

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

ANTHONY HORIGAN,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: G1-14-141

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Department of Correction to bypass Mr. Horigan for appointment as a Correction Officer I is affirmed and Mr. Horigan's appeal under Docket No. G1-14-141 is hereby ***denied***.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on January 8, 2015.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

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 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 to:

Anthony Horigan (Appellant)

Joseph Santoro (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Anthony S. Horigan,
Petitioner

Docket No. CS-14-480
(G1-14-141)

v.

Department of Correction,
Respondent

Appearance for Appellant:

Anthony S. Horigan, pro se

Appearance for Appointing Attorney:

Joseph S. Santoro
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, Massachusetts 02056

Administrative Magistrate:

Bonney Cashin

Summary of Recommended Decision

The Department of Correction provided a reasonable justification to bypass the Appellant for original appointment as a Correction Officer I. The Appellant was bypassed because of a low interview score. The Appellant offered no evidence that this bypass was due to an impermissible reason or falsehood.

RECOMMENDED DECISION

Introduction

The Petitioner, Anthony S. Horigan, timely appealed under G.L. c. 31, § 2(b) the June 9, 2014 decision of the Department of Correction (“DOC”) to bypass him for original appointment as a Correction Officer I. The bypass was based on an Interview Panel’s decision to not recommend him for appointment. I held a hearing on September 22, 2014 at the Division of Administrative Law Appeals and recorded the hearing digitally.

I accepted nine documents into evidence. James O’Gara, a Personal Analyst III with DOC, and Sargent James Callahan, a Correction Officer II with DOC who participated on Mr. Horigan’s Interview Panel, testified for DOC. Mr. Horigan testified for himself. The record closed on October 31, 2014 without either party filing a recommended decision.

Findings of Fact

Based upon the testimony and other evidence in the record and the reasonable inferences from them, as well as my assessment of witness credibility, I make the following findings of fact:

1. Mr. Horigan is a disabled veteran who currently works for Internal Security Associates as an armed security officer. (Ex. 4, Ex. 5, Ex. 6).
2. On March 24, 2012, Mr. Horigan took the civil service examination for the position of permanent Correction Officer I and scored an 89. (Bypass Stipulated Facts, HRD letter dated July 21, 2014).
3. From April 2012 to June 2012, Mr. Horigan was a Correction Officer Recruit at the Barnstable County Sheriff’s Office. (Horigan Test., Ex. 6).
4. Mr. Horigan was released from the academy after reporting late for duty because of illness. (Horigan Test., Ex. 6).
5. On August 7, 2012, the Human Resources Division (“HRD”) created an eligibility list for the Correction Officer I position, and Mr. Horigan was ranked 9th of the candidates

who indicated they would accept an appointment. (Bypass Stipulated Facts, HRD letter dated July 21, 2014).

6. On January 15, 2014, Mr. Horigan received a Certification/Referral number from HRD and was assigned number 01474. (Bypass Stipulated Facts, HRD letter dated July 21, 2014).

7. On January 17, 2014, Mr. Horigan completed a Background Information Request and Waiver Form, which permitted DOC to run a background check. (O’Gara Test., Ex. 5).

8. On January 21, 2014, Mr. Horigan submitted an application to DOC for the Correction Officer I position. (Ex. 6).

9. Mr. Horigan’s background check was acceptable. (O’Gara Test.).

10. In a letter dated January 28, 2014, Mr. Horigan received a conditional employment offer from DOC and was selected to participate in the pre-employment screening process, which included a physical abilities test and an interview. (O’Gara Test., Ex. 7).

11. Mr. Horigan was scheduled to report to the DOC Shirley Training Academy in Shirley, Massachusetts on February 18, 2014. (O’Gara Test., Ex. 7).

12. If Mr. Horigan was unable to attend on February 18, 2014, his interview could be rescheduled during an eight day period, provided he had a reasonable excuse. (O’Gara Test., Horigan Test.).

13. Approximately four to six weeks prior to February 18, 2014, Mr. Horigan sustained a concussion at work, saw a neurologist, and received a prescription for his concussion. (Horigan Test.).

14. Mr. Horigan knew that his interview could be rescheduled, but believed this would not have changed his performance. (Horigan Test.).

15. Mr. Horigan successfully completed the physical abilities test, took a shower, and dressed in business attire for the interview. (O’Gara Test., Ex. 7).

16. The required documents Mr. Horigan brought with him to the interview were given to the Interview Panel for preliminary review. (O’Gara Test., Callahan Test.).

17. Prior to meeting with the Interview Panel, Mr. Horigan was given approximately 12 minutes to complete a three question form concerning why he wanted to be a Correction Officer. (O’Gara Test., Horigan Test., Ex. 4).

18. Mr. Horigan did not finish his response to the third question in the time he was allotted. (O’Gara Test., Horigan Test., Ex. 4).

19. This three question form was also given to the Interview Panel for review. (O’Gara Test., Callahan Test.).

20. On February 18, 2014, there were three separate Interview Panels of three members each, who conducted interviews of approximately 50 to 60 candidates. (O’Gara Test.).

21. Each panel consisted of a chair, who was a high level manager at DOC with many years of experience and knowledge regarding DOC’s policies and procedures in selecting qualified applicants, and two correction officers, trained in DOC’s hiring and selection policy, many of whom have sat on numerous panels. (O’Gara Test.).

22. DOC compiles a certification list of employees who are qualified to serve on an Interview Panel. (O’Gara Test.).

23. Mr. Horigan’s Interview Panel consisted of Tim Gotovich serving as the chair, Sargent James Callahan, CO II, and Mecacla Rogers, CO I. (O’Gara Test., Callahan Test., Ex. 4).

24. Sargent Callahan completed DOC’s training for hiring boards and interview panels, has participated in approximately 20 Interview Panels over the past five years, and is on DOC’s certification list of employees who are qualified to serve on an Interview Panel. (O’Gara Test., Callahan, Test.).

25. Mr. Horigan, along with every other candidate, was asked the same nine questions during the interview. (O’Gara Test., Callahan Test., Ex. 8).

26. Mr. Horigan’s concussion delayed his responses during the interview, and he could not remember whether he was still on his prescribed medication the day of the interview. (Horigan Test.).

27. Mr. Horigan did not mention his concussion to the Interview Panel. (Horigan Test.).

28. After the interview, the Interview Panel members discussed Mr. Horigan’s performance. (O’Gara Test., Callahan Test.).

29. During this time, any discrepancies amongst the panel members would be discussed, and the score recorded would be decided by consensus. (Callahan Test.).

30. The score a candidate received would not be ordered by the Panel’s chair. (Callahan Test.).

31. The scoring for the interview is divided into Part A and Part B. (O’Gara Test., Callahan Test., Ex. 4).

32. To achieve a perfect score, an individual must score 20 points on Part A and 45 points on Part B, for a total of 65 points. (O’Gara Test., Ex. 4).

33. Part A, Experience and Abilities, is based on a candidate’s résumé (if provided), application, education, and the interview. (O’Gara Test., Callahan Test., Ex. 4).

34. Part A is divided into four categories: Experience and Competence in Related Work; Education/Training Related to this Position; Work History; and Communication/Interpersonal Skills. (O’Gara Test., Ex. 4).

35. Each of these categories are scored on a 1 through 5 scale with 1 point being less than satisfactory, 2 points are satisfactory, 3 points are average, 4 points are excellent, and 5 points are outstanding. (Ex. 4).

36. For Experience and Competence in Related Work, Mr. Horigan received 3 points. (O’Gara Test., Ex. 4).

37. For Education/Training Related to this Position, Mr. Horigan received 2 points. (O’Gara Test., Ex. 4).

38. For Work History, Mr. Horigan received 2 points. (O’Gara Test., Ex. 4).

39. For Communication/Interpersonal Skills, which included Mr. Horigan’s three question form and his Interview Panel performance, he received 1 point. (O’Gara Test., Ex. 4).

40. Cumulatively for Part A, Mr. Horigan received 8 points out of a possible 20 points. (O’Gara Test., Callahan Test., Ex. 4).

41. A candidate’s responses to the nine questions in Part B are evaluated using the same five-point scale used to evaluate Part A. (Ex. 4, Ex. 8).

42. On six of the nine questions, Mr. Horigan received 1 point. (Ex. 4).

43. On the other three questions, Mr. Horigan received 2 points. (Ex. 4).

44. Cumulatively for Part B, Mr. Horigan received 12 points out of a possible 45 points. (O’Gara Test., Callahan Test., Ex. 4).

45. For Parts A and B combined, Mr. Horigan received 20 points out of a possible 65 points. (O’Gara Test., Ex. 4).

46. Both Mr. O’Gara and Sargent Callahan considered 20 points to be the lowest combined score they recalled during their respective tenures at DOC. (O’Gara Test., Callahan Test.).

47. Mecacla Rogers completed the Interview Evaluation Form providing the Interview Panel’s consensus assessment. (Callahan Test., Ex. 4).

48. The Panel did not recommend Mr. Horigan for the Correction Officer I position. (Ex. 2, Ex. 4).

49. In the Comments section of the Interview Evaluation Form, the Interview Panel stated that Mr. Horigan failed to answer their questions directly. Instead, he answered around them, could not completely answer some of their questions, lacked good interpersonal skills, did not maintain eye contact, and rambled throughout the interview. (Ex. 4).

50. By a letter dated June 9, 2014, DOC notified Mr. Horigan that he did not obtain appointment to the June 1, 2014 Academy, i.e., that he had been bypassed, because the Interview Panel did not recommend him for appointment. (Bypass Stipulated Facts, O’Gara Test., Ex. 2, Ex. 4).

51. The Civil Service Commission received by hand Mr. Horigan’s appeal on June 23, 2014. (Ex. 1).

52. The interview at issue here was Mr. Horigan’s third one with DOC, and he has since had a fourth interview. (Horigan Test.).

53. Mr. Horigan failed his first two interviews as well, but did not sustain a concussion prior to those interviews. (Horigan Test.).

54. Sargent Callahan did not participate during Mr. Horigan’s first two interviews, nor did he meet Mr. Horigan prior to the February 18, 2014 interview. (Callahan Test.).

Discussion

The authority to bypass a candidate for a permanent promotion or appointment to a civil service position is governed by G. L. c. 31, § 27, which provides:

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 appears 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 is not highest.

An appointing authority has broad discretion in “selecting public employees of skill and integrity” and, as a result, the Civil Service Commission (or DALA) cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by the appointing authority.” *City of Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304-

305 (1997). Substantial deference is particularly appropriate when considering the appointment of public safety officers. *See City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188, 189 (2010).

When an applicant appeals an appointing authority's decision to bypass him for a position, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons for the bypass are justified. G. L. c. 31, § 2(b). The appointing authority must show a "reasonable justification" for its decision. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006); *City of Cambridge*, 43 Mass. App. Ct. at 303. Reasonable justification means the decision 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." *Id.* at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928)). The Commission's review is *de novo* and looks to the "circumstances found by [it] to have existed when the appointing authority made its decision." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (citations omitted).

If an appointing authority presents purported justifications for the bypass, an applicant must demonstrate that the reasons offered for the bypass were untrue, apply equally to the selected candidate and the bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons. *Borelli v. MBTA*, 1 MCSR 6 (1988).

Receiving a low score on an interview is "reasonable justification" for a candidate's bypass. *See Mazur v. Dep't of Transitional Assist.*, 17 MCSR 91, G-01-1309 1, 4 (2004) (concluding that the appellant was properly bypassed for a poor interview that included sexist comments, less than satisfactory responses, and a disinterest in the position); *LaRoche v. Dep't of Corr.*, 13 MCSR 159, 159-160 (2000) (finding that the appellant's bypass was appropriate when he failed to follow the appropriate dress code and lacked knowledge of department policies and procedures during his interview); *see also Benjamin v. Provincetown*

Police Dep't, 7 MCSR 106, 106-107 (1994) (finding that a candidate's bypass was appropriate where the appellant, who was more qualified "on paper" than the candidates hired, lacked "judgment and maturity" in his responses to interview questions when compared to the chosen candidates).

DOC has provided a reasonable justification for Mr. Horigan's bypass. DOC bypassed Mr. Horigan because he obtained a low interview score during the pre-employment screening process. He obtained a cumulative score of 20 points on Parts A and B out of a possible 65 points. The Interview Panel stated that Mr. Horigan made poor eye contact, rambled, and failed to answer their questions completely. Mr. O'Gara and Sargent Callahan believed that Mr. Horigan's score was the lowest they had seen in their tenure at DOC. Such a low score, based on the consensus assessment of three experienced interviewers, justifies their recommendation to not hire Mr. Horigan. *See Mazur v. Dep't of Transitional Assist.*, 17 MCSR 91, G-01-1309 1, 3-4 (2004) (finding that an "interview panel must possess some degree of discretion to allow its subjective interpretation of the candidate's responses and behaviors to affect their decisions," as this is an appointing authority's first opportunity to look at a "candidate's demeanor and ability to handle scenarios that may arise in the scope of employment in that position") (citations omitted). Therefore, DOC has provided a reasonable justification for Mr. Horigan's bypass.

Given that DOC showed a reasonable justification for bypassing Mr. Horigan, the burden shifted to Mr. Horigan to demonstrate that the reason offered for bypass was either untrue or that some impermissible pretext was the true reason for his bypass. *See Borelli v. MBTA*, 1 MCCR 6 (1998). Mr. Horigan offered no evidence that the DOC's reasons were either untrue or there was an impermissible reason for his bypass. The only justification Mr. Horigan provided for his low score was that he sustained a concussion four to six weeks prior to the interview and that this affected his ability to respond to questions. However, Mr. Horigan did not ask that the interview be rescheduled, as he could have. He could not recall

whether he was still taking his medication on the day of the interview. Furthermore, Mr. Horigan did not even mention to the Interview Panel that he had sustained a concussion that might inhibit his performance. Therefore, Mr. Horigan failed to demonstrate that DOC unjustifiably bypassed him.

Conclusion

DOC has provided a reasonable justification for its decision to bypass Mr. Horigan for appointment as a Correction Officer I. The decision to bypass Mr. Horigan is allowed and his appeal under Docket Number G1-14-141 is denied.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Bonney Cashin
Administrative Magistrate

DATED: