

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

DEZMIN DUARTE,
Appellant

v.

G1-19-201

DEPARTMENT OF CORRECTION,
Respondent

Appearance for the Appellant:

Dezmin Duarte
Pro Se

Appearance for Respondent:

Joseph Santoro¹
Labor Relations Advisor
Department of Correction
PO Box 946, Industries Drive
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman

DECISION

On September 5, 2019, Dezmin Duarte (Mr. Duarte or Appellant), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC or Department) to bypass him for original appointment to the position of Correction Officer I (CO I). On October 15, 2019, a pre-hearing conference was held at the offices of the Commission, which was followed by a full hearing at the same location

¹ Until the full hearing in this case, the Department of Correction was represented by Attorney Norman Chalupka.

on December 6, 2019.² The hearing was digitally recorded.³ The DOC submitted a post-hearing brief on January 8, 2020. The Appellant did not submit a post-hearing brief. As indicated below, the appeal is denied.

FINDINGS OF FACT:

The DOC entered sixteen (16) exhibits (Resp. 1-16⁴) and Mr. Duarte entered four (4) exhibits (App. 1-4). Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Michael Pereira, Background Investigator
- Eugene Jalette, Supervising Identification Agent

For the Appellant:

- Dezmin Duarte, Appellant

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

1. The Appellant is a Black male who has resided in New Bedford his entire life. He graduated from high school in New Bedford in 2011 and has worked a number of jobs, often working two jobs simultaneously. His recent jobs include his current employment as a team leader at Becket Family Services where he works with individuals with mild to severe mental,

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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 he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁴ After careful consideration of all of the evidence, I give Ex. 14 no weight since the DOC did not rely on it in its bypass letter to the Appellant.

intellectual, and developmental disabilities. Part of his current job is to provide 1:1 support to an individual with Pica eating disorder. The Appellant has also worked at the Key Program and at Herren Wellness, a program for adults with substance use disorder. (App. Testimony).

2. His life experiences also include participating in high school sports and earning leadership positions in high school. (App. Exs. 1, 4; App. Testimony).
3. On October 20, 2018, the Appellant took the civil service examination for CO I. (Resp. Ex. 8).
4. On February 11, 2019, the state’s Human Resources Division (HRD) sent Certification 06084 to the DOC, from which DOC sought to hire a number of CO 1s; the Appellant ranked 57th. (Stip. Facts).
5. The Appellant submitted his application to the DOC on March 21, 2019. (Resp. Ex. 8). The instructions on the second page of the application are to “answer every **question fully and accurately.**” (Id.)(emphasis added) At the top of the employment section of the application, applicants are instructed to: “COMPLETE ALL INFORMATION IN FULL. All applicants must complete this page in full even if they are also submitting a resume. BEGIN WITH YOUR MOST RECENT EMPLOYMENT, INCLUDING ANY PRESENT EMPLOYMENT... ANY GAPS IN EMPLOYMENT MUST BE BRIEFLY EXPLAINED.” (Id.)(capitalization in original) A line at the bottom of the page further instructs, “use additional pages if necessary to **include all employment.**” (Resp. Ex. 8);(**emphasis added**).
6. The Appellant listed only his three most recent employers on the application, showing continuous employment from August 2016 to the time of his application to the DOC. He did not list many other prior employers. (Resp. Ex. 8; App. Testimony).

7. On the section of the application that asked if relatives of the Appellant had been incarcerated, the Appellant listed multiple incarcerations regarding a relative. (Resp. Ex. 8).
8. The first step of the DOC's review of applicants is to conduct a pre-employment background investigation (investigation). The DOC conducts background checks of all applicants who sign a Background Investigation Request and Waiver authorizing the DOC to contact past employers, conduct a criminal records check and speak with references. (Pereira Testimony).
9. The DOC conducts background investigations because the position of a CO I is a public safety position involving the care, custody and control of inmates. The DOC, which looks to candidates' abilities to follow rules, regulations and policies, looks closely at candidates' employment history to determine whether they are suitable for the position. Not following orders from a superior could be a "life and death situation" in a correctional facility. Orders at the DOC are followed through the established chain of command. (Jalette Testimony).
10. Mr. Pereira has worked at the DOC for five years and has conducted background investigations for two hiring cycles, conducting approximately 25 investigations in total. Mr. Jalette, his supervisor, conducted Mr. Pereira's training on background investigations. Mr. Pereira conducted the Appellant's background investigation, which included a review of the Appellant's Criminal Record Offender Information (CORI). (Pereira Testimony).
11. The CORI report includes, among other criminal checks, a Massachusetts Board of Probation record (BOP). (Pereira Testimony; Jalette Testimony). Because a BOP shows the final outcome, or disposition, of cases, the BOP "**supersedes**" any incident fact sheets or police reports obtained from a police department. (Jalette Testimony)(**emphasis added**).
12. At the Commission hearing, Mr. Pereira did not recall receiving any training or instruction about using certain kinds of records in a background investigation and did not recall the part

of his training that discussed the relevant time periods of applicants' criminal records. He is not familiar with any rules about obtaining juvenile activity for employment purposes.

(Pereira Testimony).

13. The process for conducting a background investigation is to first call and meet candidates' references and then to contact the candidates' former and current employers. Thereafter, Mr. Pereira conducts home visits. (Pereira Testimony).

14. According to the BOP, the Appellant was arraigned on the following charges:

- Minor in Possession of Alcohol on August 6, 2013 – dismissed August 26, 2013;
- Intimidation on August 6, 2013 – filed⁵ August 26, 2013;
- Knowingly Receiving Stolen Property on June 25, 2013 – filed August 26, 2013.

(Resp. Ex. 6).

There is no indication in the record here that any further actions were taken against the Appellant regarding the charges that were "filed".

15. On March 19, 2019, the DOC sent a letter to the Appellant that informed him that based on the information on his CORI, the DOC "may be inclined to make an adverse decision" regarding his possible employment at DOC. The letter provided information about the process to challenge information on the CORI and a contact number at the DOC. (Resp. Ex. 5)

16. Mr. Pereira reviewed the Appellant's BOP and went to the New Bedford Police Station on April 24, 2019 to obtain more information. He obtained incident reports and the arrest report describing the charges of Minor in Possession of Alcohol and Intimidation on August 3, 2013. The reports stated that the Appellant, while in a car with friends, told the police officer

⁵ Under the Massachusetts Rules of Criminal Procedure, Rule 28, the Court may "file" a case for possible future action.

that the alcohol in the car was his own. The charge of Intimidation resulted from the same incident, when the Appellant allegedly threatened the arresting police officer. (Ex. 15;

Pereira Testimony; App. Testimony). The incident report states:

“Upon arrival, DEZMAN became extremely belligerent and uncooperative. He began informing me that he was a boxer and would find me when I was not wearing my badge. He stated he could punch me in the face and break my face. I informed him that he should not make threats as he could be charged with intimidation of a witness. To this, DEZMAN stated oh it is not a threat it is a promise, I will find you. DEZMAN remained belligerent and uncooperative throughout the booking process. (Resp. Ex. 12)(EMPHASIS IN ORIGINAL).

17. Mr. Pereira also obtained the police incident report for the Appellant’s charge of Knowingly Receiving Stolen Property in 2013, which charge was filed in 2013. This charge stemmed from the Appellant’s relative allegedly stealing an iPad, after which the Appellant asked to buy it. The incident report states that the iPad was tracked through GPS and found in the Appellant’s car:

“Duarte stated that he bought the iPad off of his [relative] []. Duarte stated that he was contacted by [his relative] and asked him to pick him up at the post office downtown. Duarte stated that when he picked [his relative] up, he noticed he had a iPad and asked if it was for sale. Duarte stated that [his relative] said it was and Duarte stated that he offered him \$50.00 for it. Duarte stated that [his relative] agreed and that he took possession of the iPad. Duarte stated **that he had a feeling the iPad was stolen** because of how cheap he bought it from [his relative].... At this time I will be charging both [the relative] and Duarte with receiving stolen property. There may be future charges against [the relative] pending this investigation.”
(Resp. Ex. 13; **emphasis added**).

18. Mr. Pereira also obtained the New Bedford Police Department’s Record Check (Face Sheet) for the Appellant. This document was not included in the file Mr. Jalette gave to Mr. Pereira when he assigned the Appellant’s background investigation to Mr. Pereira and is not part of the Appellant’s CORI. (Resp. Ex. 9; Pereira Testimony). The first page of this document

shows the Appellant's picture and gives his name and address. The "Notes" section on the first page of the Face Sheet states, "Profile: Gang Member." (Resp. Ex. 9).

19. Mr. Pereira does not know who wrote the New Bedford Police Department Face Sheet, when the section of the Fact Sheet about the Appellant's alleged gang affiliation was written, the information on which it was based or if the Appellant was prosecuted for the alleged "juvenile activity". (Pereira Testimony).

20. As part of his investigation, Mr. Pereira spoke with the Appellant's references, who described the Appellant as a "good worker," "dedicated," and "patient with clients." Two of the Appellant's references stated that the Appellant "could be argumentative with his direct supervisor" and "had issues with authority" and one reference, a co-worker, stated that the Appellant "had to work on his tardiness." (Resp. Ex. 15; Pereira Testimony).

21. Mr. Pereira conducted a home visit with the Appellant on April 25, 2019. During this visit, he and the Appellant discussed the Appellant's three arraignments (minor in Possession of Alcohol, Intimidation, and Receiving Stolen Property), which occurred in 2013 and which were either filed or dismissed shortly after arraignment. (App. Testimony; Pereira Testimony). The Appellant told Mr. Pereira that he **should have known** the iPad from his relative was stolen. (App. Testimony)(**emphasis added**). However, Mr. Pereira wrote in his background investigation report that the Appellant **knew** that the iPad was stolen because it came from his relative who had been incarcerated for that kind of activity. (Resp. Ex. 15)(**emphasis added**). I consider the Appellant's testimony that he should have known that the iPad was stolen since his family member had been incarcerated for similar activity credible and a self-effacing statement. I further find the Appellant's statements in this

regard credible in that the charge against him for receiving stolen property was filed and no further action was taken against the Appellant thereon.

22. The Appellant and Mr. Pereira discussed the 2013 arraignments for Minor in Possession of Alcohol and Intimidation that appeared on the Appellant's BOP. (Resp. Exs. 6; 10 and 12; App. Testimony; Pereira Testimony).
23. At the home interview, Mr. Pereira also asked the Appellant about his alleged gang affiliation as a juvenile based on the New Bedford Face Sheet. The Appellant explained to Mr. Pereira that he was not in a gang and that he did not know why the Face Sheet would have listed him as a gang member except that when he was 13 or 14 he and his friends would meet in a particular part of the city and the police called them a gang based on the location where they met. (Resp. Ex 15; App. Testimony; Pereira Testimony). At the Commission hearing, the Appellant vigorously, repeatedly, and credibly denied that he had been in a gang. (App. Testimony)
24. Mr. Pereira's report listed the positive and negative aspects of the Appellant's application, with the positive aspects as "Currently employed" and "References give positive feedback" and the negative aspects as "Multiple police interactions" and "Has conflicts with immediate supervisors while being employed by various employers." (Resp. Ex. 15; Pereira Testimony).
25. After the report was finalized, Mr. Jalette reviewed it and brought it to administrative review, which involves the DOC Commissioner, Associate Deputy Commissioners, and Human Resources Director. (Jalette Testimony; Pereira Testimony).
26. On August 7, 2019, Mr. Duarte was notified that he was not being considered for appointment as a CO I to the July 7, 2019 Academy because he failed the background investigation. The letter sent to the Appellant stated,

Background Investigation: Failed Background due to your Criminal Offender Record Information (CORI), limited and negative work history and suspected prior gang affiliation; specifically in 2013 you were arrested for being a minor in possession of alcohol, intimidation of a police officer and later knowingly receiving stolen property, in two police reports by the New Bedford police, you are mentioned as a possible gang member, you have no work history for five years, present employer and past employer stated you may be argumentative. (Resp. Ex. 15)

27. After he received the bypass letter, the Appellant wrote an undated letter to the Commissioner of the DOC, acknowledging that he had not included all of his work history on his application but stating that he was not gang-affiliated, and that he had made a mistake when he had alcohol as a minor and argued with the officer who arrested him. The Appellant wrote that “everything was dismissed” and expressed his desire to work at DOC as a Correction Officer (Resp. Ex. 16).
28. The Appellant duly filed this appeal on September 5, 2019. (Administrative Notice) In October 2019, the Appellant obtained positive employment references from his then-current employer, Becket Family Services, and from Spherion, a temporary employment agency where the Appellant worked from 2012 to 2015. These two reference letters were signed by personnel at Becket and Spherion who were different from the personnel Mr. Pereira consulted in conducting his background investigation. In addition, during this appeal the Appellant produced copies of his multiple W-2 forms for 2014. (App. Exs. 1 – 3).

Legal Standard

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, “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 and Gannon, 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” and upon “failure of proof by the [appointing authority], the commission has the power to reverse the [bypass] decision.”). The governing statute, G.L. c. 31, § 2(b), 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”; however, 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.* *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). That said, “[i]t is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree.” Town of Burlington v. McCarthy, 60 Mass. App. Ct. 914, 915 (2004).

In its recent decision in Boston Police v. Civ. Serv. Comm'n and Gannon, *supra*, the SJC confirmed that an Appointing Authority must prove, by a preponderance of the evidence, that the Appellant actually engaged in the alleged misconduct used as a reason for bypass. However, the Court also *reaffirmed* that, once that burden of proof regarding the prior misconduct has been satisfied, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant.

Analysis

The DOC has shown by a preponderance of the evidence it had reasonable justification to bypass the Appellant.

“Negative and Limited” Employment History

The DOC’s determination that the Appellant did not provide information indicating that he was employed from 2011-2016 is based on the information that the Appellant failed to provide in his application. The DOC application specifically required applicants to list “***all employment***” and to “***answer every question fully and accurately***”. The Appellant listed recent work information on his application (as of 2016) but did not include jobs he had held prior to the most current three employers. It is reasonable, based on that lack of information, that the DOC concluded there were gaps in the Appellant’s employment history. Further, when Mr. Pereira contacted the Appellant’s references and employers, he learned that the Appellant “could be argumentative with his direct supervisor” and “had issues with authority.” This indicates that the Appellant has not changed his ways and that he has not matured. As Mr. Jalette explained, DOC employees must follow orders that come down through the chain of command. Not to do so could result in unnecessarily dangerous “life or death” situations. Although the Appellant also had positive references, two separate employers mentioned the Appellant’s difficulties with

supervisors. The record supports the DOC's determination that the Appellant's work history, defined as "negative" and "limited," was reasonable based on the Appellant's response to the work history section of his application and the comments by employers. I note that *after* the Appellant was bypassed and *after* he had filed an appeal with the Commission, he obtained employment references from his current employer and from a temporary employment agency where he worked from 2012 to 2015 and W-2 forms for 2014. Since the Appellant graduated from high school in 2011, the added information would appear to cover his employment history for the period in question. In addition, the two new employment references that the Appellant obtained after he filed an appeal with this Commission were positive. However, the Appellant failed to provide his complete employment history on his DOC employment application. Further, that the Appellant was able to obtain positive references from of the same employers that DOC's investigator consulted is not dispositive. Employers may be more likely to give employees positive reference letters when the employees request them. Investigators, on the other hand, are able to obtain additional information about candidates from their employers, as was done in this case. Thus, the preponderance of the evidence establishes that the DOC had reasonable justification to bypass the Appellant in view of his employment record at the time that it rendered its decision.

Appellant's CORI

DOC's ability to receive and review all of the Appellant's CORI information originates in that section of the state's CORI Law (G.L. c. 6, § 172) which states in relevant part:

“ ... Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties ...” .

Criminal justice agencies such as the DOC may obtain and review candidates' "entire criminal record." Kodhimaj v. DOC, 32 MCSR 377 (2019). *See also* MacHenry v. Civil Service Comm'n, 40 Mass. App. Ct. 632, 635 (1995), *rev. den.*, 423 Mass. 1106 (1996)(duty to "review, and not merely formally to receive" bypass reasons and evaluate them "in accordance with basic merit principles"). The DOC should conduct a thorough review of a candidate's background, including a criminal background check, because of the agency's responsibility to provide for the care and custody of criminal offenders. Golden v. Department of Correction, 33 MCSR 194 (2020). *See also* Louis v. Department of Correction, 27 MCSR 31 (2014); Lapointe v. Department of Correction, 27 MCSR 110 (2014).

Here, once the DOC obtained the Appellant's criminal record information, it properly used certain information as part of its decision-making process to determine whether the Applicant was a viable candidate for position of CO I. The investigator noted that the Appellant had three charges of criminal activity in 2013, six years prior to his application to the DOC in 2019. The first charge was that the Appellant was found in possession of alcohol when he was one week short of his 21st birthday and he was charged with intimidation of a police officer. On the Appellant's BOP, the disposition for the Minor in Possession of Alcohol was "filed". At the DOC investigator's home visit, the Appellant admitted his actions regarding both charges and told the investigator that he had made a mistake when he told the officer that he (the Appellant) would find the officer and "break his face." On the BOP record, the Minor in Possession of Alcohol charge was dismissed and the intimidation charge was "filed".

The Appellant was also charged with the crime of Receiving Stolen Goods in 2013 for buying a stolen iPad from a relative. At his home interview with the DOC investigator, the Appellant told the investigator that he did not know that the iPad was stolen but acknowledged

that it may have been. The related police incident report that contemporaneously documented the police interview with the Appellant states that the Appellant told the officer he “should have known it [the iPad] was stolen.” The Appellant’s BOP indicates that this criminal charge was “filed”. As with the intimidation charge noted above, there is no indication in the record here that any further action was taken on the charge of the receipt of stolen property.

The DOC gave the Appellant a chance to address the three charges on his criminal record in 2013 at his home interview by Mr. Pereira. The DOC considered these charges in relationship to the duties of a CO I: to follow orders, work through the chain of command, and ensure for the care and custody of inmates. The investigation was thorough and the charges, particularly the charge of Intimidation of an arresting police officer, which the Appellant acknowledged in his letter to DOC after he was bypassed, created reasonable justification for the DOC to bypass the Appellant.⁶ The Appellant’s conduct relating to three criminal charges in 2013, were established by a preponderance of the evidence.

New Bedford Police Department Information

DOC also relied on the NBPD’s Face Sheet for the Appellant alleging that the Appellant was or had been a gang member in order to bypass him. In its bypass letter, the DOC cited the Appellant for “*suspected* prior gang affiliation” and being a “*possible* gang member” (emphasis added). This is particularly troubling because the Face Sheet does not provide a date of the alleged activity, nor does it indicate who wrote the report. Further, the Appellant had informed the DOC investigator at the home interview that he had not been affiliated with a gang and he

⁶ The Appellant’s temperament during his arrest – threatening a police officer – arguably shows an inability to control his temper. Correction Officers are faced with situations on a daily basis that require patience and the ability to control one’s emotions. They cannot threaten others with physical violence.

testified credibly at the Commission hearing that he had not been associated with a gang. Mere suspicions do not provide reasonable justification for a bypass.

Although DOC erred in relying on suspicions regarding the Appellant's alleged gang involvement, the DOC has otherwise shown by a preponderance of evidence it had reasonable justification to bypass the Appellant. Specifically, DOC has shown that the Appellant's conduct relating to the 2013 criminal charges, particularly the charge of Intimidation of a police officer, in addition to findings that the Appellant "could be argumentative with his direct supervisor" and "had issues with authority," and that his application indicated that he had a "limited" work history together provide reasonable justification for bypassing the Appellant for the position of CO I.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. G1-19-095 is hereby

denied.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 1, 2021.

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. 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:

Dezmin Duarte (Appellant)

Joseph Santoro (for Respondent)

Michele Heffernan, Esq. (HRD)