COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

AUREL KODHIMAJ,
Appellant

v.

G1-18-131

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Aurel Kodhimaj

Appearance for Respondent:

Joseph Santoro
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION

On July 17, 2018, the Appellant, Aurel Kodhimaj (Appellant or Mr. Kodhimaj), 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 August 14, 2018 at the offices of the Commission and I held a full hearing at the same location on November 5, 2018.[1] The hearing was digitally recorded.[2] DOC submitted a

[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] The Commission subsequently had the recording transcribed into a written transcript.

proposed decision on January 11, 2019. The Appellant, who appeared pro se, did not submit a proposed decision.

FINDINGS OF FACT:

Eleven (11) exhibits were entered into evidence at the hearing (Respondent Exhibits 1-9 (R1-R9)); Appellant Exhibit 1 (A1)); and Post Hearing Exhibit 1 (PH 1). I subsequently re-opened the record and requested that DOC submit additional documents which have all been marked as post-hearing exhibits. Based on the exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC;
- Jonathan Thomas, Correction Officer I (CO I), Background Investigator, DOC;
- Paul Dietl, then-Deputy Commissioner, Administration, DOC;

Called by the Appellant:

- Aurel Kodhimaj, 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 thirty-two (32) years old. He was born in Albania. After his brother was kidnapped in 1997, his family moved to Greece. They eventually received asylum and moved to the United States in 2005, when the Appellant was eighteen (18) years old. The Appellant completed his senior year of high school and graduated from high school in Worcester. The Appellant became a United States citizen in 2011. (Testimony of Appellant)
2. The Appellant is fluent in English, Albanian and Greek and has a fair knowledge of Italian. (Testimony of Appellant)

3. While a senior in high school, the Appellant began working as a pizza delivery driver at a pizza shop in Worcester. Five (5) years later, the Appellant's family bought the pizza shop. The Appellant is a now a manager at the business and works there 55-60 hours per week. (Testimony of Appellant)
4. In March 2009, when the Appellant was twenty-one (21) years old, he was arrested and charged with possession of an illegal Class D substance (marijuana) with the intent to distribute. (Testimony of Appellant and Exhibit A1)
5. The charges were later amended to only include possession of an illegal Class D substance. (Testimony of Appellant and Exhibit A1)
6. The criminal docket sheet from Worcester District Court (provided by the Appellant), under Disposition Date, states "5/13/09". Under "Disposition Method" it states: "Decriminalized (277 §70c)". Under "Finding" it states: "Responsible" and under "Fine / Assessment" it states: 100. (Exhibit A1)[3]
7. The Appellant acknowledges that, for a two (2)-week period in 2009, he made "poor poor decisions" and sold marijuana illegally. (Testimony of Appellant)

[3] G.L. c. 277, § 70C states: "Upon oral motion by the commonwealth or the defendant at arraignment or pretrial conference, or upon the court's own motion at any time, the court may, unless the commonwealth objects, in writing, stating the reasons for such objection, treat a violation of a municipal ordinance, or by-law or a misdemeanor offense as a civil infraction …. If a motion to proceed civilly is allowed, the court shall not appoint counsel. If counsel has already been appointed, the court shall revoke the appointment. A person complained of for such civil infraction shall be adjudicated responsible upon such finding by the court and shall not be sentenced to any term of incarceration. The commonwealth shall maintain a copy of all objections filed under this section and shall report the number of such objections, delineated by divisions of the district court, every 6 months to the house and senate committees on ways and means.

When the court has treated a violation of a municipal ordinance or by-law or a misdemeanor offense as a civil infraction under this section and the ordinance, by-law or misdemeanor in question does not set forth a civil fine as a possible penalty, the court may impose a fine of not more than $5,000. An adjudication of responsibility shall neither be used in the calculation of second and subsequent offenses under any chapter, nor as the basis for the revocation of parole or of a probation surrender. An adjudication of responsibility under this section may include an order of restitution."

8. Many correction officers patronize the pizza shop owned by the Appellant's family. Some of them encouraged the Appellant to consider a career as a correction officer. (Testimony of Appellant)
9. On March 19, 2016, the Appellant took and passed the civil service examination for Correction Officer I (CO I). (Stipulated Fact)
10. On January 19, 2018, the Appellant's name appeared on Certification No. 05164 ranked 67th among those willing to accept appointment as a CO I. (Stipulated Fact)
11. DOC appointed one-hundred fifty-six (156) candidates, sixteen (16) of whom were ranked below the Appellant, thus creating a "bypass" of the Appellant. (Stipulated Facts)
12. The one (1) reason for bypass stated on DOC's bypass letter to the Appellant was: "Failed background based on a 3/31/2009 Worcester Police Arrest Report where the applcaint (sic) was surveilled by Worcester Vice Detectives and then subsequently charged with Possession of an illegal Class D Substance with the Intent to Distribute." (Exhibit R2)

DOC's Review of the Appellant's Background

13. On February 23, 2018, the Appellant completed an "Application for Employment." The following two (2) questions appear on Page 16 of the application:

- "Has any member of your immediate family or a relative (including in-laws) ever been or is currently incarcerated in any Massachusetts State or County Correctional Institution?
- Are you aware of any acquaintance(s) or personal friend(s) who are or have been incarcerated?"

The Appellant truthfully answered "no" to both of these questions. (Exhibit R9)

14. 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 Exhibit R4)
15. When requesting the information online, the DOC employee is prompted to indicate whether the purpose of the inquiry is: "Criminal", "Justice", or "Firearms". The DOC employee chose "Justice". (Testimony of Jalette)
16. Eugene T. Jalette is the Supervising Identification Agent at DOC responsible for overseeing the background investigations of DOC applicants. Based on his CJIS training, his understanding is that, by selecting the "Justice" category, you are indicating that you are a public safety agency seeking CORI information for the purpose of conducting an employment-related background investigation. (Testimony of Jalette)
17. In response to a CJIS inquiry regarding the Appellant on February 16, 2018, DOC received a report titled: "Criminal History NCIC/III (QH)". According to Mr. Jalette, this is "fingerprint-supported data submitted to the FBI and for use with local law enforcement and national law enforcement to examine criminal records." (Testimony of Jalette) That report showed that the Appellant had an "FBI Number" which can be used to make an additional query about the Appellant. (Id.)
18. Using the FBI Number, DOC conducted an inquiry which produced a report titled "Criminal History NCIC/III (QR)" stating: "This interstate identification index response is the result of your record request for FBI/[number redacted]. The record may be obtained from within your state. The interstate identification index contains no additional data." (Exhibit R4)
19. Using this information, DOC was able to query another report titled: "Criminal History Record Information (CHRI) (FQ)". This report stated in relevant part:

"Arrest Date: 2009-03-31
…
Arresting Agency: WORCESTER PD
Subject: KODHIMAJ, AURIEL
Charge Literal Class D, Possession w/intent to Distribute
Severity Unknown" (Exhibit R4)

20. Also on February 16, 2018, DOC obtained a certified "Docket Report" from Worcester District Court. This certified "Docket Report" appears to have been downloaded from a database and contains no hand-written information. The Docket Report submitted by the Appellant appears to contain the most accurate information, with hand-written check marks and hand-writing, presumably by the presiding Judge. The actual docket sheet indicates that the charges were amended to only include "possession" of marijuana and *not* the more serious charge of "intent to distribute". There is no indication on the automated docket sheet, submitted by DOC, that the more serious charge of intent to distribute was dropped.[4] Also, instead of stating explicitly that the case was "decriminalized", the automated docket sheet only makes a reference to the Appellant being "Responsible Under G.L. c. 277 § 70C"[5]. (Exhibit R5 and Exhibit A1)
21. DOC also obtained a copy of the arrest report from the Worcester Police Department which contained a detailed description of the surveillance operation and the specific evidence related to the criminal charges. (Exhibit R6)
22. A background investigator reviewed all documents provided to him; interviewed the Appellant, his references, a neighbor and his father. As part of the background interview, the Appellant was asked a series of questions and the answers are noted by the investigator on an "interview checklist" form. Among the questions asked by the investigator are:

[4] It is clear that, when the raw data from the actual docket sheet was data-entered as part of a court computer system conversion project, there was a failure to capture the information that the intent to distribute charge was dropped.
[5] Mr. Jalette, during his testimony before the Commission stated: "It was continued 5/13/09, and then civilly adjudicated 270 – I'm not sure what those numbers are."

- Have you ever been convicted of a felony?
- Have you ever been convicted of a misdemeanor and served time in a jail of (sic) House of Correction for said conviction?
- Have you ever been convicted of any crime, which resulted in your being imprisoned?

The Appellant truthfully answered "no" to all of these questions. (Post Hearing Exhibit 1)

23. On March 11, 2018, the background investigator, after reviewing relevant documents and speaking with the Appellant, completed a summary of his findings.[6] Under "positive employment aspects", the investigator wrote: "Applicant has a high school degree and speaks three (3) languages; Applicant as (sic) extensive experience in customer service and skilled at responding to issues; Applicant has leadership experience working as a manager in a fast-paced environment; Applicant has strong family values." Under "negative employment aspects" the background investigator wrote: "Applicants (sic) past driving history and arrest for possession of marijuana." (Exhibit R3)
24. On March 14, 2018, Mr. Jalette conducted another CJIS inquiry and received a report with the heading: "MA Criminal History (BOP)." The report stated in relevant part:

"ARRAIGNMENT: (0001)
ARG-DATE: 04/01/09 PD: WOR COURT: WORCESTER DISTRICT
OFF: POSS CLASS D CONT SUB
STATUS: C WPD: WDT:
DISP: C 5/13/09 CIVIL (277-70C) (Exhibit R4)

25. DOC did not see the actual criminal docket sheet obtained by the Appellant. (Testimony of Jalette)

[6] As part of the background interview, the Appellant acknowledged to the investigator that he had sold marijuana illegally nine (9) years ago. (Exhibit R3)

26. A group of senior DOC officials, including the DOC Commissioner; Chief of Staff; Human Resources Director, the Deputy Commissioner of Administration and Mr. Jalette, met to discuss sixty-one (61) candidates that may potentially be bypassed for appointment. Of the sixty-one (61) candidates reviewed, approximately half were bypassed and half were not. (Testimony of Dietl)

27. Paul Dietl was the Deputy Commissioner of Administration at DOC at the time and he attended the meeting referenced above. Mr. Dietl does not have a specific memory of the details discussed about each candidate, but he recalls the general concern by senior officials that the Appellant had been illegally selling marijuana nine (9) years ago. Mr. Dietl stated: "… we have a national crisis with drugs in our prisons, state and county and federal prisons … so whether or not someone is distributing drugs at another point in life, I think that there are a lot of jobs where you would say there's no nexus and no danger. I think at DOC we think that there is a danger with that." (Testimony of Dietl)

28. As referenced above, on July 9, 2018, DOC sent a bypass letter to the Appellant. The one (1) reason for bypass stated on DOC's non-selection letter to the Appellant was: "Failed background based on a 3/31/2009 Worcester Police Arrest Report where the applcaint (sic) was surveilled by Worcester Vice Detectives and then subsequently charged with Possession of an illegal Class D Substance with the Intent to Distribute." (Exhibit R2)

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. "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).

Analysis

This appeal presents three (3) issues:

I. Was DOC permitted to consider all criminal record information related to the Appellant as part of its decision-making process?

II. If so, was this information used properly in the decision-making process?

III. Does the Appellant's misconduct justify DOC's decision to bypass him for appointment as a CO I?

In regard to the first issue, DOC was provided with *all* of the Appellant's criminal offender record information from CJIS, including information that would generally not be provided to non-criminal justice employers. 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. See Brooks v. Boston Police Department, 12 MCSR 19 (1999), (BPD was justified in bypassing a police officer candidate whose record included criminal charges without convictions); Lavaud v. Boston Police Department, 12 MCSR 236 (1999), (bypass justified based on assault and battery in which he was found not guilty and

five additional court appearances since 1994.); Soares v. Brockton Police Department, 14 MCSR 109 (2001), (Brockton Police Department did not err in bypassing the Appellant for police officer based on a record of criminal violations and motor vehicle infractions merely because various court proceedings ended in dismissal or continuances.); Thames v. Boston Police Department, 17 MCSR 125 (2004), (Boston Police Department could rely on Appellant's long record of arrests to warrant his bypass, even where those arrests had led to charges that had all been eventually been dismissed.); Preece v. Department of Correction, 20 MCSR 152 (2007), (bypass upheld based on his criminal history of being charged with second degree murder and assault, even though the Appellant had been acquitted) Rosa v. Department of Correction, 24 MCSR 143 (2011), (although the Appellant had no record of criminal convictions, DOC's decision to bypass him was justified based on his two arrests for assault and battery and for discipline while in the military); Solbo v. Department of Correction, 24 MCSR 519 (2011) (Appellant's arrest and arraignment for assault and battery, even though the charge was dismissed, coupled with a poor driving history, provided DOC with justification to bypass the Appellant for appointment as a CO I); Feliciano v. Springfield Police Department, 25 MCSR 412 (2012), (even though a charge of murder against the Appellant was nol prossed, the City "after conducting a … reasonably thorough review of events and circumstances related to this murder charge, discovered information that justifies their decision not to hire [the Appellant]"; Louis v. Department of Correction, 27 MCSR 31 (2014), (DOC's decision to bypass the Appellant for CO I was justified in light of the Appellant's history of criminal arraignments and restraining orders, despite the absence of any convictions.); Lapointe v. Department of Correction, 27 MCSR 110 (2014) (bypass of a candidate for CO I upheld based on an arrest for possession of marijuana,

which was nol prossed, and an arraignment for driving under the influence and negligent operation.)

In regard to the second issue, i.e. - whether, once DOC was provided with all of the Appellant's criminal record information, they used the information properly as part of the decision-making process, a careful review of the process shows that, with limited exception, they did.

G.L. c. 31, § 20 states in relevant part that:

> "No applicant shall be required to furnish any information in such application with regard to: any act of waywardness or delinquency or any offense committed before the applicant reached the age of 18 years; any arrest for a misdemeanor or felony which did not result in a court appearance, unless court action is pending; any complaint which was dismissed for lack of prosecution or which resulted in a finding or verdict of not guilty; or any arrest for or disposition of any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace if disposition thereof occurred five years or more prior to the filing of the application."

G.L. c. 151B, § 4 states that it shall be an unlawful practice:

> "9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276. (emphasis added)

> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.
>
> Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.
>
> 9 1/2. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses."

As referenced in the findings herein, DOC's "interview checklist", which is effectively a supplement to the application, asks:

- Have you ever been convicted of a felony?
- Have you ever been convicted of a misdemeanor and served time in a jail of (sic) House of Correction for said conviction?
- Have you ever been convicted of any crime, which resulted in your being imprisoned?

All of these questions on the application are permissible, given that DOC must assess whether the candidate is statutorily disqualified from being appointed under G.L. c. 125, § 9 which states in relevant part:

> " … no person who has been convicted of a felony or who has been convicted of a misdemeanor and has been confined in any jail or house of correction for said conviction, shall be appointed to any position in the department of correction …"

These limited and permissible criminal record-related questions stand in sharp contrast to other cases that have been decided by the Commission. In Kerr v. Boston Police Dep't, 31 MCSR 35 (2018), a question on the BPD employment application asked: "Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?" These type of broad questions on the employment application, designed to obtain information from the applicant, beyond what is provided for under Chapter 151B, are not permissible.

That turns to the question of whether, as part of the reasonably thorough review that DOC was required to undertake here, they were permitted to inquire with the Appellant about his entire criminal record information (beyond the questions in the application) after they had independently, and legally, obtained this information through CJIS. Based on the manner in which DOC's inquiry was conducted here, I believe the inquiry was permissible under the statute and encouraged under a relevant Executive Order.

G.L. c. 6, § 171A states in part:

> "In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information."

I listened carefully to the testimony of DOC's background investigator as well as the Appellant regarding the manner in which the criminal record information of the Appellant was discussed. Based on their consistent and credible testimony, there was no attempt by the background investigator to withhold any CORI-related information that he had obtained

regarding the Appellant, nor was there any attempt to see if the Appellant would voluntarily acknowledge his entire criminal record before sharing it with him to assess his honesty. Rather, the background investigator was transparent and forthcoming during the one-on-one interview conducted at the Appellant's home. 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 that DOC had independently obtained about him. While the background investigator did not physically hand the Appellant a copy of the CORI information before the interview, which the statute appears to call for, I do not consider that misstep to be a fatal flaw here. The point is that 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.

Sharing the CORI-related information with the Appellant and giving him the opportunity to discuss that information also appears to be consistent with Executive Order 495 (2008) (EO 495): "Regarding the Use and Dissemination of Criminal Offender Record Information.by the Executive Department." In 2009, speaking on behalf of his CORI reform legislation before the Joint Committee on the Judiciary, Governor Deval Patrick stated: "The only condition we impose is that the employer give the applicant a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before the employer makes a hiring decision." That is precisely what occurred here. When presented with the information that DOC had legally obtained from an independent source, the Appellant acknowledged that, for a brief period several years ago, he had illegally sold marijuana; and he provided confirmation and clarification that one charge had been dropped and another converted to a civil offense with payment of a $100

fine. The Appellant then told the investigator that, while he considered his conduct several years ago to be a serious error in judgment, it did not define who is he is today: a law-abiding citizen who works up to 60 hours per week in a family-owned business with a sincere desire to pursue a career in law enforcement.

In summary, the manner in which DOC obtained, inquired about, and considered the Appellant's entire criminal record is consistent with the longstanding civil service requirement to conduct a reasonably thorough review of a candidate's background before deciding to bypass him or her as well those laws meant to limit how a candidate's CORI information can be considered.

This balanced approach is consistent with the SJC's decision in Bynes v. School Committee, 411 Mass. 264, 581 (1991). In Bynes, the SJC held that the Boston School Committee had acted properly in accessing the CORI of two school bus drivers in 1985, as part of a broader inquiry into the background of its current and prospective drivers. The CORI check revealed that one driver had been convicted of assault by means of a dangerous weapon 12 years earlier, with a second similar charge a year earlier having been dismissed after payment of restitution. The other driver had a conviction in 1975 for possession of marihuana with intent to distribute, for which she received a suspended sentence and probation.

The SJC rejected the claim that G.L.c.151B,§ 4(9) had been violated, because the school committee was expressly authorized by the CORI law to obtain CORI records on such employees and was so certified by CHSB, so that such CORI information, *which came from a lawful source other than the drivers themselves*, did not constitute a violation of Chapter 151B. Id., 411 Mass. at 266-269, See also, Ryan v. Chief Admin. Justice, 56 Mass. App. Ct. 1115, 779

(2002) (no violation of c. 151B,§ 4((9) from denying promotion of a court officer based on knowledge of c.209A restraining order reported in the media).

In Bynes, the SJC also rejected the claim that the school committee violated the CORI law by obtaining information that exceeded the type of CORI it was certified to receive, holding that, under the facts presented, the responsibility for such oversight, if any, would lie with the CHSB and not the school committee. Id. 411 Mass. at 270-271, 581 N.E.2d at 1022-23. Cf. Bellin v. Kelly, 435 Mass. 261, 755 N.E.2d 1274 (2001) (authorizing police to disclose CORI to employer as part of investigation into employee's possible subsequent offenses). See generally, Crete v. City of Lowell, 418 F.3d 54 (1st Cir. 2005) (absolving municipality from liability for hiring police officer despite an adverse CORI in subsequent excessive use of force claim).

Further, I believe the balanced approach here is consistent with the Appeals Court's decision in Kraft v. Police Commissioner of Boston, 410 Mass.155 (1991). Kraft, a Boston Police Officer, was terminated, after the Department learned that he had failed to disclose on his application for employment that he had previously been a patient receiving psychological treatment at the Veterans' Administration Hospital. The Appeals Court, ruling in favor of Kraft, stated that, since the Boston Police Department was not permitted, under G.L. c. 151B, to ask that question on the application for employment, then Kraft could not be disciplined for providing a false answer. The Appeals Court went on to state, however, that the Boston Police Commissioner: " … could have obtained information concerning Kraft's qualifications [to carry a firearm, which is a job requirement], however, without violating [the state's anti-discrimination law]." That is precisely what DOC did here. After legally obtaining criminal record information about the Appellant, and only after disclosing this information to the Appellant, DOC provided the Appellant with a chance to discuss the

criminal record, both its accuracy and its relevance to the job in question, before making its hiring decision.[7]

Finally, as to the third issue, having determined that DOC properly obtained and was permitted to consider the Appellant's entire criminal record as part of its review, the question turns to whether, standing alone, the Appellant's prior misconduct provided DOC with reasonable justification to bypass him for appointment.

In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment. While the Commission, when there is no evidence of political or personal overtones, owes substantial deference to the judgment of criminal justice Appointing Authorities regarding hiring decisions, that deference is not without limits. In the matter of Teixeira v. Department of Correction 27 MCSR 471 (2014), DOC relied upon two (2) criminal matters that had occurred almost twenty (20) years earlier, when the candidate was a junior in high school, without ever giving the candidate the opportunity to address his criminal record and without even considering the candidate's life record over the intervening two (2) decades. The Commission, in overturning DOC's bypass decision, stated:

"The wisdom of looking behind a CORI report was on full display here. Without doing the type of thorough review referenced in Beverly, DOC, when making its hiring decision, did not know that Mr. Teixeira was a junior in high school when the crime was committed. They did not know that, during the two decades that has transpired since then, Mr. Teixeira has become a father who is actively involved in his son's school and extracurricular activities, serving as a youth sports

[7] I also see no inconsistency with a recent United States Court of Appeals decision in Heagney v. Wong, 915 F.3d 805 (2019). That case is distinguishable from the instant appeal as it involved a decision to rescind an offer of employment to a Police Chief candidate in Fitchburg for failing to voluntarily disclose a prior criminal record that he was not required to disclose under G.L. c. 151B, Section 9. Here, the Appellant was not asked to disclose his entire criminal record nor was he bypassed for appointment based on his failure to disclose said information. Rather, he was bypassed for appointment based on his prior criminal behavior, which DOC learned about through legal means and then gave the Appellant the opportunity to address the criminal conduct.

coach and chaperone for class trips. They did not know that, for the past eight (8) years, Mr. Teixeira has worked as the beverage coordinator for a popular restaurant in Southeastern Massachusetts, supervising many employees. In short, they knew almost *nothing* about Mr. Teixeira, his accomplishments, his character or his ability to perform the duties of a Correction Officer. DOC failed to conduct the type of thorough review that is required here; [and] they inappropriately relied on a stale CORI report without discussing the CORI with the candidate …"

Since 2014, DOC has significantly modified its hiring process and, except in cases where there is a statutory disqualifier, gives all candidates the opportunity to address issues in their CORI report *before* making a decision to appoint or bypass the candidate. This is consistent with the principles of the above-referenced Executive Order where an Appointing Authority is not required to look "beyond" a candidate's CORI, but, rather, look "behind" it, considering the candidate's entire life record, as opposed to a past snapshot.

As shown here, DOC now has a background investigator meet personally with the candidate and give him/her the opportunity to address any CORI-related issues, in addition to discussing any other negative or positive factors of the applicant. The background investigator then completes a summary which, in addition to CORI-related information, includes a thorough discussion of the Appellant's background, including employment history, military record, educational history, neighbor interviews, etc. Prior to any decision being made to bypass a candidate for appointment, a team of senior DOC managers, including the DOC Commissioner, now reviews the summary and discusses the merits of the applicant's candidacy.

I listened carefully to the testimony of then-Deputy Commissioner Paul Dietl regarding the senior management review that was completed here. The review was serious and substantive and senior managers did in fact consider the nature of the misconduct, the amount of time that had transpired since the misconduct occurred and balanced all of the many positive attributes regarding the Appellant that were listed in the background investigator's report. After

considering all of those factors, the DOC Commissioner at the time decided that he didn't want to take the risk of appointing a correction officer who, albeit briefly and many years ago, had admittedly sold marijuana illegally. That judgment call was rooted in a legitimate concern surrounding the core need to enforce a zero tolerance policy regarding illegal drugs in any DOC correctional facility. There was no evidence of any impermissible political or personal factors in play here and the judgment call was made at the highest level of the DOC and only after a reasonably thorough review based on valid concerns directly related to critical care and custody functions of a Correction Officer I. The Appellant has much to commend him for appointment, if not now, perhaps in the future. Nevertheless, under the circumstances here, the Commission must defer to the judgment of DOC.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. G1-18-131 is hereby ***denied.***

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 7, 2019.

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:
Aurel Kodhimaj (Appellant)
Joseph Santoro (for Respondent)