

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 8/19/09
Civil Service Commission *CB*

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

SHANE T. CRAVEN,
Appellant

v.

DEPARTMENT OF
CORRECTION,
Respondent

Case No.: G1-08-188

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on August 13, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated June 5, 2009. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, and Stein [Taylor absent], Commissioners) on August 13, 2009.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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 to:

Shane T. Craven (for Appellant)
Jeffrey S. Bolger (for Appointing Authority)
John Marra, Esq. (HRD)
Shelly Taylor, Esq. (DALA)

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
BOSTON, MA 02114

SHELLY L. TAYLOR
Chief Administrative Magistrate

Tel: 617-727-7060
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June 5, 2009

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

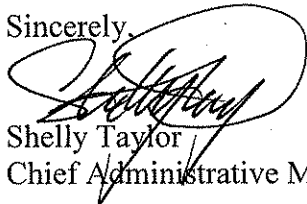
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CIVIL SERVICE COMMISSION

Re: Shane T. Craven v. Department of Correction
DALA Docket No. CS-08-723

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,



Shelly Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

cc: Shane T. Craven
Jeffrey S. Bolger

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Civil Service Commission

Appeal of:

Shane T. Craven,
Appellant

v.

Docket Nos. CS-08-723
G1-08-188

Department of Correction,
Appointing Authority

Appearance for Appellant:

Shane Craven
[REDACTED]
[REDACTED]

Appearance for Appointing Authority:

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

Administrative Magistrate:

James P. Rooney, Esq.

Summary of Decision

Department of Correction's decision to bypass correction officer applicant on medical grounds affirmed based on medical opinion that candidate's previously undiagnosed diabetes is insufficiently controlled and could compromise his ability to perform the functions of the position or even to take the pre-employment physical.

Recommended Decision

Shane T. Craven appeals, under the provisions of M.G.L. c. 31, § 2(b), a decision by the Department of Correction to bypass him for appointment as a Correction Officer 1 on the ground

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that he is not medically qualified. I heard the appeal on December 15, 2008 at the offices of the Division of Administrative Law Appeals (DALA).

Craven and the Department of Correction submitted a total of 13 documents into the record; I have added Craven's appeal letter as a fourteenth exhibit and the Civil Service Commission's ruling on the Department of Correction's motion to dismiss as a fifteenth exhibit. Craven was the only witness at the hearing. In lieu of live testimony, the Department of Correction presented an affidavit from Robert P. Naparstek, M.D. Ex 1. I made one tape of the hearing. Both sides presented their arguments at the close of the hearing.

Findings of Fact

Based on the testimony and exhibits presented at the hearing, I make the following findings of fact:

1. Shane T. Craven is employed as a special police officer in Boston. Working 80 hours per week, he patrols high rise housing projects. He regularly walks a beat and has on occasion been called on to chase suspects and handcuff them. Craven testimony.

2. Craven took a civil service examination for the position of Correction Officer 1. Ex. 6. The duties of correction officer include: maintaining "custodial care and control of inmates by transporting them under restraint, patrolling facilities, [and] making periodic rounds, head counts and security checks of buildings, grounds and inmate quarters." Correction officers "may be subjected to verbal and physical abuse from others; may be required to interact with people who are under physical and/or emotional stress; [and may] stand and walk for prolonged periods of time." Ex. 9.

3. In a letter to him dated March 31, 2008, the Department of Correction extended

Craven a “conditional offer of employment.” In the letter, the Department informed him that he would have to pass a physical abilities test, drug and psychological screening, and take a complete physical in order to have the opportunity to attend the next academy that trains correction officers. The letter also listed the date and place of the required physical: April 7, 2008 at Caritas Good Samaritan Occupational Health Services. Ex. 6.

4. Craven took the physical on April 7, 2008, as instructed. The medical examiner learned that Craven was 32 years old, weighed 317 pounds (down from a maximum of 340 pounds) and that his father, who died at age 56, had a history of diabetes. A urinalysis showed a “significant amount of ketones¹ in the urine, as well as profound glycosuria (sugar in the urine).” The medical examiner thereafter “put him on ‘medical hold’ due to significant abnormalities in his urine demonstrating absolute medical instability from a diabetes point of view.” Ex 1.

5. Craven had not known previously that he has Type 2 diabetes. In September 2007, he had undergone a medical examination, including blood tests, at Children’s Hospital. Testing then showed nothing to indicate that he had diabetes. Craven testimony.

6. Diabetes is not an automatic bar to employment as a correction officer. Rather, the Department of Correction’s pre-employment physical and medical requirements provide that “[t]he use of oral hypoglycemic agents and/or insulin injections to control diabetes will be reviewed in light of the applicant’s job title and essential job requirements.” Ex. 5. The Department of Correction does employ as correction officers people with diabetes, some of

¹ I take notice that ketones are a class of organic compounds and that abnormal quantities of specific ketones may be “found in the blood and urine during certain pathological conditions, as diabetes.” The Random House Dictionary of the English Language 784 (1966)(definitions of ketone and ketone body).

whom must take insulin injections. Craven testimony.

7. After the testing at Caritas revealed diabetes, Craven was told to have his own doctor evaluate and treat him. Craven testimony. On April 9, 2008, Craven went to see his physician, Andrew S. Lim, M.D. Ex. 13. This visit included blood tests, about which Dr. Naparstek later commented that Craven's:

blood glucose was significantly abnormal at 214 mg. per deciliter (nl: 70 - 110 mg per dl). His hemoglobin A1C which is considered a good reflection of chronic control as well as levels of sugar in urine were significantly elevated at 11.5% The normal range is 4.2 to 5.8%. Anything over 9% is considered extremely poorly controlled diabetes.

Ex. 1.

8. Craven's diabetes does not need to be treated with insulin injections. He was told to lose weight, eat more fruits and vegetables, eliminate soda from his diet, cut down on his sugar intake and start an exercise regimen. Craven has altered his diet and runs 1.5 miles every other day. He also takes metformin to rid his blood of excess sugar. Craven testimony.

9. Craven's blood was tested again by Dr. Lim on May 14, 2008. This time his hemoglobin A1C result was 10.9%. The blood test report notes that for diabetic patients, a reading of 6.2-7% shows that diabetes is well controlled, while a reading of 7-9% shows the disease is intermediately well controlled. Ex. 13.

10. On May 19, 2008, Dr. Lim noted that Craven's "diabetes control is improving. He is motivated and is following up as instructed." Ex. 13.

11. On May 23, 2008, Craven spoke to Dr. Naparstek. Naparstek told Craven that his diabetes was not in good control and consequently he would not be allowed to proceed to the physical fitness test portion of the correction officer pre-employment process. Ex. 1.

12. To pass the fitness test, a correction officer applicant must run one half-mile in six minutes, climb 30 steps per minute for three minutes, drag a dummy, bend for 60 seconds, and squat for 60 seconds. Craven testimony.

13. Dr. Naparstek has originally conveyed this opinion to the Department of Correction on April 10, 2008. Ex. 4. In reliance on Dr. Naparstek's opinion, the Department sent Craven a letter on June 10, 2008 informing him that he would not be considered for appointment to the June 2008 academy because he was "not medically qualified." Ex. 3.

14. Craven appealed on August 10, 2008. Ex. 14. At a prehearing conference on September 8, 2008, the Department of Correction agreed to process Craven again through its pre-employment screening process. Ex. 2.

15. Craven was examined for a second time at Caritas on September 15, 2008. He was again bypassed on medical grounds: As explained by Dr. Naparstek:

[H]is urine analysis [on September 15, 2008] showed the presence of ketones in the urine and glycosuria. Although the amount of ketones and glycosuria were decreased from the levels of his previous examination of April 7, 2008, they were nevertheless persistent. The presence of ketones in the urine in a non fasting state represents a profound metabolic abnormality. On that day ... he was found to still be medically obese, but continuing to have lost weight. His weight was 304 pounds, but his pulse was tachycardic² at 95 beats per minute resting. ... Mr. Craven was once again placed on medical hold to explain the persistence of glycosuria and ketones.

In my medical opinion, within a reasonable degree of medical certainty, it is quite clear that Mr. Craven is not yet, based on the latest data available to me, in metabolic stability. The pre-placement testing as well as the demands of the Corrections Officer position's essential functions do represent direct harm to Mr. Craven should he perform these tasks. Until such time as he is metabolically stable, Mr. Craven ought not to pursue the essential functions of the corrections officer position because of the potential harm that he places himself and others in. Metabolic instability, such as demonstrated by Mr. Craven, can

² I take notice that tachycardia is an excessively rapid heartbeat. Random House Dictionary of the English Language 1446 (1966).

lead to significantly compromised states at any time during the day. This would leave Mr. Craven unable to perform his functions and unable to come to the help of others.

Ex. 1.

16. Thereafter, the Department of Correction moved to dismiss the appeal because it had medically evaluated Craven a second time, as it had agreed to do. Ex. 2. Christopher Bowman, the Chairman of the Civil Service Commission, denied the motion because the agreement for a second medical evaluation did not prohibit Craven from pursuing his appeal. Ex. 15.

Discussion

When an applicant for a civil service position challenges the decision of an appointing authority to bypass him for the position, the appointing authority must show a “reasonable justification” for the bypass. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 682 N.E.2d 923, 925 (1997). In this context, 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.” 682 N.E.2d at 926, quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928).

Decisions by appointing authorities rejecting a candidate on medical grounds have frequently been affirmed when supported by a doctor’s opinion that the candidate is unfit to perform the essential functions of the position. See *Ryan v. City of Beverly*, 20 MCSR 268 (2007)(doctor determined that arthritis made candidate unfit to be police officer because of the risk of sudden incapacitation while performing the job’s duties), *Kinney v. Lowell Fire Department*, 18 MCSR 1 (2004)(doctor found that severe pulmonary obstructive disease

disqualified applicant from being firefighter because job's duties would strain his already compromised respiratory system); and *Coraminas v. Salem Police Department*, 15 MCSR 76 (2002)(chronic lumbar pain made candidate unfit to be police officer, according to doctor who examined her, because episodic back pain hindered candidate's ability to lift).

Here, Dr. Naparstek has stated that Mr. Craven's diabetes is not sufficiently under control that he should risk performing the functions of a correction officer or even take the fitness tests required of a candidate to be a correction officer. According to Dr. Naparstek, that is because:

Metabolic instability, such as demonstrated by Mr. Craven, can lead to significantly compromised states at any time during the day. This would leave Mr. Craven unable to perform his functions and unable to come to the help of others.

Ex. 1.

Mr. Craven urges that he be allowed to take the fitness test. He points out that Dr. Naparstek never examined him, that he has taken the steps recommended to him to bring his diabetes under control, that those steps have led to an improvement in his condition, and argues that he must be in better condition than those employed as corrections officers who must inject insulin. He also questions whether the Department of Correction is complying with the Americans with Disabilities Act, 42 U.S.C. 12101, et. seq., or with its own personnel policies that encourage persons with disabilities to apply for positions.

In some circumstances, it may be significant whether a doctor has personally examined a person before offering a medical opinion. See *Carr v. Plainville Police Department*, 15 MCSR 1 (2002)(candidate for firefighter position was blind in one eye; appointing authority relied on opinion of doctor, who is not an ophthalmologist and who did not examine the candidate, that the candidate was unfit because he lacked stereoscopic vision; Civil Service Commission reversed

based on opinion of ophthalmologists who examined candidate and determined he had sufficient depth perception). That does not appear to be the case here. Mr. Craven's diabetes was not evident until his urine was tested and it is the results of blood and urine tests that led Dr. Naparstek to conclude that Mr. Craven's diabetes is not sufficiently under control.

What was evident to Dr. Lim who examined Mr. Craven was that he is highly motivated to bring his diabetes sufficiently under control and to become a correction officer. This motivation was equally evident at the hearing. After learning that he had diabetes, Mr. Craven has attempted to address the situation by changing his diet, losing weight (23 pounds lost in five months), and adopting an exercise regimen.

Both his doctor and Dr. Naparstek note Mr. Craven's efforts. Dr. Lim wrote that Mr. Craven's "diabetes control is improving." Ex. 13. Dr. Naparstek was not quite so explicit, but in discussing the latest medical examination of Mr. Craven by Caritas, he did not say, as he had about the earlier examination by Caritas, that Mr. Craven's hemoglobin A1C level was too high. Ex. 1. I take from that Mr. Craven's efforts have brought his hemoglobin A1C levels under sufficient control.

But Mr. Craven's commendable efforts notwithstanding, no doctor has found him to be medically fit, as yet, to be a correction officer. Dr. Lim thought he was improving, but he did not say that Mr. Craven had brought his diabetes within adequate control to be a correction officer. And Dr. Naparstek concluded that the most recent examination of Mr. Craven "showed the presence of ketones in the urine and glycosuria" with the ketone finding being particularly troubling because the "presence of ketones in the urine in a non fasting state represents a profound metabolic abnormality." Ex. 1. Thus, the evidence shows no medical basis for

concluding that Mr. Craven's diabetes is controlled enough to warrant reversing the decision of the Department of Correction.

Mr. Craven's work and personal history, which show him running 1.5 miles every other day and performing a job as special police officer that appears to place significant physical demands on him, do not make up for the lack of medical evidence that his diabetes is under control. It may be that to date he has been able to perform demanding physical tasks, including some that are similar to those he would be asked to do if he took the correction officer fitness test or later served as a correction officer. This hardly undermines Dr. Naparstek's opinion. Dr. Naparstek did not say that Mr. Craven was wholly incapable of performing these tasks, but rather that his "[m]etabolic instability" could:

lead to significantly compromised states at any time during the day. This would leave Mr. Craven unable to perform his functions and unable to come to the help of others.

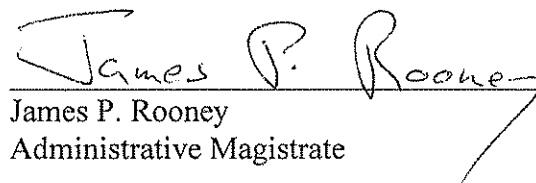
Ex. 1. A medical opinion that a condition could flare up and interfere with job performance is sufficient to support an appointing authority's decision to bypass a candidate. *See Ryan*, 20 MCSR at 269 (arthritis could be incapacitate police officer at a critical time) and *Grenier v. Springfield Fire Department*, 6 MCSR 107, 108 (1996)(herniated disc would not, at present, interfere with performing as firefighter, according to doctor, but could worsen from performing the functions of the job).

Finally, I am not convinced that the Department of Correction's treatment of Mr. Craven violated the Americans with Disabilities Act or the Department's personnel policies (assuming that either of these two contentions may be considered here). The Act provides that an employer may use "qualification standards, tests, or selection criteria that screen out or tend to screen out

or otherwise deny a job or benefit to an individual with a disability” if such measures have “been shown to be job-related and consistent with business necessity.” 42 U.S.C. 12113(a). Here, the Department of Correction is willing to hire people with diabetes (and has done so), but reviews each applicant’s condition in light of his prospective job duties. Ex. 5. The evidence that the Department offered shows that it had a medical basis to believe that Craven’s diabetes is not sufficiently controlled to perform the duties of a correction officer. Thus, it had a job-related basis to bypass him because of his diabetes. That some Department employees must inject insulin hardly shows discrimination against Mr. Craven who need not take injections. More likely, it shows that the Department will hire individuals who have the disease under adequate control, even if that means they must inject insulin.

In the final analysis, I conclude that the Department of Correction has demonstrated that it was justified in bypassing Shane Craven for the position of correction officer, based on his condition on the two dates he was medically examined for his fitness for the position. Although I would encourage his continued efforts to meet the medical standards for the position, I recommend that the Civil Service Commission affirm the Department of Correction’s decision to bypass Mr. Craven for the position of correction officer.

DIVISION OF ADMINISTRATIVE LAW APPEALS


James P. Rooney
Administrative Magistrate

Dated:

JUN 05 2009