

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL GLEBA
Appellant,

CASE NO: G1-13-39

v.

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Michael Gleba
Pro Se

Appearance for Respondent:

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

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Michael Gleba (“Appellant”) appealed to the Civil Service Commission (“Commission”) pursuant to G.L.c.31, §2(b), claiming that he was unlawfully bypassed for original appointment to the position of Correction Officer I with the Department of Correction (DOC). The Commission held an evidentiary hearing on May 28, 2013, which was digitally recorded. The DOC called one witness and the Appellant testified on his own behalf. Both parties waived the filing of a proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

FINDINGS OF FACT

Giving appropriate weight to the documents in evidence (Exhibits 1 through 10), the testimony of the witnesses (the Appellant and James O’Gara), and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

1. The Appellant took a civil service examination on March 24, 2012, achieving a score of 94. (Ex. 8)
2. The Appellant sought original appointment to the position of Correction Officer I. (Ex. 8)
3. The DOC selected 146 candidates for appointment. Among these, the Appellant was ranked 28th. Of those ultimately appointed, 51 were ranked below the appellant. (Ex. 8)
4. On September 16, 2012, the Appellant signed DOC certification no. 00024, and signed a background waiver, allowing a background check to be performed. (Ex. 2)
5. The background check was performed by James O’Gara (“O’Gara”), or members of his staff, on August 28, 2012. The search was performed using the Criminal Justice Information System (CJIS). (Ex. 4)
6. Mr. O’Gara flagged the Appellant’s criminal background and driving history, and passed them on to his supervisor. (Testimony of Mr. O’Gara, Ex. 5, 7)
7. One of the goals of the CJIS search was to determine if candidates had good judgment. Although the entire record is reviewed the DOC considers the most recent five years especially important (“the five year rule”). (Testimony of Mr. O’Gara)
8. The Appellant’s driving record included a surchargable accident on 11/16/99, improper equipment on 3/3/01, failure to stop and a seatbelt violation on 3/27/02, a

surcharagable accident on 3/13/02, speeding on 12/18/04, speeding on 4/5/06, speeding on 10/11/06, speeding and seatbelt violation on 2/19/08, improper equipment and failure to stop on 1/17/10, speeding on 2/5/10 and speeding on 4/20/10. (Ex. 7)

9. The Appellant's criminal record included possession of a class D substance, dated 9/27/99. The charge was continued without a finding. (Ex. 5)
10. The Appellant was notified of his bypass on February 11, 2013. (Ex. 8)
11. The stated reasons for bypass were: "Negative Criminal History – Possession of a Class D Substance 9/27/99; Extensive Driving History." (Ex. 3)
12. The Appellant filed an appeal with the Commission on February 25, 2013. A full hearing was held on May 28, 2013. (Ex 8)

CONCLUSION

Summary

The DOC met its burden of proof to establish reasonable justification for deciding not to employ the Appellant as a Correction Officer I. The preponderance of the evidence established that the Appellant had a poor driving record that was extensive, and tended to show that the Appellant had exercised poor judgment in the recent past.

Applicable Civil Service Law

This appeal involves a bypass for original appointment to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

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

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted [without] . . . a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . the Civil Service Commission.”

The task of the Commission when hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification” for the decision to bypass the candidate Reasonable justification in this context 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.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. The Commission’s primary concern is to ensure that the appointing authority’s action comports with “basic merit principles,” as defined in G.L.c.31,§1. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001).

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, that the reasons assigned for the bypass of an appellant were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any

particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

The Driving Record

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

Good judgment is essential to Correction Officers, and it is reasonable to infer from the Appellant's driving record that he had difficulty exercising good judgment. The CJIS report includes 11 separate incidents that resulted in traffic stops, some of which involved more than one violation. In the five year period before the CJIS search, the Appellant was stopped four times, resulting in six violations, most recently in 2010.

The Appellant did not substantially dispute his record, but argued instead that the use of his criminal record as a reason for bypass was unfair, as it had occurred too long ago. He attempted to explain his driving record as a product of a difficult period of his life.

This record shows a pattern of conduct conforming to the DOC's conclusion of an inability to obey the law. As six violations occurred in the last five years, it was reasonable for the DOC to conclude that the Appellant had not fully developed the judgment necessary to excel in the position of Correction Officer. As such, I find *solely* on the basis of the Appellant's driving record, that the DOC met its burden of proof to establish reasonable justification for deciding not to employ the Appellant as a Correction Officer I.

The Criminal Record

While the case may be decided solely on the basis of the driving record, I find that it is necessary to briefly discuss the Appellant's criminal record. A 1999 marijuana arrest was cited specifically as a reason for bypass.² At the time the CJIS search was conducted, the charge was from 13 years ago. The Appellant was approximately 18 years old at the time of the arrest. At the hearing, the Appellant took full responsibility for this youthful transgression.

The 1999 offense is too remote in time and bears too little nexus to the Appellant's current fitness to bypass him as a Correction Officer I. The Appellant presented himself at the hearing as polite and well mannered. He left me with a clean impression that he has taken full responsibility for his past mistakes. He may well have turned a corner in his life. Should he continue on this present course, he may be capable of earning the public's trust in the future.

For the reasons stated above, the appeal of the Appellant, Michael Gleba, is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on June 13, 2013.

A True Record. Attest:

² At the hearing, DOC also argued that a second, 2003 criminal charge gave reasonable grounds for bypass. However, this issue was not raised in the original bypass letter, whereas the 1999 incident was mentioned specifically. As such it cannot form a valid basis for the bypass, as the Appellant was not given fair notice of this issue.

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)(1), 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 a Civil Service Commission's final decision.

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:
Michael Gleba (Appellant)
Jeffery S. Bolger (for Respondent)