (*Resp. Exh. 13*)
18. In a letter dated July 11, 2022, the Appellant was informed that he had been bypassed a second time for the same reasons stated in the February 4, 2022 letter. (*Testimony of the Appellant; Resp. Exh. 13*)
19. The Appellant did not appeal the second bypass. (*Administrative Notice*)

APPLICABLE LEGAL STANDARD

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Service Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Promotional appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both – consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4). An appointing authority is not required, however, to prove every reason stated for the

bypass decision. Porter v. Town of Reading, 21 MCSR 43 (2008); Driscoll v. Boston Police PPD, 30 MSCR 477 (2007).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission's role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has "reasonable justification" for the bypass after an "impartial and reasonably thorough review" of the relevant background and qualifications bearing on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

"Reasonable justification . . . 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'". Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons "more probably than not sound and sufficient").

The governing statute, G.L. c. 31, gives the Commission's de novo review "broad scope to evaluate the legal basis of the appointing authority's action" and it is not necessary that the Commission find that the appointing authority acted "arbitrarily and capriciously." City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission ". . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority" but, when there are "*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,"

then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Public safety officers are vested with considerable power and discretion and must be held to a high standard of conduct. See, e.g., Falmouth v. Civil Service Comm’n., 61 Mass. App. Ct. 796, 801 (2004), citing City of Cambridge v. Civil Service Comm’n., 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997); Police Comm’r v. Civil Service Comm’n., 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986). Although there are limits, especially when it comes to assessing the positives and negatives presented by a candidate, the Commission “owes substantial deference to the judgement of criminal justice Appointing Authorities regarding hiring decisions” E.g., Kodhimaj v. Department of Correction, 32 MCSR 377 (2019).

ANALYSIS

DOC established by a preponderance of the evidence that it had reasonable justification for its decision to bypass the Appellant for appointment as a CO I based on a legitimate concern about the Appellant’s alleged criminal misconduct during the decade immediately preceding the bypass. Although DOC improperly made a premature conditional offer of employment and required the Appellant to submit to medical and psychological screening before relying on that previously known non-medical information to bypass the Appellant, the preponderance of the evidence satisfied me that, in this specific case, the bypass decision was based solely on the background investigation and the medical information did not enter into DOC’s decision.

I give little weight to the earliest incidents on the Appellant’s record in 2010 and 2011. The 2010 charges were dismissed, and 2011 incident never rose to the level of any charges being brought against the Appellant. The Appellant denies culpability for these incidents and the only

evidence supporting his misconduct are the hearsay allegations of the alleged victims as reported to Lawrence Police officers. In order to rely on those incidents as a credible basis to doubt the present suitability of the Appellant to serve as a Correction Officer, a more thorough review and substantiation of the underlying facts of the case would be necessary, something that now is nearly impossible, given the lengthy passage of time involved.

The Appellant admitted to committing an aggravated assault and battery of a family member in 2014. He was charged with a similar offense in 2017. In 2015, he was accused of threatening another family member with a knife and I find his comments to the police at the time to be somewhat equivocal (admitting that he did get upset and argued with the alleged victim and denied “previously” ever pulling a knife on anyone, according to the police report, but he did not expressly deny the multiple eyewitnesses’ account that he did so on the occasion in question). Finally, he claimed that he had video proof that he was not responsible for the 2019 alleged vandalism of his estranged spouse’s car, which was never produced, and which seems to be contradicted by the police report that specifically stated that there was no camera footage that captured the vandalism. Considering these four incidents as a whole, they portray a pattern of sufficiently recent behavior at the time of this particular bypass, supported by admissions and probable cause, to justify DOC’s conclusion that the Appellant should not be entrusted with the care and custody of prisoners, which is the challenging and arduous daily responsibility of a DOC correction officer.

I did not overlook the fact that the Appellant repeatedly voiced regret for his conduct and expressed a continuing desire to improve himself and his character. He has procured stable employment and appears to be making serious efforts to become a role model for his children. The Appellant’s professional references were all positive, and the investigator who interviewed him noted that he appeared to be honest regarding his interactions with law enforcement. DOC

witnesses acknowledged that the Appellant's record does not amount to a "forever" bar to his candidacy and that, as DOC witnesses testified, at some future time, his positive attributes might well be seen to outweigh the negative criminal history. The Appellant could also improve his chances were he able to provide the proof he claims to have that the 2019 incident was a case of mistaken identity. Based on the Appellant's most recent history, however, DOC's decision to bypass him in February of 2022 was supported by a preponderance of the evidence and was reasonably justified.

Bona Fide Conditional Offer

As the Commission has previously held, DOC did err in this case by providing the Appellant with a conditional offer of employment, putting him through a medical and psychological screening, and then bypassing him for non-medical reasons of which it was aware prior to making the conditional offer. See, e.g., Jane A Doe v. Department of Correction, 35 MCSR 99 (2022); Matoofi v. DOC, 32 MCSR 285 (2019). See also Police Department of Boston v. Kavaleski; Kavaleski v. Reade, Suffolk Sup. Ct. No. 09-4978-C (consolidated cases) (August 14, 2014) (citing MCAD Guidelines at V(B): ". . . prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information."); Morley v. Boston Police Dep't, 29 MCSR 456 (2016); Michaud v. Saugus Police Dep't, 28 MCSR 534 (2015).

The Appellant's background investigation was completed on October 12, 2021, and he received a conditional offer on November 5, 2021. Consequently, DOC had the results of the background investigation for at least three weeks prior to making its conditional offer to the Appellant. This contravenes the principles in the MCAD guidelines, which are intended to prevent post-hoc justifications in cases involving medical discrimination. While there is no indication that such discrimination has occurred in this specific case, in the future, DOC shall ensure that its

process complies with the MCAD Guidelines and the Commission's prior decisions that require bypass decisions based on non-medical reasons to be made prior to a bona fide conditional offer.⁵

CONCLUSION

For all of the above reasons, the bypass appeal of Edwin Concepcion under Docket No. G1-22-045 is hereby *denied*.

Civil Service Commission
/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; McConney, Stein, and Tivnan, Commissioners [Dooley, Commissioner – absent]) on April 20, 2023.

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 the 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his/her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Edwin Concepcion (Appellant)
Joseph S. Santoro (for Respondent)

⁵ In the event that DOC ignores this directive, which has been made via prior decisions, the Commission reserves the option of initiating an investigation under Section 2(a) of the civil service law to ensure compliance.