

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DOUGLAS DESMARAIS,
Appellant

v.

G1-12-41

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Douglas Desmarais, *Pro se*

Appearance for Respondent:

Earl Wilson, Esq.
Department of Correction
P.O. Box 946
Norfolk, MA 02052

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

The Appellant, Douglas Desmarais (hereinafter “Mr. Desmarais” or “Appellant”), pursuant to G.L. c. 31, § 2(b), seeks review of the decision of the Massachusetts Department of Correction (hereinafter “DOC” or “Appointing Authority”) to bypass him for an original appointment to the position of Correction Officer I.

The appeal was timely filed with the Civil Service Commission (hereinafter “Commission”) on February 7, 2012. A pre-hearing was held at the offices of the Commission on March 13, 2012. A full hearing was held on April 19, 2012 at the same location. Mr. Desmarais testified on his own behalf and the DOC called one witness: Mr. James Mitchell, a

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

Correctional Program Officer at the DOC. Ten exhibits, originally attached to the DOC's pre-hearing memorandum, were admitted into evidence without objection. A digital recording of the hearing was made. Both parties submitted post-hearing briefs. For the following reasons, the appeal is denied.

Based on the arguments made at the hearing, the credible testimony of the witnesses, and taking administrative notice of all matters filed in the case as well as pertinent statutes, regulations, case law, policies and rules, and reasonable inferences from the evidence, a preponderance of the evidence establishes:

1. At the time of the hearing, Mr. Desmarais was employed by the Oak Hill Community Development Corporation as a lead rehabilitation specialist. He is married with five children. (Testimony of Mr. Desmarais; Ex. 6)
2. In October 2011, Mr. Desmarais applied for the position of Correction Officer I with the DOC. (Ex. 6)
3. A background investigation was conducted in connection with Mr. Desmarais' application for employment with the DOC. The investigation was completed on November 11, 2011 by Mr. Mitchell. (Ex. 3)
4. From approximately 1991 to 2000, Mr. Desmarais was employed by Hollingsworth & Vose Paper Company in West Groton, Massachusetts. (Ex. 6, Testimony of Mr. Desmarais)
5. In 2000, Mr. Desmarais worked as the backtender on the number seven machine on the night shift at Hollingsworth & Vose Paper Company. Mr. Desmarais' work crew was made up of approximately ten to twelve employees and there were approximately thirty employees on the night shift. (Testimony of Mr. Desmarais)

6. It was common practice for employees at Hollingsworth & Vose Paper Company to regularly play practical jokes and pranks on one another. (Testimony of Mr. Desmarais)
7. It was also normal for employees at Hollingsworth & Vose Paper Company to have cakes on birthdays and special occasions. (Testimony of Mr. Desmarais).
8. When Mr. Desmarais' friend and fellow crew member, Neil, was moving to another position, there was a cake for him on his last day. Neil was the only African-American employee in Mr. Desmarais' crew. Mr. Desmarais could not recall if there were other minorities on the night shift. (Testimony of Mr. Desmarais).
9. Shortly before the cake was presented, Mr. Desmarais and two other coworkers decided to pull what the Appellant called a last practical joke on Neil. Mr. Desmarais and his two coworkers dressed in white hooded dust suits used on the job, which were suggestive of the Ku Klux Klan. Instead of candles, Mr. Desmarais and his two coworkers used wooden toothpicks in the shape of a cross on the cake. Mr. Desmarais' coworker, Neil, then lit the toothpicks on fire. The entire incident took place over the course of five to ten minutes. (Testimony of Mr. Desmarais)
10. At the time the incident took place, there were approximately twenty other employees working on the night shift, in addition to Mr. Desmarais' crew. These employees were at least one hundred yards away and were not directly involved with the incident. (Testimony of Mr. Desmarais)
11. About one week following the incident, Mr. Desmarais was called into the personnel office and suspended for three to four weeks pending investigation, along with the two other coworkers who had dressed in white dust suits when they presented a cake to Neil. (Testimony of Mr. Desmarais)

12. When asked by his employer if the incident had taken place, Mr. Desmarais admitted his involvement. After three to four weeks, Mr. Desmarais was terminated. Mr. Desmarais filed an appeal with his union and sought arbitration. Prior to arbitration, Mr. Desmarais was offered a settlement of \$10,000, which he accepted. (Testimony of Mr. Desmarais)
13. The other two employees who were involved in the incident and had dressed in the white dust suits when they presented the cake to Neil were also terminated but did not seek arbitration. (Testimony of Mr. Desmarais)
14. In accordance with the settlement agreement, Mr. Desmarais' then-employer was supposed to put a letter in his personnel file stating that he had resigned. That letter never appeared, however. A copy of the settlement agreement was produced by neither the Appellant nor the Appointing Authority. (Testimony of Mr. Desmarais)
15. At the time of the incident, Mr. Desmarais was approximately twenty-nine or thirty years old. (Testimony of Mr. Desmarais)
16. Following Mr. Desmarais' suspension, he contacted his coworker Neil to ask if he had offended him. While Neil said that he had not been offended by the incident, Mr. Desmarais acknowledged that he did not consider whether it may have offended another employee on the night shift who observed it. (Testimony of Mr. Desmarais)
17. Mr. Desmarais speculated that one of his several former in-laws, who worked for Hollingsworth & Vose Paper Company at the time the incident occurred, may have initiated the complaint that led to his termination. However, there was no additional evidence presented on this issue. (Testimony of Mr. Desmarais; Administrative Notice)
18. In Mr. Desmarais' Application for Employment with the DOC, Mr. Desmarais indicated in the Employment History section that he had been discharged from his position at

Hollingsworth & Vose Paper Company. Mr. Desmarais' Application for Employment also included an Employment History Addendum, which further stated that he was formally disciplined by an employer and was discharged, via an arbitration settlement, for a "poor practical joke." (Ex. 6)

19. While the "prank" was not Mr. Desmarais' idea, he acknowledges that because he was involved, he was just as responsible for it. (Testimony of Mr. Desmarais)

20. Prior to the incident, Mr. Desmarais' only other discipline was a possible warning about "low hours" in his bank as a result of taking time off. In the approximately twelve years following the incident, Mr. Desmarais has not received any discipline from any other employer. (Testimony of Mr. Desmarais)

21. During Mr. Mitchell's background investigation on Mr. Desmarais, in connection with his Application for Employment with the DOC, Mr. Mitchell spoke with Mr. Desmarais' current and former employers, in addition to individuals who provided professional references for Mr. Desmarais. A neighborhood investigation was also conducted, along with a spouse interview. (Ex. 3; Testimony of Mr. Mitchell)

22. On or about November 9, 2011, Mr. Mitchell contacted Ms. Kathy Linton, a Human Resources employee with Hollingsworth & Vose Paper Company. Ms. Linton confirmed the dates of Mr. Desmarais' employment and his position held, but could not release any further information. Ms. Linton refused to speak about the incident that led to Mr. Desmarais' termination. Ms. Linton did mention that a letter regarding the arbitration settlement was not in Mr. Desmarais' personnel file and would look into the matter. Mr. Mitchell contacted Mr. Desmarais and asked him to request his personnel file from Hollingsworth & Vose Paper Company. (Ex. 3, Testimony of Mr. Mitchell)

23. On November 10, 2011, Mr. Desmarais contacted Mr. Mitchell to inform him that he had requested his personnel file and would fax it to the DOC Human Resources office when he received it. (Ex. 3)
24. According to Mr. Mitchell, Hollingsworth & Vose Paper Company was “vague” and despite Ms. Linton’s claim that the matter would be looked into, Mr. Mitchell never received any additional information about the settlement, arbitration or resignation from either the company or Mr. Desmarais. (Testimony of Mr. Mitchell)
25. On November 9, 2011, Mr. Mitchell contacted Ms. Jayne Windham at the Oak Hill Community Development, located in Worcester, Massachusetts, Mr. Desmarais’ then-current employer. Ms. Windham gave Mr. Desmarais a very positive reference, stating that he was “a mature person that is dedicated to his job, rarely misses a day and always shows up on time.” Ms. Windham also stated that Mr. Desmarais comes in contact with a lot of people during the course of his work and “has always been professional and shows respect to everyone.” According to Ms. Windham, Mr. Desmarais has never been disciplined in any way and she is unaware of any racial, religious, or ethical prejudices. Ms. Windham would re-hire the applicant if given the opportunity. (Ex. 3)
26. On November 11, 2011, Mr. Mitchell spoke to Mr. Gary O’Neil at First Environmental Contractors, where Mr. Desmarais had been employed as a construction supervisor from 2000 to 2010. Mr. O’Neil gave Mr. Desmarais a very positive reference and stated that Mr. Desmarais was a diligent and skilled employee. Mr. O’Neil described Mr. Desmarais as “a mature person that took his job seriously.” (Ex. 3)
27. On November 10, 2011, Mr. Mitchell contacted Mr. Steve Leblanc, an acquaintance of Mr. Desmarais. Mr. Leblanc stated that Mr. Desmarais was someone whom he trusted,

with “integrity and good ethics.” Mr. Leblanc stated that when work situations have gone wrong, Mr. Desmarais handled the situations well. Mr. Leblanc was unaware of any negative attributes that Mr. Desmarais might possess. (Ex. 3)

28. On November 8, 2011, Mr. Mitchell spoke with Mr. Jim Kriedler, the Town Manager of Winchendon, Massachusetts, a professional reference for the Appellant. Mr. Kriedler described Mr. Desmarais as “an excellent person” who is “very dependable and caring.” He further described Mr. Desmarais as someone “who would help people he does not know” and whose generosity extends beyond just family and friends. Mr. Kriedler did not mention any negative attributes about Mr. Desmarais. (Ex. 3)

29. On November 9, 2011, Mr. Mitchell spoke with some of Mr. Desmarais’ neighbors. Both individuals he spoke to recommended Mr. Desmarais for the position of Correction Officer. One neighbor stated that Mr. Desmarais had installed windows in his house and that Mr. Desmarais “has always been very helpful.” Another neighbor described Mr. Desmarais as “a good guy who is always willing to help people out.” The neighbor also stated that Mr. Desmarais is “respectful in the neighborhood.” (Ex. 3)

30. By form letter dated January 18, 2012, Ms. Alexandra McInnis, Director of Personnel with DOC’s Division of Human Resources, notified Mr. Desmarais that he was not considered for appointment due to an unsatisfactory background check. (Ex. 2)²

31. Mr. Desmarais was very forthcoming regarding the incident that took place at the Hollingsworth & Vose Paper Company, both during the interview process and at the Commission hearing. Although the incident was meant to be a prank and Mr. Desmarais did not intend to offend anyone, he fully acknowledges his involvement in the incident

² As referenced in Manca v. Department of Correction, CSC Case No. G1-12-35 (2012), DOC must, on a going forward basis, provide bypassed applicants with a more detailed description of the reasons for bypass.

and made no attempts to diminish its gravity. Mr. Desmarais appears genuinely remorseful about the incident. (Testimony and Demeanor of Mr. Desmarais)

32. Since the incident at the Hollingsworth & Vose Paper Company occurred, over twelve years ago, Mr. Desmarais has maintained an excellent employment record. (Ex. 3)

33. Mr. Desmarais is now a “man of faith” and plays in a Christian band. (Testimony of Mr. Desmarais)

DISCUSSION

Applicable Civil Service Statutes and Rules

The authority to bypass a candidate for original appointment to a permanent civil service position is set forth in G.L. c. 31, § 27, which states, in pertinent part:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and correct rules of law.” *Comm’rs. of Civil Serv. v. Municipal Ct.*, 359 Mass. 211, 214 (1971) (quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 485 (1928)). An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 189 (2010).

“In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” *City of Beverly*, 78 Mass. App. Ct. at 187 (quoting *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006). “[T]he commission does not act without regard to the previous decision of the town, but rather decides whether ‘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.’” *Id.* at 824 (quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)). As a result, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” *City of Beverly*, 78 Mass. App. Ct. at 188.

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions” *City of Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997) (citing *Murray v. Second Dist. Court of E. Middlesex*, 389 Mass. 508, 514 (1983); *Kelleher v. Personnel Adm’r. of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm’r. of Bos. v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 370, *rev. den.*, 398 Mass. 1103 (1986)). “When there are, in connection with personnel decisions, 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on

merit or policy considerations by an appointing authority.” *City of Cambridge*, 43 Mass.App.Ct. at 304 (citing *Sch. Comm’n of Salem v. Civil Serv. Comm’n*, 348 Mass. 696, 698-99 (1965); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Comm’r. of Health & Hosps. of Bos. v. Civil Serv. Comm’n*, 23 Mass. App. Ct. 410, 413 (1987)).

The Respondent’s Argument

While the DOC commends Mr. Desmarais’ admission of the incident leading to his termination at the Hollingsworth & Vose Paper Company in 2000, it maintains that the decision to bypass Mr. Desmarais for employment as a Correction Officer was reasonably justified. The DOC claims that because the Appellant was twenty-nine or thirty years old at the time the incident took place, the passage of time since that conduct is less significant. Also, by participating in the incident, Mr. Desmarais exercised extremely poor judgment and engaged in racially insensitive behavior at the work place that resulted in his termination.

The Appellant’s Argument

Mr. Desmarais asserts he has taken full responsibility for his involvement in the incident at Hollingsworth & Vose Paper Company. He acknowledges that his conduct was immature and insensitive and deeply regrets his involvement. Mr. Desmarais claims that in the approximately twelve years since that incident took place, he has matured and become a “man of faith.” Since 2000, Mr. Desmarais states that he has maintained an excellent employment record and has worked with minorities without issue. Mr. Desmarais contends that he has moved on from his mistake and learned from it and should be given a chance to demonstrate that he is capable of being a model employee.

Analysis

To begin, it must be stated unequivocally that I condemn Mr. Desmarais' conduct in the incident that took place at the Hollingsworth & Vose Paper Company in 2000. The incident and Mr. Desmarais' involvement therein was offensive and it demonstrated remarkably poor judgment on Mr. Desmarais' part. Although it does not appear that Mr. Desmarais was acting with intentional maliciousness with respect to the incident that occurred, the fact remains that he was a participant in a racist incident. However, it is important to note and give credit to Mr. Desmarais, who does not shrink from his responsibility in regard to the incident. In fact, Mr. Desmarais was very forthcoming in providing the details surrounding the incident, both at the hearing and during the appointment process. It is clear that he is profoundly remorseful for his conduct and acknowledges the magnitude of his mistake.

DOC urges that since the incident at the Hollingsworth & Vose Paper Company occurred when Mr. Desmarais was approximately thirty years old, it cannot be described as a youthful indiscretion. DOC appropriately probed the events surrounding the racist incident twelve years ago, as well as his conduct since then. There is no question that Mr. Desmarais' conduct that led to his termination from Hollingsworth & Vose was racially insensitive and wrong. I find fault with the Appellant not only because of his involvement in the incident but also because he failed to perceive that his conduct was offensive prior to his participation in it. The African American coworker who was the subject of the incident was a friend of Mr. Desmarais' and also reportedly participated in the incident by lighting the toothpicks on the cake presented to him and he denied to Mr. Desmarais that he had filed a complaint following the incident. However, the Appellant's coworker may well have been offended by the incident but concerned about disclosing his pain in this regard. Since the incident was reported and the employer took action in response to the

incident, someone at the paper plant was offended by it. There can be no question that Mr. Desmarais has had very positive references and an excellent employment record since then.

Mr. Desmarais' termination from the Hollingsworth & Vose Paper Company following the incident in 2000 is followed by more than a decade of highly positive employment history. As part of the background investigation, Mr. Mitchell contacted Mr. Desmarais' former and current employers, professional references, and neighbors. Mr. Desmarais received positive recommendations from every individual contacted by Mr. Mitchell, the only exception being Hollingsworth & Vose Paper Company.³ The individuals contacted by Mr. Mitchell spoke highly of Mr. Desmarais' strong work ethic, reliability, and diligence. Mr. O'Neil, the owner of First Environmental Contractors, also described Mr. Desmarais as a "mature person that took his job seriously." In addition, Ms. Windham, of Oakhill Community Development, was unaware of any racial prejudices held by Mr. Desmarais and also described him as a "mature person," noting that he has "always been professional and shows respect to everyone." In the approximately twelve years since the incident occurred, Mr. Desmarais has become an active "man of faith," has demonstrated maturity through his employment, and is described as a respectful person who is always willing to help out others.

Thus, there can be no question that Mr. Desmarais has had very positive references and an excellent employment record since the incident twelve years ago and that DOC considered this information along with the information concerning the incident in the year 2000. However, I cannot say that DOC's decision to bypass Mr. Desmarais is not a valid exercise of judgment.

³ Ms. Linton, a human resources employee at Hollingsworth & Vose Paper Company, was only able to provide Mr. Mitchell with confirmation of the dates of Mr. Desmarais' employment and the position held. At the hearing, Mr. Mitchell testified the company was vague and despite Ms. Linton's claims that she would look into the matter of an arbitration settlement letter that was not in Mr. Desmarais' personnel file, no additional information was provided. Furthermore, even after Mr. Desmarais requested the release of his personnel records, it does not appear that the Hollingsworth & Vose Paper Company ever provided the information.

Further, the Commission has recognized that, “ ... officers must comport themselves in a professional and exemplary manner in order to ensure the efficient and orderly operation of a paramilitary organization.” Duquette v. Department of Correction, 19 MCSR 339, 340 (2006)(Commission upheld the termination of a correction officer for creating an offensive cartoon with racial overtones about a superior officer.) The Commission has upheld discipline of a police officer for similar reasons. *See* Blais v. Framingham, 20 MCSR 642, 647 (2007)(Commission upheld the suspension of a police officer who asked an African-American teenager if he was “fighting over the last piece of fried chicken”). As DOC has disciplined racist behavior of existing employees, it is within its authority, after due consideration, to refrain from hiring someone who has exhibited such behavior.

CONCLUSION

For the reasons stated herein, DOC had reasonable justification to bypass Mr. Desmarais. Therefore, the Appellant’s appeal filed under Docket Number G1-12-41 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By a 4 - 1 vote of the Civil Service Commission (Bowman, Chairman - YES; Ittleman - YES, Marquis - YES, McDowell - YES, and Stein - NO, Commissioners) on December 13, 2012.

A true record. Attest:

Commissioner

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:

Douglas Desmarais (Appellant)

Earl Wilson, Esq. (for the DOC)