COMMONWEALTH OF MASSACHUSETTS

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

MICHAEL GOLDEN,
Appellant

v. G1-19-198

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant: Charlotte N. Tilden, Esq.
Churchill & Tilden, P.C.
121 Sandwich Street
Plymouth, MA 02360

Appearance for Respondent: Norman Chalupka, Esq.
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Commissioner: Christopher C. Bowman

DECISION

On September 19, 2019, the Appellant, Michael L. Golden (Appellant or Mr. Golden), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on October 15, 2019 at the offices of the Commission and I held a full hearing at the same location on December 9, 2019.[1] The hearing was digitally recorded.[2] The

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.
[2] 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

parties submitted proposed decisions on January 9, 2019 (Appellant) and January 10, 2019 (DOC).

FINDINGS OF FACT:

Ten (10) exhibits were entered into evidence at the hearing. Exhibit 7 (the Appellant's sealed criminal record) was entered de bene and the parties were given the opportunity to address its admissibility in their post-hearing briefs. For the reasons discussed in the analysis, those records are admissible. Based on the exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC;

Called by the Appellant:

- Michael Golden, 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 forty-eight (48) years old. He has lived in Pembroke since 2007, where he currently resides with his wife and two (2) children. (Testimony of Appellant; Exhibit 10)
2. His neighbor, who has been employed by DOC since 2012 and has known the Appellant for five (5) years, describes him as a "dependable, outgoing, personable, stand-up guy." (Exhibit 9)
3. The Appellant has been a member of the Army National Guard since 1997. He served tours of duty in Iraq (2005) and Afghanistan (2010). (Testimony of Appellant; Exhibit 10)

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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. A fellow member of the Army National Guard, who served with the Appellant in Iraq and Afghanistan, describes him as an "extremely dependable" person who handles stressful situations well. He told the DOC background investigator that: "If 10 applicants for a job all walked into an interview at the same time, the [Appellant] would beat all ten out due to his professionalism. (Exhibit 9)
5. The Appellant has been employed since 2016 by a private company where he works at a local transfer station running the scale weighing trucks, working approximately 40-50 hours per week. (Testimony of Appellant and Exhibit 10)
6. For the five years prior to 2016, the Appellant worked for a collection agency. His supervisor at the time told the DOC background investigator that the Appellant "had good relationships with all coworkers and was considered a very mature family man." She noted that the Appellant was one of her top collectors, was always on time for work and never abused sick time. (Exhibit 9)
7. On October 20, 2018, the Appellant took and passed the civil service examination for CO I. (Stipulated Fact)
8. On February 6, 2019, the Appellant's name appeared tied for 11th on Certification No. 06084, from which DOC ultimately appointed 147 candidates. 145 of those appointed candidates were ranked below the Appellant. (Stipulated Facts)
9. The bypass letter sent to the Appellant by DOC stated that the Appellant was being bypassed due to: "Failed Background due to your Massachusetts Board of Probation sealed and not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports." (Exhibit 2)

10. Eugene T. Jalette, Supervising Identification Agent for DOC, testified that the "biggest issue" for DOC was the above-referenced 2000 assault and battery conviction. (Testimony of Mr. Jalette)

DOC's Review of the Appellant's Background

11. On March 15, 2019, the Appellant completed an "Application for Employment." (Exhibit 10)
12. DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). This information is accessed online by CJIS-authorized DOC employees. (Testimony of Jalette and Exhibits 3, 5, 6 and 7)
13. In response to the CJIS inquiry regarding the Appellant, DOC received two documents that are relevant to this appeal: 1) a document titled "MA Criminal History (BOP)"; and 2) the Appellant's sealed criminal record. (Exhibits 6; Exhibit 7 and Testimony of Mr. Jalette)
14. On April 15, 2019, as part of the background investigation, a DOC background investigator met with the Appellant at his home. During that background interview, the Appellant was asked to address the various entries on his sealed and unsealed CORI records. (Testimony of Appellant)
15. In regard to the one entry on his <u>unsealed</u> record, the Appellant told the investigator that, in 1996, his now ex-wife and he had a verbal argument that escalated; they "came to blows"; she hit the Appellant; the Appellant grabbed his ex-wife's arm. The Appellant went to his mother's house. A restraining order was issued and dismissed a few weeks later. (Testimony of Appellant)

16. During that same home interview on April 15, 2019, the Appellant, in response to questions regarding the sealed criminal records that DOC had obtained, provided the DOC background investigator with the information contained in the findings that follow. (Testimony of Appellant and Exhibit 9)[3]
17. In 1996, the Appellant was charged with assault and battery in relation to the events that resulted in the restraining order. The criminal charge was dismissed the same day as the restraining order. (Testimony of Appellant and Exhibit 9)
18. The Appellant was found not guilty of breaking and entering after a jury trial in 2001. The Appellant denied any involvement in the alleged crime. (Exhibit 9 and Testimony of Appellant)
19. In 2000, the Appellant was 29 years old. He was driving a car on Route 9; his mother was a passenger in that car. The Appellant's vehicle was "rear-ended" by the driver of another vehicle, who the Appellant came to believe was a drunk driver. The Appellant exited his vehicle and approached the vehicle that had just rear-ended him; and opened the driver's side door of that vehicle. The driver of the vehicle swung at the Appellant two or three times and missed. The Appellant proceeded to punch the driver of that vehicle multiple times until he was asked to stop by a witness who told the Appellant that he (the witness) had already called police. The State Police arrived. The State Police issued the Appellant a summons but he never received it. A default warrant was issued and the Appellant was subsequently arrested. The Appellant pled guilty to assault and battery (a misdemeanor); he was sentenced to six months' probation and ordered to perform 50 hours of community service. (Testimony of Appellant)

[3] I have not included references to other minor and stale (i.e. – charges related to graffiti) matters that occurred well over 20 years ago.

20. The background investigator's report indicates that, on April 18, 2019, the investigator contacted the police department in the Town of Pembroke where the Appellant has resided since 2007, and "no negative findings" were reported to him. (Exhibit 9)
21. The background investigator's report also indicates, on April 18, 2019, the investigator contacted the Marshfield Police Department and there were "multiple reports" and that "all reports added to the applicant's file". The only Marshfield Police Department report submitted as evidence by DOC was a May 20, 2000 police report regarding the assault and battery charge for which the Appellant was eventually found not guilty. (Exhibits 8 and 9)
22. The background investigator's summary of the "police reports" is consistent with the information provided by the Appellant. (Testimony of Appellant and Exhibit 9)
23. In regard to the assault and battery charge and the underling incident on Route 9, the background investigator's report states that he was told by the State Police that "due to the fact that the applicant[']s records were sealed, they would have to forward their request to their legal department. This investigator was then told if they were allowed to release the report, it would be forwarded to DOC HRD. (Exhibit 9) No report from the State Police was submitted by DOC as part of these proceedings.
24. Under "positive employment aspects", the background investigator wrote: "Active National Guard with Two Deployments; Strong References." Under "negative employment aspects", the investigator wrote: "Guilty plea on Assault and Battery Charge; History of Negative Interactions with Marshfield Police Department." (Exhibit 9)
25. The DOC Commissioner, who is the appointing authority, was personally involved in the decision-making process here and was provided with the Appellant's entire package, including his application, his CORI records and the investigator's report. The Commissioner

concluded that the assault and battery conviction was the most problematic issue and decided to bypass the Appellant for appointment. (Testimony of Mr. Jalette)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006) and ensuring that the appointing authority conducted an

"impartial and reasonably thorough review" of the applicant. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It 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 and another v. McCarthy, 60 Mass. App. Ct. 914, 915 (2004).

Disputed facts regarding alleged prior misconduct of an applicant must be considered under the "preponderance of the evidence" standard of review as set forth in the SJC's recent decision in Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461 (2019), which upheld the Commission's decision to overturn the bypass of a police candidate, expressly rejecting the lower standard espoused by the police department. Id., 483 Mass. at 333-36.

Analysis

The bypass letter sent to the Appellant states that the reasons for bypass were: "Failed background due to your Massachusetts Board of Probation sealed and not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports." To ensure clarity, the list of "unsealed" entries on the CJIS reports provided to DOC totals 1 – the ex parte temporary restraining order that was issued on 10/24/96 and dismissed on 11/21/96. Although the background investigator's report indicates that he talked to Marshfield Police about a related (sealed) charge, DOC had no further information about this restraining order at the time of bypass other than what the Appellant self-reported to the investigator during the background interview. The Appellant offered detailed testimony about the underlying incident that occurred 23 years ago with his ex-wife. While the Commission has long held that evidence of domestic violence is a valid reason to bypass a candidate for appointment,

particularly in regard to public safety appointments, the facts, as shown here, including that the event occurred more than 2 decades ago and that the ex-parte restraining order and criminal charges were dismissed a few weeks later, do not provide a valid reason for bypassing the Appellant in 2019.

That turns to the other reason for bypass: "not sealed cases that includes a 2000 guilty plea for Assault and Battery and supporting police reports." Critical to deciding this case are the following questions:

1. Was DOC permitted to rely on the Appellant's sealed criminal records and/or the underlying incident related to those records to justify its decision to bypass him?
2. Should DOC be permitted to enter those sealed criminal records as an exhibit before the Commission?
3. Assuming that DOC can rely on the sealed criminal records and/or the underlying incidents, do they justify DOC's to bypass the Appellant for appointment?

As referenced in the findings, DOC accessed and obtained the sealed Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). Nothing on that sealed report constituted a statutory disqualifier from serving as a correction officer, nor was the Appellant, as part of his DOC employment application, required to answer any questions related to information on that sealed report. The background investigator, after receiving the sealed report, met with the Appellant and asked him to address entries on that report. In response, the Appellant provided detailed responses, including the details related to the 2000 assault and battery charge, to which he pled guilty and was sentenced to probation and community service.

The Commission, in Kodhimaj v. DOC, 32 MCSR 377 (2019), previously concluded that DOC, as a criminal justice agency, may rely on criminal records not available to non-criminal justice employers, stating in part:

> "DOC's ability to receive all of the Appellant's CORI information from CJIS appears to be derived from 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 …'
>
> Among the criminal justice duties that DOC must perform is the appointment of suitable candidates, such as CO Is, to provide for the care and custody of criminal offenders. In that context, it is appropriate for DOC to conduct a thorough review of a candidate's background, including the review of a candidate's entire criminal offender record information. This is consistent with years of Commission decisions involving the bypass of criminal justice candidates based on their entire criminal record."

Since none of the criminal records in Kodhimaj were sealed, the Commission did not need to address whether DOC could rely on sealed criminal records to justify a bypass and admit those records into evidence before the Commission.

G.L. c. 276, Section 100A, provides, in pertinent part, as follows:

> " … sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any board or commissions…"

G.L. c. 276, Section 100D, provides as follows:

> "Notwithstanding any provision of section 100A, 100B or 100C of this chapter, criminal justice agencies as defined in section 167 of chapter 6 shall have immediate access to, and be permitted to use as necessary for the performance of their criminal justice duties, any sealed criminal offender record information as defined in section 167 of chapter 6 and any sealed information concerning criminal offenses or acts of delinquency committed by any person before he attend the age of 17." (emphasis added)

The Appellant argues that, regardless of whether DOC had the ability to obtain the Appellant's sealed records, the entries contained within that sealed record should not have been

used as a basis to bypass the Appellant for employment as that is directly in contradiction with G.L. c. 276, § 100A. Further, even assuming, without conceding, that DOC properly used the Appellant's sealed record as a basis for the bypass decision, in accordance with the provisions of G.L. c. 276, § 100A, the Appellant argues that the sealed records should not be admitted into evidence by the Commission and should not be considered by the Commission in making its decision on this appeal citing that portion of Section 100A which states: "nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any board or commissions…".

The Appellant argues that, unlike G.L. c. 276, § 100D, which enables law enforcement agencies to immediately obtain sealed records for their "criminal justice duties", there is no similar exception in § 100A for the admissibility of sealed records in the context of "…hearings before any board or commissions."

In addition to relying on the Commission's decision in Kodhimaj, DOC argues that, whether the Appellant's records are sealed or not becomes less important since the Appellant admitted, both to DOC and the Commission, that he committed the misdemeanor, which carries a potential sentence of up to 2 ½ years in a house of correction.

The legislature has explicitly provided criminal justice agencies with the ability to: "obtain" and "use as necessary" sealed criminal records for the "actual performance of their criminal justice duties." (G.L. c. 6, s. 172 & G.L. c. 276, s. 100D). First, DOC is a "criminal justice agency". Second, as stated in Kodhimaj, the appointment of suitable candidates, such as CO Is, to provide for the care and custody of criminal offenders, is among the criminal justice duties that DOC must perform. In that context, it is appropriate for DOC to conduct a thorough review of a candidate's background, including the review of a candidate's entire criminal offender

record information, including sealed criminal records. Third, based on the above, it would be nonsensical and inconsistent with the above referenced statutes to prohibit DOC from entering the sealed criminal record into evidence before the Commission.

As discussed in Kodhimaj, however, DOC cannot rely solely on entries on a (sealed or non-sealed) criminal history record if the entry does not constitute an automatic statutory disqualifier. Rather, DOC must give the Appellant a chance to address the criminal record, in regard to both its accuracy and relevance to the job. Here, the background investigator informed the Appellant at the outset about the CORI-related information he had obtained and then offered the Appellant the opportunity to address the information. DOC's process is consistent with the intent of the statute: be transparent, let the Appellant know what additional CORI-related information you have obtained; and then allow him/her to provide an explanation about the alleged or actual misconduct. Put another way, DOC cannot rely solely on the CJIS records themselves to bypass the Appellant. Rather, only after speaking with the Appellant and gathering any other relevant information (i.e. – police reports, etc.) regarding the accuracy and relevance of the underlying misconduct, can DOC consider the underlying misconduct as a possible reason for bypass.

That turns to whether the Appellant's criminal conduct is a valid reason for bypass. DOC acknowledges that the assault and battery charge from 19 years ago, for which the Appellant pled guilty, was the major reason for the decision to bypass him for appointment. DOC argues that the Appellant used poor judgment in handling an interaction with the driver who rear-ended his car. Opening the door of the driver's car and repeatedly punching the individual, according to DOC, demonstrates a lack of self-control; a quality that is necessary for a Correction Officer as inmates frequently throw bodily fluids at COs, and are often violent. DOC argues that handling situations like those described requires patience and self-control, qualities that, according to

DOC, appear to be lacking in the Appellant. Thus, DOC argues, there was a sufficient nexus between the candidate's prior misconduct and his potential ability to perform the duties of a Correction Officer.

The Appellant argues that it is manifestly unjust to bypass him for appointment, given that the bypass was based upon a Guilty plea for an Assault and Battery from 2000; approximately nineteen (19) years have passed since that Guilty plea; he has had no further legal difficulties in the intervening years, during which time he has sought and maintained gainful employment with positive reports from his employer; served two deployments with the National Guard; re-married, become a homeowner and is raising two children. Preventing him from employment with the DOC, based primarily upon an approximately nineteen (19) year old Guilty plea for a misdemeanor offense when all other factors are highly favorable certainly, argues the Appellant, amounts to an arbitrary and capricious action on the part of DOC.

This is a (very) close call. In its recent decision in Boston Police v. Civ. Serv. Comm'n and Gannon, 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. Specifically, the SJC stated in relevant part:

> "a police department should have the discretion to determine whether it is willing to risk hiring an applicant who has engaged in prior misconduct … However, where, as here, the alleged misconduct is disputed, an appointing authority is entitled to such discretion only if it demonstrates that the misconduct occurred by a preponderance of the evidence. See Cambridge, 43 Mass. App. Ct. at 305; G. L. c. 31 § 2 (b).
>
> In Cambridge, *supra* at 305, the Appeals Court held that where an applicant has engaged in past misconduct, it is for the appointing authority, not the commission, to determine whether the appointing authority is willing to risk hiring the applicant. However, the

> misconduct in Cambridge was undisputed by the applicant. Here, in contrast, the question whether Gannon engaged in past misconduct was the single issue brought before the commission. Because the failed drug test was the department's proof that Gannon ingested cocaine and was the sole reason for the bypass, it was the department's burden to prove by a preponderance of the evidence that the test reliably demonstrated that Gannon had ingested cocaine. To the extent that the dissent suggests that there are occasions when an appointing authority need not demonstrate reasonable justification by a preponderance of the evidence as required by G. L. c. 31, § 2 (b), we disagree.
>
> In Beverly, 78 Mass. App. Ct. at 190, the Appeals Court concluded that the commission erred as a matter of law when it required the city to prove that the candidate committed the misconduct for which he was fired from a previous job. In so doing, the Appeals Court articulated a different standard of proof to be applied in cases where an applicant's misconduct is in dispute, i.e., an appointing authority need only demonstrate "a sufficient quantum of evidence to substantiate its legitimate concerns." Id. at 188. See 0. L. c. 31, § 2 (b).[30] It is error to apply any standard other than a preponderance of the evidence in this context. See Anthony's Pier Four Inc. v. HBC Assocs., 411 Mass. 451, 465 (1991), quoting Commonwealth v. Hawkesworth. 405 Mass. 664, 669 n.5 (1989) ("an appellate court 'carefully scrutinizes the record, but does not change the standard of review' ").
>
> Citing to Cambridge, 43 Mass. App. Ct. at 305, the court in Beverly, 78 Mass. App. Ct. at 190, further suggested that to require an appointing authority to prove a candidate's alleged misconduct "would force the city to bear undue risks." However, the "risk" discussed in Cambridge pertained to risk that the candidate might engage in future misconduct, not risk that the candidate engaged in past misconduct.
>
> For these reasons, the department may not rely on demonstrating a "sufficient quantum of evidence" to substantiate its "legitimate concerns" about the risk of a candidate's misconduct. Beverly, 78 Mass. App. Ct. at 188. Instead, it must, as required by G. L. c. 31, § 2 (b), demonstrate reasonable justification for the bypass by a preponderance of the evidence."

Applied here, it is undisputed that the Appellant engaged in criminal behavior 19 years ago. DOC effectively argues that, as part of a thorough review in which the Appellant was given the opportunity to address the underlying misconduct, they exercised their discretion not to assume the risk of hiring the Appellant based on that prior misconduct. The Appellant argues that, rather than being a valid exercise of discretion, DOC's decision here was arbitrary and capricious.

I can't conclude that DOC's decision here was necessarily "arbitrary and capricious" as it did not "lack any rational explanation that reasonable persons might support." Cambridge v. Civil Serv. Commn., 43 Mass. App. Ct. 300, 303 (1997).

In regard to the broader issue of whether the Appellant's behavior from 19 years ago provides DOC with reasonable justification to bypass the Appellant, there are strong public policy arguments suggesting it is not. Leaders across the political spectrum in Massachusetts have stressed the need to avoid looking at a snapshot of who a candidate was many years ago, but, rather, to look at who that candidate is today, as defined primarily by the intervening years since the misconduct occurred.

Here, the Appellant has a 19-year record of being a good citizen, serving two tours of active military duty in Iraq and Afghanistan, raising a family, maintaining steady employment and, importantly, no evidence of any criminal misconduct during that time period. That 19-year record would appear to be a better predictor of whether the Appellant has the patience and self-control needed to serve as a correction officer.

The Commission reached a somewhat similar conclusion in Laguerre v. Springfield Fire Department, 25 MCSR 549 (2012). In Laguerre, the Appellant had pled "no contest" to a charge of assault and battery with a dangerous weapon (a felony) 15 years prior to seeking appointment as a firefighter. The Commission questioned the reasonableness and legitimacy of relying on this criminal misconduct, particularly given that Mr. Laguerre, similar to Mr. Golden, had been a model citizen for the intervening 15 years, including serving two tours of duty in Iraq. In Laguerre, however, the Springfield Fire Department failed to even *consider* the intervening 15 years, discontinuing the review process after learning of Laguerre's criminal record.

Here, as referenced above, DOC *did* consider the 19 intervening years since Mr. Golden engaged in criminal behavior and DOC *did* give Mr. Golden the opportunity to address his criminal history. After what appears to be careful review and consideration, the DOC Commissioner, after weighing all factors, concluded that it would be too great of a risk to

appoint Mr. Golden to the stressful position of CO I. To me, that conclusion stretches the bounds of reasonableness, commonsense and equity. However, given that the criminal misconduct is undisputed; given that DOC did the type of thorough review required, which included a consideration of the Appellant's entire history; and given that DOC has articulated specific, rational reasons supporting their conclusion that the Appellant's appointment could, arguably, create too high of a risk, I see no basis upon which the Commission can overturn DOC's discretionary decision here.

However, for the reasons stated above, including the compelling public policy arguments in favor of giving more weight to the Appellant's now two decades of being a model citizen, the Commission is making this decision effective sixty days from the date of issue. To ensure clarity, we encourage DOC to use this sixty-day period to reconsider their decision to bypass the Appellant for appointment. Should DOC ultimately decide that the Appellant, at a minimum, deserves a second look in a subsequent hiring cycle, the Commission would grant the appropriate relief to facilitate that reconsideration.

Conclusion

The Appellant's appeal under Docket No. G1-19-198 is hereby ***denied***, with a future effective date of July 7, 2020.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, and Tivnan, Commissioners – Yes; Stein, Commissioner - No) on May 7, 2020.

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:
Charlotte Tilden, Esq. (for Appellant)
Norman Chalupka, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

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

MICHAEL GOLDEN,
Appellant

v. G1-19-198

DEPARTMENT OF CORRECTION,
Respondent

OPINION OF COMMISSIONER STEIN

I respectfully dissent. I agree with the majority that the record here presents a very close call and, because it is such a close call, I would require a heightened scrutiny and more clearly articulated explanation for the DOC's conclusion that the Appellant's 19-year-old misdemeanor conviction serves as a rational justification to trump an otherwise stellar personal and professional record which gives every indication of the Appellant's present suitability to serve as a DOC Correction Officer. The majority is correct that the Commission should not be substituting its judgement for the rational exercise of discretion afforded to an appointing authority, but that discretion is not unfettered.

Massachusetts law has defined those offenses and misconduct that are, indeed, sufficiently problematic as a matter of law, that they may bar a candidate "forever" from appointment to the DOC, such as a felony conviction or prior incarceration. The Appellant's misconduct, here, as inexcusable as it was, is not in that category. Thus, when an appointing authority relies on a discretionary decision that is as close a call as even the majority describes, I do not believe that the Commission is required to give rote deference to the decision but must require, in the unusual

and rare circumstances presented, more than the DOC has done here to persuade the Commission that there is a demonstrable, not hypothetical, nexus between the single instance of proved misconduct involved and a candidate's present "ability, knowledge and skills", which is the standard of suitability required by basic merit principles.

I would allow this appeal and provide the Appellant with one additional opportunity to prove his qualification for appointment as a DOC Correction Officer under the heightened standard of scrutiny that I believe his record entitles him.

/s/ Paul M. Stein

May 7, 2020